Description of document:	Equal Employment Opportunity Commission (EEOC) Investigator Training Manual, 2017
Requested date:	23-August-2017
Release date:	01-April-2019
Posted date:	22-April-2019
Source of document:	FOIA Request Assistant Legal Counsel Equal Employment Opportunity Commission Office of Legal Counsel FOIA Programs 131 M Street, NE, Suite 5NW22B Washington, D.C. 20507 Fax: (202) 653-6034 Email: foia@eeoc.gov EEOC FOIA Public Access Website

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
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April 1, 2019

Re: FOIA No.: 820-2017-003035 (2017 Investigator Training Manual)

Your Freedom of Information Act (FOIA) request, received on August 23, 2017, is processed. Our search began on August 28, 2017. The initial due date was extended by 10-business days to October 5, 2017. All agency records in creation as of August 28, 2017 are within the scope of EEOC's search for responsive records. The paragraph(s) checked below apply.

[**X**] Your request is granted in part and denied in part. Portions not released are withheld pursuant to the subsections of the FOIA indicated at the end of this letter. An attachment to this letter explains the use of these exemptions in more detail.

[**X**] You may contact the EEOC FOIA Public Liaison, Stephanie D. Garner, for further assistance or to discuss any aspect of your request. In addition, you may contact the Office of Government Information Services (OGIS) to inquire about the FOIA mediation services they offer.

The contact information for OGIS is as follows: Office of Government Information Services, National Archives and Records Administration, 8601 Adelphi Road-OGIS, College Park, Maryland 20740-6001, email at ogis@nara.gov; telephone at (202) 741-5770; toll free 1-877-684-6448; or facsimile at (202)741-5769.

The contact information for the FOIA Public Liaison: (see contact information in the above letterhead or under signature line).

[**X**] If you are not satisfied with the response to this request, you may administratively appeal in writing. Your appeal must be postmarked or electronically transmitted in 90 days from receipt of this letter to the Office of Legal Counsel, FOIA Programs, Equal Employment Opportunity Commission, 131 M Street, NE, 5NW02E, Washington, D.C. 20507, or by fax to (202) 653-6056, or by email to FOIA@eeoc.gov, or online at the following public access link (PAL): https://publicportalfoiapal.eeoc.gov/palMain.aspx. Your appeal will be governed by 29 C.F.R. § 1610.11.

[**X**] See the attached Comments page for further information.

Sincerely,

M. Omer Pervaiz /s/

Stephanie D. Garner
Assistant Legal Counsel
Phone: (202) 663-4634
FOIA@eeoc.gov

Applicable Sections of the Freedom of Information Act, 5 U.S.C. § 552(b):

Exemption(s) Used: (b)(5), (b)(6), (b)(7)(C) and (b)(7)(E)

Exemption (b)(5) to the Freedom of Information Act (FOIA), 5 U.S.C. § 552(b)(5) (2016), as amended by the FOIA Improvement Act of 2016, Pub. L. No. 114-185, 130 Stat. 538, permits withholding documents that reflect the analyses and recommendations of EEOC personnel generated for the purpose of advising the agency of possible action. This exemption protects the agency's deliberative process, and allows nondisclosure of "inter-agency or intra-agency memorandums or letters which would not be available to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). The exemption covers internal communications that are deliberative in nature. *National Labor Relations Board v. Sears, Roebuck & Co.*, 421 U.S. 132 (1975); *Hinckley v. United States*, 140 F.3d 277 (D.C. Cir. 1998); *Mace v. EEOC*, 37 F.Supp. 2d 1144 (E.D. Mo. 1999). The purpose of the deliberative process privilege is to "allow agencies freely to explore alternative avenues of action and to engage in internal debates without fear of public scrutiny." *Missouri ex. rel. Shorr v. United States Corps of Eng'rs.*, 147 F.3d 708, 710 (8th Cir. 1998).

Records may be withheld under this exemption if they were prepared prior to an agency's decision, *Wolfe v. Department of Health and Human Services*, 839 F.2d 768, 775, 776 (D.C. Cir. 1988) (en banc) and for the purpose of assisting the agency decision maker. *First Eastern Corp. v. Mainwaring*, 21 F.3d 465,468 (D.C. Cir. 1994). See also, *Greyson v. McKenna & Cuneo and EEOC*, 879 F. Supp. 1065, 1068, 1069 (D. Colo. 1995). Records may also be withheld to the extent they reflect "selective facts" compiled by the agency to assist in the decision making process *A. Michael's Piano, Inc. v. Federal Trade Commission,* 18 F.3d 138 (2d Cir. 1994). An agency may also withhold records to the extent that they contain factual information already obtained by a requester through prior disclosure. See *Mapother, Nevas, et al. v. Dep't of Justice*, 3 F.3d 1533 (D.C. Cir. 1993).

DOCUMENTS WITHHELD PURSUANT TO EXEMPTION (b)(5) TO THE FOIA:

Page 4, Intermediate Skills for Investigators Workshop sheet, 3 items redacted.
Page 79, Letter to Mr. Atmi, (1 page), undated, 2 lines redacted.
Page 80, Adverse Impact Analysis Chart, (1 page) withheld.
Page 89, Appendix (1 page), case list redacted.
Pages 154-156, Memo, (3 pages) withheld.
Pages 163-164, Memo, (2 pages) withheld.
Pages 182-183, Talking Points (2 pages) withheld.
Page 214, Harrington v. AC Medical Lab chart, R's Defenses and Evidence columns redacted.
Page 215, 3-Step Basic Investigative Plan, 5 lines redacted, assessment code redacted.
Page 216, Harrington v. AC Medical Lab chart, R's Defenses and Evidence columns redacted.
Page 217, Pretext? Defense Sheet #2, Title VII-Sex-Promotion, 4 lines redacted.
Page 218, Pretext? Defense Sheet #3, Title VII-Sex-Promotion, 4 lines redacted.
Page 219, Pretext? Defense Sheet #4, ADA-Disability-Promotion, 4 lines redacted.
Page 220, Harrington v. AC Medical Lab chart, R's Defenses and Evidence columns redacted.
Page 221, Pretext? Defense #2, Title VII-Sex-Promotion, 4 lines redacted.
Page 222, Pretext? Defense Sheet #3, Title VII-Sex-Promotion, 4 lines redacted.
Page 223, Pretext? Defense Sheet #4, ADA-Disability-Promotion, 4 lines redacted.
Page 224, Harrington v. AC Medical Lab chart, R's Defenses and Evidence columns redacted.
Page 225, Pretext? Defense Sheet #2, Title VII-Sex-Promotion, 4 lines redacted.

Page 226, Pretext? Defense Sheet #3, Title VII-Sex-Promotion, 4 lines redacted
Page 227, Pretext? Defense Sheet #4, ADA-Disability-Promotion, 7 lines redacted.
Page 228, Witherspoon v. BankOnMe, Inc. sheet, R's Defenses and Evidence columns redacted.
Page 229, 3-Step Basic Investigative Plan, 5 lines redacted.
Page 230, Witherspoon v. BankOnMe, Inc. sheet, R's Defenses and Evidence columns redacted.
Page 231, 3-Step Basic Investigative Plan, 5 lines redacted, assessment code redacted.
Page 232, Witherspoon v. BankOnMe, Inc. sheet, case name redacted, R's Defenses and Evidence columns redacted.
Page 233, 3-Step Basic Investigative Plan, 5 lines redacted, assessment code redacted.
Page 234, Witherspoon v. BankOnMe, Inc. sheet, case name redacted, R's Defenses and Evidence columns redacted.
Page 235, 3-Step Basic Investigative Plan, 5 lines redacted, assessment code redacted.
Page 754-755, Overview of the Charge Process – Training Tab, techniques withheld.
Page 764, Overview of the Charge Process – Training Tab, techniques, 3 lines redacted.
Page 766, Overview of the Charge Process – Training Tab, techniques, 8 lines redacted.
Page 876, Briefing Technique, 14 lines redacted
Page 899, Training Slide – Charge Prioritization PCHP category withheld in 3 locations.
Page 1073-1077, Talking Points, withheld.
Page 1083-1085, Talking Points, withheld.
Page 1137, Investigative Interviewing – Training Tab, techniques, withheld

Exemption (b)(6) to the Freedom of Information Act (FOIA), 5 U.S.C. § 552(b)(6) (2016), as amended by the FOIA Improvement Act of 2016, Pub. L. No. 114-185, 130 Stat. 538, permits withholding of information about individuals in "personnel and medical files and similar files" if its disclosure "would constitute a clearly unwarranted invasion of personal privacy." In addition to personnel records and medical files, the term "similar files" encompasses all information that "applies to a particular individual." *Dep't of State v. Washington Post Co.*, 456 U.S. 595, 599-603 (1982). This exemption requires that the privacy interests of the individual be balanced against the public interest in disclosure. *Dep't of the Air Force v. Rose*, 425 U.S. 352, 372 (1976). In examining whether there is a "public interest" in disclosure of certain information, the "public interest" must truly be in the interest of the overall public. In *United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989), the Supreme Court explained that only "[o]fficial information that sheds light on an agency's performance of its statutory duties" merits disclosure under FOIA, and noted that "disclosure of information about private citizens that is accumulated in various governmental files" would "reveal little or nothing about an agency's own conduct."

Personal details pertaining to an individual are generally protected under this exemption. See, e.g., *DOD v. FLRA*, 510 U.S. 487, 500-502 (1994) (finding privacy interest in federal employees' home addresses even though they often are publicly available through sources such as telephone directories and voter registration lists); *Pons v. United States Customs Service*, No. 93-2094,1998 U.S. Dist. LEXIS 6084 at **13-14 (D.D.C. April 27, 1998) (protecting identities of lower and mid-level agency employees who worked on asset forfeiture documents); *Barvick v. Cisneros*, 941 F. Supp. 1015 (D. Kan. 1996) (finding personal information such as home addresses and telephone numbers, social security numbers, dates of birth, insurance and retirement information, reasons for leaving prior employment, and performance appraisals protectable under Exemption Six). See also, *Rothman v. USDA*, 1996 Lexis 22716 (C.D. Cal. June 17, 1996) (disclosure of information in the applications of persons who failed to get a job may embarrass or harm them).

DOCUMENTS WITHHELD PURSUANT TO EXEMPTION (b)(6) TO THE FOIA:

Page 228, Witherspoon v. BankOnMe, Inc. sheet, first name redacted.
Page 230, Witherspoon v. BankOnMe, Inc. sheet, first name redacted.
Page 232, Witherspoon v. BankOnMe, Inc. sheet, first name redacted.
Page 234, Witherspoon v. BankOnMe, Inc. sheet, first name redacted.

Exemption (b)(7)(C) to the Freedom of Information Act (FOIA), 5 U.S.C. § 552(b)(7)(C) (2016), as amended by the FOIA Improvement Act of 2016, Pub. L. No. 114-185, 130 Stat. 538, authorizes the Commission to withhold:

records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy . . . .

The seventh exemption applies to civil and criminal investigations conducted by regulatory agencies. Abraham & Rose, P.L.C. v. United States, 138 F.3d 1075, 1083 (6th Cir. 1998). Release of statements and identities of witnesses and subjects of an investigation creates the potential for witness intimidation that could deter their cooperation. *National Labor Relations Board v. Robbins Tire and Rubber Co.*, 437 U.S. 214, 239 (1978); *Manna v. United States Dep't. of Justice*, 51 F.3d 1158,1164 (3d Cir. 1995). Disclosure of identities of employee-witnesses could cause "problems at their jobs and with their livelihoods." *L&C Marine Transport, Ltd. v. United States*, 740 F.2d 919, 923 (11th Cir. 1984).

The Supreme Court has explained that only "[o]fficial information that sheds light on an agency's performance of its statutory duties" merits disclosure under FOIA, and noted that "disclosure of information about private citizens that is accumulated in various governmental files" would "reveal little or nothing about an agency's own conduct." *United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989).

For the purposes of determining what constitutes an unwarranted invasion of personal privacy under exemption (b)(7)(C), the term "personal privacy" only encompasses individuals, and does not extend to the privacy interests of corporations. *FCC v. AT&T Inc.*, 131 S.Ct. 1177, 1178 (2011).

DOCUMENTS WITHHELD PURSUANT TO EXEMPTION (b)(7)(C):

Page 228, Witherspoon v. BankOnMe, Inc. sheet, first name redacted.
Page 230, Witherspoon v. BankOnMe, Inc. sheet, first name redacted.
Page 232, Witherspoon v. BankOnMe, Inc. sheet, first name redacted.
Page 234, Witherspoon v. BankOnMe, Inc. sheet, first name redacted.

Exemption (b)(7)(E) to the Freedom of Information Act (FOIA), 5 U.S.C. § 552(b)(7)(E) (2016), as amended by the FOIA Improvement Act of 2016, Pub. L. No. 114-185, 130 Stat. 538, authorizes the Commission to withhold:

law enforcement information that "would disclose techniques and procedures for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law."

DOCUMENTS WITHHELD PURSUANT TO EXEMPTION (b)(7)(E) OF THE FOIA:

Page 10, Investigating Discrimination Claims Using the Models of Proof, (doc page 6) 2 lines redacted.
Page 13, Investigating Discrimination Claims Using the Models of Proof, (doc page 9) 3 lines redacted
Page 89, Appendix (1 page), case list redacted.
Pages 154-156, Memo, (3 pages) withheld.
Pages 163-164, Memo, (2 pages) withheld.
Pages 182-183, Talking Points (2 pages) withheld.
Page 214, Harrington v. AC Medical Lab chart, R's Defenses and Evidence columns redacted.
Page 215, 3-Step Basic Investigative Plan, 5 lines redacted.
Page 216, Harrington v. AC Medical Lab chart, R's Defenses and Evidence columns redacted.
Page 217, Pretext? Defense Sheet #2, Title VII-Sex-Promotion, 4 lines redacted.
Page 218, Pretext? Defense Sheet #3, Title VII-Sex-Promotion, 4 lines redacted.
Page 219, Pretext? Defense Sheet #4, ADA-Disability-Promotion, 4 lines redacted.
Page 220, Harrington v. AC Medical Lab chart, R's Defenses and Evidence columns redacted.
Page 221, Pretext? Defense #2, Title VII-Sex-Promotion, 4 lines redacted.
Page 222, Pretext? Defense Sheet #3, Title VII-Sex-Promotion, 4 lines redacted
Page 223, Pretext? Defense Sheet #4, ADA-Disability-Promotion, 4 lines redacted
Page 224, Harrington v. AC Medical Lab chart, R's Defenses and Evidence columns redacted.
Page 225, Pretext? Defense Sheet #2, Title VII-Sex-Promotion, 4 lines redacted.
Page 226, Pretext? Defense Sheet #3, Title VII-Sex-Promotion, 4 lines redacted
Page 227, Pretext? Defense Sheet #4, ADA-Disability-Promotion, 7 lines redacted.
Page 228, Witherspoon v. BankOnMe, Inc. sheet, R's Defenses and Evidence columns redacted.
Page 229, 3-Step Basic Investigative Plan, 5 lines redacted.
Page 230, Witherspoon v. BankOnMe, Inc. sheet, R's Defenses and Evidence columns redacted.
Page 231, 3-Step Basic Investigative Plan, 5 lines redacted.
Page 232, Witherspoon v. BankOnMe, Inc. sheet, R's Defenses and Evidence columns redacted.
Page 233, 3-Step Basic Investigative Plan, 5 lines redacted.
Page 234, Witherspoon v. BankOnMe, Inc. sheet, R's Defenses and Evidence columns redacted.
Page 235, 3-Step Basic Investigative Plan, 5 lines redacted.
Page 410-411, Charge Priority Handling Procedures – Training Tab, PCHP Assessment Form, withheld.
Page 433, Fact Finding Conference – Training Tab, techniques, withheld.
Page 439, Fact Finding Conference – Training Tab, techniques, withheld.
Page 626, Negotiating Settlement/Conciliation – Training Tab, techniques, withheld.
Page 628, Negotiating Settlement/Conciliation – Training Tab, techniques, withheld.
Page 648-651, Negotiating Settlement/Conciliation – Training Tab, techniques, withheld.
Page 813-820, Memo, techniques, withheld.

Page 821, Questions and Answers on Mixed Charge Files, assessment codes redacted in 2 locations.
Page 872-873, Model Investigative Plan, withheld.
Page 874, Model Investigative Plan, R's Defenses and Evidence columns redacted.
Page 875, 3-Step Basic Investigative Plan, 5 lines redacted.
Page 877-878, Interview Model Checklist, withheld.
Page 879-881, Request for Information Model Check list, withheld.
Page 882-883, Fact Finding Conferences Model Checklist, withheld.
Page 884-886, On-Sites Model Checklist, withheld.
Page 887-889, Memo, withheld.
Page 1137, Investigative Interviewing – Training Tab, techniques, withheld

Comments

This is in response to your Freedom of Information Act (FOIA) request. You requested a digital/electronic copy of the presentation materials for the New Investigator training and Intermediate Skills training class. We apologize for the delay with the processing of your FOIA request. Your request is granted in part and denied in part.

Attached for your review is the 2017 New Investigator Training and Intermediate Skills Training documents for your review.(1288 pages).

For a full description of the exemption codes used please find them at the following URL: https://publicportalfoiapal.eeoc.gov/palMain.aspx

This response was prepared by Tracy L. Smalls, Government Information Specialist, who may be reached at 202-663-4331.

PARTICIPANT MANUAL

The PREAMBLE

PREAMBLE

Since the initial development of this Intermediate Skills for Investigators Workshop in FY 2012, the U.S. Equal Employment Opportunity Commission (EEOC) released the Strategic Plan for Fiscal Years 2012-2016. The Strategic Plan (Plan) makes clear the vision, "Justice and Equality in the Workplace", and the mission of the agency to "Stop and Remedy Unlawful Employment Discrimination." The Plan states:

To accomplish this mission and achieve this vision in the 21st Century, the EEOC is committed to pursuing the following objectives and outcome goals:

1. Combat employment discrimination through strategic law enforcement, with the outcome goals of: 1) having a broad impact on reducing employment discrimination at the national and local levels; and 2) remedying discriminatory practices and secure meaningful relief for victims of discrimination;

2. Prevent employment discrimination through education and outreach, with the outcome goals of: 1) members of the public understand and know how to exercise their right to employment free of discrimination; and 2) employers, unions and employment agencies (covered entities) better address and resolve EEO issues, thereby creating more inclusive workplaces; and

3. Deliver excellent and consistent service through a skilled and diverse workforce and effective systems, with the outcome goal that all interactions with the public are timely, of high quality, and informative.

The Plan also identifies strategies for achieving each outcome goal and identifies 14 performance measures for gauging the EEOC's progress as it approaches FY 2016.

The Strategic Plan also directed the Commission to develop a Strategic Enforcement Plan (SEP) that (1) establishes priorities and (2) integrates all components of EEOC's private, public, and federal sector enforcement. The purpose of the SEP is to focus and coordinate the EEOC's programs to have a sustainable impact in reducing and deterring discriminatory practices in the workplace. The Commission approved the Strategic Enforcement Plan for Fiscal Years 2013 –2016 on December 17, 2012.

In the SEP the Commission adopted the following national priorities:

1. Eliminating Barriers in Recruitment and Hiring. The EEOC will target class-based recruitment and hiring practices that discriminate against racial, ethnic and religious groups, older workers, women, and people with disabilities.

2. Protecting Immigrant, Migrant and Other Vulnerable Workers. The EEOC will target disparate pay, job segregation, harassment, trafficking and discriminatory policies affecting vulnerable workers who may be unaware of their rights under the equal employment laws, or reluctant or unable to exercise them.

3. Addressing Emerging and Developing Issues. The EEOC will target emerging issues in equal employment law, including issues associated with significant events, demographic changes, developing theories, new legislation, judicial decisions and administrative interpretations.

4. Enforcing Equal Pay Laws. The EEOC will target compensation systems and practices that discriminate based on gender.

5. Preserving Access to the Legal System. The EEOC will target policies and practices that discourage or prohibit individuals from exercising their rights under employment discrimination statutes, or that impede the EEOC's investigative or enforcement efforts.

6. Preventing Harassment Through Systemic Enforcement and Targeted Outreach. The EEOC will pursue systemic investigations and litigation and conduct a targeted outreach campaign to deter harassment in the workplace.

As part of the enforcement arm of the agency, investigators play a vital role in helping us accomplish these overarching objectives, goals and national priorities.

Exercise: To make sure that we all have the entire Strategic Plan and the Strategic Enforcement Plan, please take a few minutes to locate the Strategic Plan on our public website, www.eeoc.gov . Once you have it, copy it to your own computer.

Now please locate the Strategic Enforcement Plan by conducting a search on InSite. Once you have it, copy it to your own computer.

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In line with our Strategic Plan objectives and the national priorities in the SEP, the agency has taken another look at the Priority Charge Handling Procedures (PCHP) from an enforcement perspective. We want to be able to effectively identify those charges that rise to the top because they are about a national priority or a local priority. So, by now, you all should have taken the webinar training that covered the new PCHP guidance and introduced the (b)(5) case categorization code that replaces the (b)(5) or (b)(5) codes. For purposes of this training, we will keep in mind what was taught on the PCHP coding and use the reference materials as needed.

As we move ahead in this Workshop, we will use the concepts, objectives, goals and priorities contained in the Strategic Plan and the Strategic Enforcement Plan as the foundation that drives how we do our work.

PARTICIPANT MANUAL

INTERMEDIATE SKILLS FOR INVESTIGATORS WORKSHOP FY2012/FY2013

CONTENTS

INTRODUCTION

Since the beginning of your employment with the U.S. Equal Employment Opportunity Commission (EEOC), you have been in a culture that is woven together by the laws we enforce and the people we encounter. We have all met many people and spoken to them about the laws that we enforce and the procedures we follow. Since no one case is exactly like another and no two people are alike, each experience we have as we do our work marks a moment that affords us professional and communal development. While we work at becoming better and better each day at enforcing the anti-discrimination laws and utilizing the tools that are available to us, it is necessary to remove ourselves from the day-to-day processing of charges sometimes to regroup, reflect, refresh, and importantly, learn.

This Workshop is intended to

1. build on those aspects of our investigative process that are tried and true;
2. provide you the opportunity to enhance, polish, or fine-tune your analytical skills as they relate to the job of an investigator; and
3. increase your awareness about some investigative tools and techniques.

We acknowledge that every office in the field possesses its own rich micro-culture. However, the ability of an investigator to manage a caseload, regardless of specific office idiosyncrasies, lies in the investigator's ability to properly apply the models of proof, adhere to the principals of the Priority Charge Handling Procedures (PCHP), test respondent defenses and resolve cases correctly. This requires a high level of confidence and knowledge on the part of the investigator.

Since at least 2004, as part of the New Investigator Training and the Pre-determination/Charge Receipt training that was delivered in 2011, we have discussed the **essential skills** of a successful investigator. It is absolutely critical that investigators be sharp when it comes to:

- **Analytical/critical thinking skills**
- **Thorough understanding of the models of proof**
- **Excellent communication skills (written/verbal/listening)**
- **Sound customer service**

While these skills build organically on each other, at the core of them is a need for the successful investigator to have analytical skills that accurately and effectively distill the information or evidence gathered in a way that brings the counseling sessions to the correct end and the cases to appropriate resolutions. In this Workshop, you will have

the opportunity to fine-tune and practice using your analytical abilities as an investigator through practical applications. You will read, interpret, plan and work with two case studies that will help you hone your analytical skills. We will focus primarily on three main **goals:**

1. *Analyzing position statements/RFI responses/evidence:* Understanding the evidence is critical to proper PCHP application and successful implementation of the relevant portions of the Agency's Strategic Plan.
2. *Looking beyond the Charging Party's allegations, when appropriate:* As a public service agency, we have a responsibility to address issues that may impact or affect other individuals besides the Charging Party.
3. *Presenting cases:* Being able to present case briefings (written and oral) in a complete and succinct manner, allows management and legal to provide thoughtful and informed feedback in the development of cases.

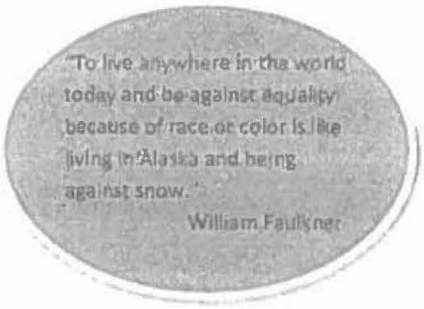
TRAINING STRUCTURE

You may have noticed that this training is called a Workshop. This means that there will be very little lecture and a significant amount of time spent on actual application. The brief lecture will cover the following:

- ✓ Theories of Discrimination
- ✓ Models of Proof
- ✓ Focus on Defenses/Pretext
- ✓ Using the Investigative Plan

The trainers will call upon each person to discuss the cases and report out on various assignments. Everyone will have the opportunity to speak. You will be expected to conduct research using your laptop. We hope that this opportunity to practice your craft is welcomed and that you will fully engage yourself in this Intermediate Skills for Investigators Workshop.

NOW LET US BEGIN!



There are so many different fact patterns and cases that people bring to us all the time and with so much work and so many expectations on our plate, it becomes difficult sometimes to know what to do on each case. Even while we are investigating a case, many things can surface that throw us off track. We have no control over how much extraneous information each case will end up having associated with it because we are dealing with people, their stories, positions, beliefs and concerns. So, what is the roadmap? How do we investigate our cases and stay on track?

The answer lies in how we approach the case in the first place. What theory of discrimination are you using for the case? What are the elements of proof that must be received and tested in the case? What tool(s) can you use to help you be most efficient and effective in every phase of your investigation so that you do not go off on irrelevant tangents, or in order that you do not over-investigate or under-investigate a case?

Let's review!

INVESTIGATING DISCRIMINATION CLAIMS USING THE MODELS OF PROOF

As investigators, you have to gather enough information for the agency to determine whether "reasonable cause" of unlawful discrimination may exist. To gather the most useful information, you must understand how these charges are analyzed. There are several different ways to analyze claims, depending on the facts and allegations raised. You may even find that a different approach, or more than one approach, is necessary after more facts are uncovered during an investigation. So it is important for investigators to understand when and how the different theories of discrimination apply.

(b)(7)(E)

I. Selecting the Correct Model of Proof

The *Models of Proof* list the different methods available for investigating charges. These methods include disparate treatment, adverse impact, sex-based wage discrimination, reasonable accommodation (disability), religious accommodation, retaliation, and harassment. Based on the allegations in the charge, the method of proof may be obvious. For example, claims involving the denial of leave to attend a religious service will fall under religious accommodation; sex-based pay claims must, of course, use the model for sex-based wage discrimination; and claims involving discrimination because someone has filed a charge must be analyzed as retaliation. It may be less obvious when to apply two of the broader methods of proof – disparate treatment and adverse impact.

A. Disparate Treatment

The disparate treatment method of proof focuses on whether there is evidence of intentional discrimination on a protected basis. In other words, motive matters. The disparate treatment method of proof applies to Title VII, ADEA, ADA, and GINA claims. It can be used when one person, several people, or even a large group of people allege discrimination.[1]

There are two types of evidence to use when investigating disparate treatment claims, and a separate model of proof for each:

[1] As you learned in New Investigator Training, intentional discrimination can occur on a broad, class-wide basis. Charging parties frequently allege systemic discrimination against one or more protected groups in hiring, promotions, or layoffs.

1. **Direct Evidence** – (also called "smoking gun" evidence). Direct evidence, on its face, reveals that the discrimination was motivated by discrimination. For example, a letter from the respondent's manager to the charging party explaining that "I have decided to terminate your employment because I found out you are pregnant," is direct evidence that the CP's termination was based on sex (pregnancy).

2. **Circumstantial Evidence** – Here, no one piece of evidence reveals the employer's motive, but a combination of different pieces of information may, unless rebutted, provide evidence of discrimination. Often, circumstantial evidence requires comparisons between the treatment received by the CP, and the treatment received by other workers from outside the CP's protected group who are "similarly situated." This evidence may include testimony, documents, statistical evidence, or any other evidence that creates an inference of discrimination.

Example 1: *Max is a White male who works at Fairer Company as an electrician. He alleges that he was not promoted to lead electrician because he is a White male. Max complains that Maxine, a Black female, was promoted. Max believes that he is more qualified than Maxine.*

Based on what we know so far, the model of proof that applies to investigating this case is disparate treatment via circumstantial evidence. Max and Maxine are from different racial groups and genders. If Max's allegation is true, it means that a less qualified person who is presumably similarly situated to Max was treated more favorably based on race and sex.

B. Disparate (Adverse) Impact

Disparate impact, sometimes called "adverse impact," is used when the CP claims that he was harmed by a broad workplace policy or practice under which his protected group fares significantly worse than other groups, even though the policy does not outwardly discriminate. In other words, the policy or practice has a more negative effect on one protected group than it does on others. This is shown by statistics.

For this method of proof, you cannot find cause just because there is a "disparate impact." The employer has a defense. If the employer shows that its policy or practice accurately predicts whether people will be good employees in the job in question, then the policy or practice is *not* discriminatory. But, if the employer fails to show the policy or practice accurately predicts who will be a good employee in the position, then *it is discriminatory*. One caution: this defense is applied differently under the different EEO laws, so see Section II.B. below for a discussion of Testing the Respondent's Defenses (TRD)).

A disparate impact method of proof applies to charges that, at least potentially, involve a large number of people from the same protected class. While disparate impact applies to Title VII, the ADEA, and the ADA (as "Discriminatory Qualification Standards"), there are enough differences between each statute that the *Models of Proof* includes a separate model for each statute.

The EEOC has found cause in charges where physical stamina and strength tests disproportionately exclude older workers or women, and are not sufficiently job related. Also, if the employer requires written tests, there may be a disparate impact on African Americans or Hispanics.[2] Finally, a policy or practice that an employer uses to exclude all applicants with criminal convictions is likely to have an adverse impact on African Americans, Hispanics, or men. There are many situations where seemingly neutral rules or requirements may adversely and disproportionately affect certain groups of people.

Example 2: *Neutral Debt Collection Co. excludes all applicants with criminal convictions, regardless of how much time has passed, how minor the crime, or the job in question The charging party is an African American man who was rejected by Neutral Debt Collection due to a 20-year-old misdemeanor conviction. Based on what we know so far, the approach to investigating this charge will be disparate impact, because it challenges a policy that may have a more negative effect on African Americans than on other people. The employer's defense would be to show that the policy accurately predicts success in the job – or that it is "job related and consistent with business necessity" under Title VII.*

II. Applying the *Models of Proof*

The "Models of Proof" all have basic, or *prima facie* elements that must be met, and then an opportunity for rebuttal/defense by the employer. Your analysis of charges generally breaks down into two elements – (A) determining if the allegation's basic elements are present; and (B) Testing the Respondent's Defenses.

A. Basic Elements Present (BEP) – the Prima Facie Case

Each model first outlines the *prima facie* case. "*Prima facie*" means "at first view" in Latin. It is defined in English as, "evidence sufficient to establish a fact, or to raise a presumption of fact, unless rebutted."[3] For most of the models of proof, the *prima facie*

[2] The question then becomes whether the test is sufficiently job related and consistent with business necessity. There are special rules for deciding if an employer has shown its defense with regard to tests, often turning on whether the test was "validated" as sufficiently related to the job in question and consistent with business necessity.

[3] THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1142 (unabridged ed., 1971).

elements are not intended to be a burdensome hurdle for you to uncover. The exact information required to establish a prima facie case also will depend on the facts at issue. (b)(7)(E)

(b)(7)(E)

Investigation of disparate treatment charges involving circumstantial evidence often use similarly situated comparators, but this is not the only way to establish the prima facie case. CP's claim is not necessarily defeated if CP cannot provide comparative evidence, as long as there is other evidence that reasonably gives rise to an inference of discrimination. Also, a claim should not be dismissed based on lack of evidence if CP was not in a position to have access to such evidence.

In other models of proof, the relevance of comparison evidence may vary. A religious or disability accommodation claim does not require a comparison to the treatment received by other workers, in most cases. Retaliation claims also do not usually require comparisons with other employees. By contrast, sex-based wage disparity claims *always* require wage comparisons between men and women working in substantially equal jobs.

In disparate impact cases, you do not have to find evidence that the employer *intended* to discriminate against a protected group. Instead, you should focus on determining whether a neutral policy had a larger adverse affect on the protected group. If possible, try to identify the specific part of the policy that causes the observed statistical disparity. Statistical analysis will be required.

B. Test Respondent's Defenses (TRD)

After the prima facie elements in the *Models of Proof*, the models list the "rebuttal" required of the respondent. This is the respondent's opportunity to give EEOC the reasons for its actions, and present its defense(s). Usually, the respondent provides some rationale and/or defenses to the charge. However, if the respondent fails to provide any rationale and the prima facie/basic elements are present, a cause finding is appropriate.

After receiving the respondent's information, we make sure to Test Respondent's Defenses (TRD). In our TRD, we must determine whether the defense(s) provided by the respondent is a cover-up for illegal discrimination. Is the respondent's seemingly legitimate, non-discriminatory reason actually pretext for discrimination (disparate treatment)? Or is the respondent engaging in an employment practice that, although neutral on its face, amounts to unlawful discrimination because it is not sufficiently related to the job in question (disparate impact)?

1. Defenses in Disparate Treatment Cases. Respondents often raise arguments that generally can be described as denials or justifications. In a denial, the respondent will say that the facts, as alleged by the charging party, simply are false. When this occurs, you must make sure that you follow up on the reasons the claim is allegedly untrue, with both parties. This is one way to TRD.

In a justification, the respondent may not say that the charging party's facts are false, but the respondent will offer a seemingly legitimate, non-discriminatory reason or explanation for its actions. You must test out and explore this reason by asking questions of the parties and witnesses, analyzing relevant documents, conducting basic statistical analyses, or visiting the respondent facility to view the particular job, etc. Legally, disparate treatment defenses include after-acquired evidence, or the bona fide occupation qualifications (BFOQ) defenses.[4]

2. Defenses in Disparate Impact Cases. Under Title VII, if statistical evidence establishes that a neutral policy has a disparate impact on a protected group, then the employer must show that "the challenged practice is job related for the position in question and consistent with business necessity." This means that the employer must show that the practice accurately measures traits that are important for the job and necessary to the business. If the employer meets this defense, the charging party has one last chance to overcome the defense with evidence that there is a "less discriminatory alternative" – a different way to accomplish the same job-related goals with less adverse impact on the CP's protected group – but that respondent refused to adopt it. Where a less discriminatory alternative is found, a cause finding is appropriate.

Under the ADEA, an employer must show that a policy with a disparate impact on older workers is justified as a "*reasonable factor other than age*." This is a lower standard than "job related and consistent with business necessity." it means that the policy or practice must be reasonably designed to further a legitimate business practice. Here, however, a less discriminatory alternative does not require a cause finding, although it is relevant to deciding whether the employer's rationale is "reasonable." The Commission adopted a rule explaining this ADEA defense, which is found at https://www.federalregister.gov/articles/2012/03/30/2012-5896/disparate-impact-and-reasonable-factors-other-than-age-under-the-age-discrimination-in-employment .

[4] The Models of Proof specifically mention these defenses.

C. Checklists for applying the *Models of Proof*

Making Sure You Have BEP (Basic Elements Present)

- ✓ Analyze the intake questionnaire or other correspondence from CP
- ✓ Interview CP, ask the relevant questions
- ✓ Check the information gathered against the relevant model of proof

Making Sure You TRD (Test Respondent's Defenses)

- ✓ Figure out what is actually disputed
- ✓ Ask questions to ascertain the real facts.
- ✓ Have respondent explain the defense until it is clear to you, if necessary
- ✓ Interview people, analyze data, gather statistics to figure out the following:
    - o Were similarly situated individuals outside CP's class treated differently?
    - o Is there evidence of bias by respondent's decision makers towards persons of CP's class?
    - o Are there statistics that run counter to the respondent's defenses?
    - o Overall, is the defense believable?

III. Supreme Court Cases Used to Create *Models of Proof*

Lots of lawyers, both respondent and EEOC, reference Supreme Court decisions when they are talking about employment discrimination charges. This section provides very brief references to a few of the most important Supreme Court decisions for disparate treatment and disparate impact cases. The *Models of Proof* are derived from these cases, among others.

A. Disparate Treatment involving Circumstantial Evidence

The basic, most commonly used "roadmap" for analyzing charges is derived from *McDonnell Douglas v. Green*, 411 U.S. 792, 802 (1973). Under that decision, a plaintiff can establish a prima facie case of race discrimination by establishing that (1) he or she belongs to a racial minority; (2) he or she applied and was qualified for a job for which the employer was seeking applicants; (3) he or she was rejected for the position despite his or her qualifications; and (4) the position remained open after his or her rejection and the employer continued to seek applications from other people with similar qualifications to the plaintiff. A few years later in another decision, *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981), the Supreme Court also stated that after the plaintiff has established a prima facie case, the burden of production shifts

to the employer "to articulate a legitimate, non-discriminatory reason for the [CP's] rejection." If the employer sustains the burden, the CP then has an opportunity to present evidence showing that the employer's stated reason for the rejection was pretext.

B. Disparate Impact under Title VII

Adverse impact cases first appeared after the holding of the Court in Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971), which states that Title VII "required . . . the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classifications. If an employment practice which operates to exclude . . .[a protected group] cannot be shown to be related to job performance, the practice is prohibited," notwithstanding the employer's lack of discriminatory intent.

C. Disparate Impact under the ADEA

Disparate or adverse impact cases apply different standards than Title VII, due to the Court's holding in Smith v. City of Jackson, 544 U.S. 228, 233 (2005). The Court confirmed that disparate impact analysis is available in age discrimination cases, but also found that a different defense – reasonable factor other than age – applies. Soon thereafter, the Court confirmed in Meacham v. Knolls Atomic Power Laboratory, 554 U.S. 84, 93 (2008), that reasonable factor other than age requirement is a defense that the defendant/respondent has the burden to prove.

****

Using the methods and the models of proof over the next few days, we will practice BEP and TRD with two case studies. Remember that in order to stay on track you must follow the checklists for applying the Models of Proof---BEP and TRD.

When you test the defenses you are trying to determine whether there is evidence of **pre-text**.

Using the Investigative Plan

A tried and true tool that high performing investigators across the country use is the Investigative Plan (IP). This is an effective tool because it is a planning tool and a working document for your entire investigation. It allows for efficiency in that as you complete your IP, you minimize the need to re-review the case, and it serves as your reminder at every step in the investigation of your roadmap (i.e. theory of discrimination and models of proof). The IP is the document where you write down your thought processes and what the evidence you gather really is and how it may or may not be relevant to the case. A completed IP will also allow you to determine what your next steps in the investigation should be. You will be able to see if there are holes in your investigation. Ultimately, you will be able to use your IP to write your reasonable cause Investigative Memorandum (IM) or the no cause recommendation for closure.

IPs have taken many forms for many investigators over the history of the Commission. You may even have your own special form or other way of mapping out your plan for each one of your cases. The IP is more about substance as opposed to form. The key is in the planning. However, for purposes of this Workshop, you will be asked to use the IP contained in your training materials.

****

RECAP

In order to get through cases as effectively and efficiently as possible, you must know and use the theories of discrimination (methods) and the models of proof. You must also plan each phase of the investigation using some sort of planning tool which should ultimately allow you to write your closure recommendations, cause or no cause, in a cohesive way that presents a clear and concise analysis of the evidence that supports your recommendation for closure.

****

CASE STUDIES

Now that we have gone through a brief refresher on theories of discrimination, models of proof, defenses and using the IP, we are ready to begin work on two cases.

As you receive and work on handouts for both case studies, you may insert them into your binder under the proper tabs. Your trainer will guide you through this section.

Harrington v. AC Medical Lab

***Instruction #1**: Review Handout Packet A---Fill in the IP*

Now that you've had a chance to closely review Harrington's allegations, take a look at AC Medical Lab's response to the charge and go back to your IP again, add/edit, etc.

***Instruction #2**: Review Handout Packet B---Add/Edit the IP*

What things come to mind right away after reading the position statement? Jot them down.

****

Let's just review what we've done so far with the Harrington case.

1. Read and analyzed CP's documents—IQ, Charge, Interview Notes, Rejection Letter.
2. Read and analyzed R's response to the allegations.
3. Used the IP as our tool to keep us on track-using theories/models as our guide.
4. Determined the next step in the process.

****

A Note About Research

As mentioned earlier, with so many cases, we cannot possibly know everything there is to know about every fact pattern, every legal twist and turn, every concept, every procedure, every Agency answer, etc. However, in order to properly investigate cases, we ultimately have to learn about things or locate information that helps us to do our work. For our own professional development, we must be able to do research to find answers to our questions. With the technology age that we live in, it is important that we all become comfortable with doing a significant amount of online research.

We strongly encourage you to explore the many avenues for getting useful information that is available. You will find that the EEOC website and other training and reference tools can help you.

Take a few minutes to just look on InSite and www.eeoc.gov.[5]

[5] Note that this training manual includes an Appendix that contains several key documents that you can use as needed.

Witherspoon v. BankOnMe, Inc.

Now, let's look at another case and start our analysis—***Witherspoon v. BankOnMe, Inc.*** As with the *Harrington* case, your trainer will guide you. You will also receive handouts that you may insert into this binder under the appropriate tab.

Instruction #3: *Review Handout Packet A---Fill in IP*

Now that you've had a chance to closely review Witherspoon's allegations, take a look at BankOnMe's response to the charge and go back to your IP again, add/edit, etc.

Instruction #4: *Review Handout Packet B---Add/Edit the IP*

What things come to mind right away after reading the position statement? Jot them down.

****

Let's review what we've done so far with the Witherspoon case.

1. Read and analyzed CP's documents—IQ, Charge, Interview Notes.
2. Read and analyzed R's response to the allegations.
3. Used the IP as our tool to keep us on track-using theories/models as our guide.
4. Determined the next step in the process.

****

Instruction #5: *Review Handout Packets C for both cases—Update IP*

Briefing Management About Your Case

Because you have several cases at a time to investigate, case management is very important. It is necessary to make sure that your supervisor knows what is happening in your cases. Many times it becomes necessary for the supervisor to assist you in managing the caseload and determining next steps in your investigations of your cases.

Your supervisor has several investigators with caseloads and cannot possibly know all of the details of all of the cases. Therefore, in order to receive the greatest benefit or value from a case management conversation with your supervisor, you will need to provide the necessary information in a clear, succinct manner that allows the supervisor to assist you. You will recall that one of the essential skills of a successful investigator is the ability to effectively communicate.

We recommend that you include the following steps when you talk to your supervisor about cases, in the order in which they are listed:

1. CP's allegations/basis/issues/prima facie elements/initial charge category assessment.
2. R's response to the allegations (defenses)
3. Discussion of the evidence that you already have.
4. Identification of the evidence you need and discussion about how you will get it which includes discussion of realistic timeframes within which you can do the next steps in light of your intake schedule, scheduled on-sites or FFCs, vacation schedules, case priorities, etc.

****

Instruction #6: For the Harrington and Witherspoon cases, prepare to brief your supervisor. Your IP should be updated and detailed enough so that you won't have to go back into the case documents for the most part. Remember the briefing steps and be prepared to discuss them in order.

****

Now that you have gone through the exercise of briefing your supervisor and discussing next steps, it is time to go to the next phase. You have taken the identified next step from your briefing with your supervisor and you have additional materials to review on both of your cases.

Instruction #7: *Review Handout Packets D for both cases---Update the IP.*

Work independently.

****

Instruction #8: Now get with your team and practice the briefing strategy/order that we just went through with your team members. This time, pretend that you are briefing management and legal in an A meeting about the two cases that you have.

****

Now that you have had a little practice briefing your team members in an A Meeting, we will move on to the next phase.

Instruction #9: With your team, prepare to conduct a briefing at an A Meeting that will include management and legal. You will discuss both of your cases. The trainer will give detailed instructions for this final exercise. Remember to use the briefing steps and your IP. In order to complete step 4 of the briefing steps, it is advisable to also have your calendar with you so that you can talk about realistic timeframes for completing tasks in light of your other case activities, intake rotations schedule, etc.

RECAP

- Workshop purpose was to build on New Investigator Training
- Essential Skills of Successful Investigators
  - Analytical/Critical thinking skills
  - Thorough understanding of the models of proof
  - Excellent communication skills (written/verbal/non-verbal)
  - Sound customer service
- Main Goals
  - Analyze position statements/RFI responses/evidence
  - Look beyond the CP's allegations, as appropriate
  - Present cases to supervisor/A Meeting, etc.
- Workshop was practice using our roadmap set for in a few landmark cases.
  - Identifying the theory of discrimination (method)
  - Understanding the type of evidence we need
  - Using the Models of Proof to make sure we have BEP and TRD to get to Pre-text analysis
  - Using some form of an IP to help keep thoughts organized and next steps clear
- Practiced doing research because many times we need to find answers (i.e. LGBT questions, jurisdiction questions on integrated enterprise, etc.)
- Covered looking at collaboration with OFCCP on wage claims (can be on other types of claims as well).
- Worked through two case studies to help us with practice all of these concepts as well as 4 steps to briefing cases and using the IP as a living document.

Notably, you also practiced working in teams. Oftentimes, in our work, especially as you start to work on more complex or larger cases, you may need to be part of a team to successfully complete the cases.

We hope that you enjoyed your time away from your real caseload, intake, etc. to practice and work with colleagues to refresh yourself and fine-tune your skills.

We appreciate all of the very valuable work that you do every day for the EEOC and our country.

THE END

Slide 1

Intermediate Skills for Investigators Workshop

RECAP

Slide 2

Essential Skills

- Analytical/critical thinking skills
- Thorough understanding of the models of proof
- Excellent communication skills
- Sound customer service

Slide 3

Workshop Goals

- Hone Analytical Skills
  - Analyze PS/RFI response/evidence
  - Look beyond CP allegations (when necessary)
  - Present the cases to management

Ultimate Goal

To be able to efficiently, effectively produce quality investigations and results.

Slide 4

Roadmap and Foundation

- Theories of Discrimination
  - Disparate Treatment
  - Disparate (Adverse) Impact
- Models of Proof
  - Are the Basic Elements Present? (BEP)
  - Did you Test Respondent's Defenses? (TRD)
- Ultimate Question—is there evidence of pre-text?

Slide 5

Using the Investigative Plan

- Planning Tool
- Working Document
- Visit it throughout the entire investigation
- Use it when briefing the supervisor
- Use it to help you determine next steps
- Has many forms, but same function

Slide 6

Let's move on to the Case Studies!!!!

HARRINGTON

PACKET A

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
INTAKE QUESTIONNAIRE

Please immediately complete the entire form and return it to the U.S. Equal Employment Opportunity Commission ("EEOC"). **REMEMBER**, a charge of employment discrimination must be filed within the time limits imposed by law, generally within 180 days or in some places 300 days of the alleged discrimination. Upon receipt, this form will be reviewed to determine EEOC coverage. **Answer all questions as completely as possible, and attach additional pages if needed to complete your response(s). If you do not know the answer to a question, answer by stating "not known." If a question is not applicable, write "n/a." (PLEASE PRINT)**

1. **Personal Information**

Last Name: Harrington_____ First Name: Reese_____MI: M._____

Street or Mailing Address: 15303 Parker Street_____Apt Or Unit #: 305_____

City: Generic_____County: Anywhere_____State: US_____Zip: 00000_____

Phone Numbers: Home: (500) 795-4432_____ Work: (500) 435-8000_____

Cell: (500) 540-9913_____ Email Address: rmh68@email.com_____

Date of Birth: 11/16/1968__ Sex: Male____ Female_X__ Do You Have a Disability? Yes _X___ No ___

Please answer each of the next three questions. i. Are you Hispanic or Latino? Yes ____ No _X___

ii. What is your Race? Please choose all that apply. ___ American Indian or Alaskan Native ____Asian _X__White

____Black or African American ____Native Hawaiian or Other Pacific Islander

iii. What is your National Origin (country of origin or ancestry)? American_____

Provide The Name Of A Person We Can Contact If We Are Unable To Reach You:

Name: Rina Paxon_____ Relationship: Attorney_____

Address: 25000 Center Drive_____ City: Basic City_____ State: US__ Zip Code: 00001____

Home Phone: (500) 373-1409_____ Other Phone: (500) 670-1927_____

2. **I believe that I was discriminated against by the following organization(s): (Check those that apply)**

__X__Employer _____Union _____Employment Agency _____ Other (Please Specify) _____

Organization Contact Information (If the organization is an employer, provide the address where you actually worked. If you worked from home, check here ____ and provide the address of the office to which you reported.) **If more than one employer is involved, attach additional sheets.**

Organization Name: AC Medical Lab_____

Address: 1605 Raleigh _____**County:** Anywhere_____

City: Generic_____ **State:** US _ **Zip:** 00000_____ **Phone:** (500) 465-1209_____

Type of Business: Medical Lab_____ **Job Location if different from Org. Address:** _____

Human Resources Director or Owner Name: Arnie Clark_____ **Phone:** (500) 223-1455_____

Number of Employees in the Organization at All Locations: Please Check (✓) One

_____Fewer Than 15 __X__ 15 - 100 _____ 101 - 200 _____201 - 500 _____More than 500

3. **Your Employment Data** (Complete as many items as you can) **Are you a Federal Employee?** ____ Yes ____ No

Date Hired: 08/19/1998_____ Job Title At Hire: Inventory Control Clerk_____

Pay Rate When Hired: $9.50_____ Last or Current Pay Rate: $17.50_____

Job Title at Time of Alleged Discrimination: Inventory Control Clerk_____ Date Quit/Discharged: N/A_____

Name and Title of Immediate Supervisor: Melissa Torres - Office Manager; Ryan McKendrick - Inventory Control Manager

If Job Applicant, Date You Applied for Job February 27, 2012_____ Job Title Applied For Inventory Control Manager____

4. **What is the reason (basis) for your claim of employment discrimination?**

FOR EXAMPLE ,if you feel that you were treated worse than someone else because of race, you should check the box next to Race. *If you feel you were treated worse for several reasons, such as your sex, religion, and national origin, you should check all that apply. If you complained about discrimination, participated in someone else's complaint, or filed a charge of discrimination, and a negative action was threatened or taken, you should click the box next to* Retaliation.

_____ Race __X__ Sex _____ Age _____ Disability _____ National Origin _____ Religion _____ Retaliation

_____ Pregnancy _____ Color (typically a difference in skin shade within the same race) _____Genetic Information; choose which type(s) of genetic information is involved:

_____ i. genetic testing _____ ii. family medicinal history _____ iii. genetic services (genetic services means counseling, education or testing)

If you check color, religion or national origin, please specify: _____

If you checked genetic information, how did the employer obtain the genetic information? _____

_____

Other reason (basis) for discrimination (Explain). Not promoted because of sex (transgender) and disability._____

5. **What happened to you that you believe was discriminatory? Include the date(s) of harm, the action(s), and title(s) of the person(s) who you believe discriminated against you. Please attach additional pages if needed.**
(Example: 10/02/06 – Discharged by Mr. John Soto, Production Supervisor)

_____

A) Date: March 12, 2012____ Action: Not selected for the Inventory Control Manager position, despite meeting all of the qualifications and having the experience.

_____

Name and Title of Person(s) Responsible: Arnie Clark - Owner

_____

B) Date: _____Action:_____

_____

Name and Title of Person(s) Responsible_____

6. **Why do you believe these actions were discriminatory? Please attach additional pages if needed.**

I worked as an Inventory Control Clerk for almost 12 years. When the Inventory Control Manager left, I applied for the position. I did not get selected. I was interviewed by Arnie Clark, the Owner. The Office Manager, Melissa Torres told me that my presentation at work as a woman for the interview was unacceptable. I did not understand why this was a problem, but I presented in male clothing for the interview. Also, last year I was diagnosed with ITP. I took FMLA leave related to my illness last summer.

7. What reason(s) were given to you for the acts you consider discriminatory? By whom? His or Her Job Title?

I was told that I was not selected because I did not interview well. Arnie Clark and Melissa Torres.

8. Describe who was in the same or similar situation as you and how they were treated. For example, who else applied for the same job you did, who else had the same attendance record, or who else had the same performance? Provide the race, sex, age, national origin, religion, or disability of these individuals, if known, and if it relates to your claim of discrimination. For example, if your complaint alleges race discrimination, provide the race of each person; if it alleges sex discrimination, provide the sex of each person; and so on. Use additional sheets if needed.

Of the persons in the same or similar situation as you, who was treated *better* than you?

A. Full Name	Race, sex, age, national origin, religion or disability	Job Title
Ryan McKendrick	Male, no disability	Inventory Control Manager
Description of Treatment	McKendrick was selected for the Inventory Control Manager position. I have worked for this employer longer and believe I am better qualified.	

B. Full Name	Race, sex, age, national origin, religion or disability	Job Title
Description of Treatment		

Of the persons in the same or similar situation as you, who was treated *worse* than you?

A. Full Name	Race, sex, age, national origin, religion or disability	Job Title
Description of Treatment		

B. Full Name	Race, sex, age, national origin, religion or disability	Job Title
Description of Treatment		

Of the persons in the same or similar situation as you, who was treated the *same* as you?

A. Full Name	Race, sex, age, national origin, religion or disability	Job Title
Description of Treatment		

B. Full Name	Race, sex, age, national origin, religion or disability	Job Title
Description of Treatment		

Answer questions 9-12 only if you are claiming discrimination based on disability. If not, skip to question 13. Please tell us if you have more than one disability. Please add additional pages if needed.

9. Please check all that apply:

_X__ Yes, I have an actual disability

____ I have had an actual disability in the past

____ No disability but the organization treats me as if I am disabled

10. What is the disability that you believe is the reason for the adverse action taken against you? Does this disability prevent or limit you from doing anything? (e.g., lifting, sleeping, breathing, walking, caring for yourself, working, etc.)

I have immune thrombocytopenic purpura (ITP). I am currently asymptomatic and I have no restrictions. I also have migraine headaches which is a side effect of my medications.

11. Do you use medications, medical equipment or anything else to lessen or eliminate the symptoms of your disability?

__X__ Yes _____ No

If "Yes," what medication, medical equipment or other assistance do you use?

I take Nplate for the ITP. I take Topmirate for my migraine headaches. _____

_____

12. Did you ask your employer for any changes or assistance to do your job because of your disability?

_____ Yes __X__ No

If "Yes", when did you ask? _____ How did you ask (verbally or in writing)? _____

Who did you ask? (Provide full name and job title of person)

_____

_____

Describe the changes or assistance that you asked for:

_____

_____

How did your employer respond to your request?

_____

_____

13. Are there any witnesses to the alleged discriminatory incidents? If yes, please identify them below and tell us what they will say. (Please attach additional pages if needed to complete your response)

A. Full Name	Job Title	Address & Phone Number
Leslie Mitchell	Receptionist	4802 Cedar Ln. All Cities, US (500) 672-3345

What do you believe this person will tell us?

Leslie can tell you that I was better qualified. Also, she knows that Arnie Clark did not select me because of my transgender status.

B. Full Name	Job Title	Address & Phone Number
Randy Ogletree	Former Inventory Control Manager	43776 Rosewood Ave. My City, US (500) 485-1326

What do you believe this person will tell us?

Randy was my Supervisor before he left. He can tell you that I was a good performer and qualified for the job. The position I applied for was Randy's vacant position.

14. Have you filed a charge previously in this matter with EEOC or another agency? Yes _____ No _X__

15. If you have filed a complaint with another agency, provide name of agency and date of filing:

16. Have you sought help about this situation from a union, an attorney, or any other source? Yes __X__ No _____
Provide name of organization, name of person you spoke with and date of contact. Results, if any?
Attorney Rina Paxon – 25000 Center Drive, Basic City, US (500) 373-1409. When I did not get the promotion I called her office. I spoke to her on March 15th. She advised me to file a charge of discrimination.

Please check one of the boxes below to tell us what you would like us to do with the information you are providing on this questionnaire. If you would like to file a charge of job discrimination, you must do so within 180 days from the day you knew about the discrimination, or within 300 days from the day you knew about the discrimination if the employer is located in a place where a state or local government agency enforces laws similar to the EEOC's laws. **If you do not file a charge of discrimination within the time limits, you will lose your rights. If you would like more information before filing a charge or you have concerns about EEOC's notifying the employer, union, or employment agency about your charge, you may wish to check Box 1. If you want to file a charge, you should check Box 2.**

BOX 1

_____	I want to talk to an EEOC employee before deciding whether to file a charge. I understand that by checking this box, I have not filed a charge with the EEOC. **I also understand that I could lose my rights if I do not file a charge in time.**

BOX 2

__X__	I want to file a charge of discrimination, and I authorize the EEOC to look into the discrimination I described above. I understand that the EEOC must give the employer, union, or employment agency that I accuse of discrimination **information about the charge, including my name.** I also understand that the EEOC can only accept charges of job discrimination based on race, color, religion, sex, national origin, disability, age, genetic information, or retaliation for opposing discrimination.

_Rose Harrington_____ _____
Signature Today's Date

PRIVACY ACT STATEMENT: This form is covered by the Privacy Act of 1974: Public Law 93-579. Authority for requesting personal data and the uses thereof are:

1. **FORM NUMBER/TITLE/DATE.** EEOC Intake Questionnaire (9/20/08)
2. AUTHORITY. 42 U.S.C. § 2000e-5(b), 29 U.S.C. § 211, 29 U.S.C. § 626, 42 U.S.C. 12117(a), 42 U.S.C. § 2000ff-6
3. **PRINCIPAL PURPOSE.** The purpose of this questionnaire is to solicit information about claims of employment discrimination, determine whether the EEOC has jurisdiction over these claims, and provide charge filing counseling, as appropriate. Consistent with 29 CFR 1601.12(b) and 29 CFR 1626.8(c), this questionnaire may serve as a charge if it meets the elements of a charge.
4. **ROUTINE USES.** EEOC may disclose information from this form to other state, local and federal agencies as appropriate or necessary to carry out the Commission's functions, or if EEOC becomes aware of a civil or criminal law violation. EEOC may also disclose information to respondents in litigation, to congressional offices in response to inquiries from parties to the charge, to disciplinary committees investigating complaints against attorneys representing the parties to the charge, or to federal agencies inquiring about hiring or security clearance matters.
5. **WHETHER DISCLOSURE IS MANDATORY OR VOLUNTARY AND EFFECT ON INDIVIDUAL FOR NOT PROVIDING INFORMATION.** Providing of this information is voluntary but the failure to do so may hamper the Commission's investigation of a charge. It is not mandatory that this form be used to provide the requested information.

Intake Notes

Reese Harrington v. AC Medical Lab
Charge No: 000-2012-99999

CP has been employed with R since August 19, 1998 as an Inventory Control Clerk.

CP is a transgender individual who although physically considered a male, her gender identity is that of a woman

CP also has a disabling condition.
CP's condition is immune thrombocytopenic purpura (ITP). This condition affects her blood platelets. CP currently has no symptoms and she controls her condition with medication. CP takes Nplate for the ITP. A side effect of the medication is migraine headaches. CP takes Topmirate for the migraines.
CP was on an extended sick leave over the summer of 2011. She was out for all of June, July and August 2011.
CP believes that R harbored animosity against her for needing this time off, but CP has no concrete information to support this.
CP says that when she returned from leave, the Lab/Office Manager, Melissa Torres was cool and distant. CP contends that Torres had previously treated her in a very warm and friendly manner. CP thinks that Torres felt "put upon" by CP's absence, but CP could not identify any specific remarks or comments that Torres made to her to substantiate this belief.
CP says that upon her return from sick leave the Owner, Arnie Clark, made a "smart alleck" remark to the effect "Well look who finally decided to come back to work...did you have a nice summer vacation?"
CP says that Clark said this to her sometime in September while she was stocking some of the pharmaceuticals.
CP believes (but is not certain) that this remark was overheard by her then Inventory Control Manager, Randy Olgetree.
Olgetree is no longer employed with AC Medical Lab. He left in December to take a job with another company.
CP provided Olgetree's contact information (See the IQ and IMS Notes).

R posted the Inventory Control Manager position previously held by Olgetree on February 15, 2012.

CP says she has a copy of the posting at home. (CP told to provide).
CP applied for the position on February 27, 2012.
CP states that she was qualified for the position and met the criteria on the posting.
CP says her performance was good and that she never received a below average review. CP says that the review process at AC Medical Lab is very informal and not routinely done.

CP was interviewed by Owner Arnie Clark and Office/Lab Manager Melissa Torres on March 1, 2012.
The interview took place in Arnie's office and lasted about a half an hour.
Clark and Torres had written questions and took notes.
The day before the interview, Torres told CP that she should come to the interview dressed as a man.
CP asked why, but did not receive an answer. According to CP, Torres just looked at her and said "just a word to the wise."
CP states that she did not understand this because as a transgendering female she has presented as a female for the last seven years.
CP said her coworkers and managers all knew about her female gender identity.
CP has been engaged in hormone replacement therapy.
CP states that her typical attire as an Inventory Control Clerk was gender neutral hospital scrub clothing or lab coats over her clothes.
As an Inventory Control Manager she would not be wearing scrubs, but could wear a lab coat when working in the facility.

CP said that her coworkers and Randy Olgetree were very supportive of her situation and that is why Torres' comment came as such a shock.
CP was not selected for the position.
She learned of this by a letter dated March 12, 2012.
CP provided a copy of the rejection letter.

CP says that Ryan McKendrick was selected for the Inventory Control Manager position.
CP believes that McKendrick was hired in 2004 or 2005 as an Inventory Control Clerk, but she was not certain.
CP states that she helped train McKendrick when he was hired.

CP contends that she was a better performer than McKendrick, but does not know what kind of reviews he received.
McKendrick is now CP's direct supervisor.
CP says that McKendrick is treating her fairly.

AC Medical Lab, Inc.
1605 Raleigh Rd.
Generic, US 00000

(500) 373-1409

March 12, 2012

Ms. Reese Harrington
15303 Parker St.
Generic, US 00000

Re: Inventory Control Manager

Dear Ms. Harrington:

Thank you for applying for the Inventory Control Manager position. I regret to inform you that the position has been filled by another candidate. If you should become interested in any other positions that become available and for which you are qualified, please do not hesitate to apply.

Your continued employment with AC Medical Lab is very important to our organization and we look forward to working with you for many years to come.

Sincerely,

Arnie Clark
Arnie Clark
President – Owner
AC Medical Lab

EEOC Form 5 (11/09)

CHARGE OF DISCRIMINATION

This form is affected by the Privacy Act of 1974 See enclosed Privacy Act Statement and other information before completing this form

Charge Presented To:	Agency(ies) Charge No(s):
[ ] FEPA	
[X] EEOC	000-2012-99999

and EEOC

State or local Agency, if any

Name *(indicate Mr., Ms., Mrs.)*	Home Phone *(Incl. Area Code)*	Date of Birth
Ms. Reese Harrington	**(500) 540-9913**	**11/16/1968**

Street Address: **15303 Parker St. Generic, US 00000** City, State and ZIP Code

Named is the Employer, Labor Organization, Employment Agency, Apprenticeship Committee, or State or Local Government Agency That I Believe Discriminated Against Me or Others. *(If more than two, list under PARTICULARS below.)*

Name	No. Employees, Members	Phone No. *(Include Area Code)*
AC MEDICAL LAB	**15-100**	**(500) 373-1409**

Street Address: **1605 Raleigh, Generic, US 00000** City, State and ZIP Code

Name	No. Employees, Members	Phone No. *(Include Area Code)*

Street Address: City, State and ZIP Code

DISCRIMINATION BASED ON *(Check appropriate box(es).)*

[ ] RACE [ ] COLOR [X] SEX [ ] RELIGION [ ] NATIONAL ORIGIN
[ ] RETALIATION [ ] AGE [X] DISABILITY [ ] GENETIC INFORMATION
[ ] OTHER *(Specify)*

DATE(S) DISCRIMINATION TOOK PLACE

Earliest	Latest
03/12/2012	**03/12/2012**

[ ] CONTINUING ACTION

THE PARTICULARS ARE *(If additional paper is needed, attach extra sheet(s))*

I began employment with the above named employer on August 19, 1998. I am employed as an Inventory Control Clerk. I am an individual with a disability. I was on disability leave related to my condition from June through August 2011.

On February 27, 2012 I applied for the position of Inventory Control Manager. I was interviewed by the owner of the company. The day before my interview, I was told by the Office Manager that it was unacceptable for me to present myself as a woman. I interviewed in male specific clothing. On March 12, 2012 I was denied the promotion, despite my qualifications. A less qualified male was hired.

I believe that I was denied promotion due to my gender, female and due to gender stereotyping, in violation of Title VII of the Civil Rights Act of 1964, as amended. Further, I believe that I was denied promotion due to my disability, in violation of the Americans with Disabilities Act of 1990, as amended.

I want this charge filed with both the EEOC and the State or local Agency, if any. I will advise the agencies if I change my address or phone number and I will cooperate fully with them in the processing of my charge in accordance with their procedures.

I declare under penalty of perjury that the above is true and correct.

Reese Harrington

Date *Charging Party Signature*

NOTARY – *When necessary for State and Local Agency Requirements*

I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.
SIGNATURE OF COMPLAINANT

SUBSCRIBED AND SWORN TO BEFORE ME THIS DATE
(month, day, year)

PRIVACY ACT STATEMENT: Under the Privacy Act of 1974, Pub. Law 93-579, authority to request personal data and its uses are:

1. FORM NUMBER/TITLE/DATE. EEOC Form 5, Charge of Discrimination (11/09).

2. AUTHORITY. 42 U.S.C. 2000e-5(b), 29 U.S.C. 211, 29 U.S.C. 626, 42 U.S.C. 12117, 42 U.S.C. 2000ff-6.

3. PRINCIPAL PURPOSES. The purposes of a charge, taken on this form or otherwise reduced to writing (whether later recorded on this form or not) are, as applicable under the EEOC anti-discrimination statutes (EEOC statutes), to preserve private suit rights under the EEOC statutes, to invoke the EEOC's jurisdiction and, where dual-filing or referral arrangements exist, to begin state or local proceedings.

4. ROUTINE USES. This form is used to provide facts that may establish the existence of matters covered by the EEOC statutes (and as applicable, other federal, state or local laws). Information given will be used by staff to guide its mediation and investigation efforts and, as applicable, to determine, conciliate and litigate claims of unlawful discrimination. This form may be presented to or disclosed to other federal, state or local agencies as appropriate or necessary in carrying out EEOC's functions. A copy of this charge will ordinarily be sent to the respondent organization against which the charge is made.

5. WHETHER DISCLOSURE IS MANDATORY; EFFECT OF NOT GIVING INFORMATION. Charges must be reduced to writing and should identify the charging and responding parties and the actions or policies complained of. Without a written charge, EEOC will ordinarily not act on the complaint. Charges under Title VII, the ADA or GINA must be sworn to or affirmed (either by using this form or by presenting a notarized statement or unsworn declaration under penalty of perjury); charges under the ADEA should ordinarily be signed. Charges may be clarified or amplified later by amendment. It is not mandatory that this form be used to make a charge.

NOTICE OF RIGHT TO REQUEST SUBSTANTIAL WEIGHT REVIEW

Charges filed at a state or local Fair Employment Practices Agency (FEPA) that dual-files charges with EEOC will ordinarily be handled first by the FEPA. Some charges filed at EEOC may also be first handled by a FEPA under worksharing agreements. You will be told which agency will handle your charge. When the FEPA is the first to handle the charge, it will notify you of its final resolution of the matter. Then, if you wish EEOC to give Substantial Weight Review to the FEPA's final findings, you must ask us in writing to do so within 15 days of your receipt of its findings. Otherwise, we will ordinarily adopt the FEPA's finding and close our file on the charge.

NOTICE OF NON-RETALIATION REQUIREMENTS

Please **notify** EEOC or the state or local agency where you filed your charge **if retaliation is taken against you or others** who oppose discrimination or cooperate in any investigation or lawsuit concerning this charge. Under Section 704(a) of Title VII, Section 4(d) of the ADEA, Section 503(a) of the ADA and Section 207(f) of GINA, it is unlawful for an *employer* to discriminate against present or former employees or job applicants, for an *employment agency* to discriminate against anyone, or for a *union* to discriminate against its members or membership applicants, because they have opposed any practice made unlawful by the statutes, or because they have made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under the laws. The Equal Pay Act has similar provisions and Section 503(b) of the ADA prohibits coercion, intimidation, threats or interference with anyone for exercising or enjoying, or aiding or encouraging others in their exercise or enjoyment of, rights under the Act.

_____ vs. _____

Charge Number _____

CP's allegations	R's defenses	Disputed	Evidence
Statute: Basis: Issue: Initial Assessment: PF Case:	Rebuttal:	(Y/N)	**PRETEXT?** **1. Is R's reason believable?** **We have:** **We need:** **2. Comps: how are folks outside the protected group treated?** **We have:** **We need:** **3. Is there evidence of bias by decision-makers towards the protected group?** **We have:** **We need:** **4. What do the stats say?** **We have:** **We need:** **Updated Assessment:**

3-Step Basic Investigative Plan

The Investigative Plan (IP) is an ever-evolving, fluid document which should contain the bulleted or summarized items that will become the skeleton of the Investigative Memorandum (IM) at the end of the process. As a tool, the IP can provide several benefits for the user. It can serve as a gateway for PCHP application in that it allows the Investigator to synthesize the information contained in a case file into one (or two) page(s). This will facilitate communication with management and Legal in order to receive guidance about steps in the investigative process. Additionally, it will arm the Investigator with the relevant information that should be conveyed to the Charging Party during a PDI.

While an IP may vary in complexity based on the case, 3 simple steps can assist in keeping an investigation on track:

1. Did CP present a prima facie case?
2. Did R articulate a legitimate, non-discriminatory reason for the action?
3. Does the EVIDENCE support the allegation or the defense?

HARRINGTON
PACKET B

SHARP, SHEPPARD & SHADY PC
ATTORNEYS AND COUNSELORS
320 MICHIGAN AVE.
EXECUTIVE TOWERS – SUITE 1910
GENERIC, USA 00000
(500) 200-4000

Joseph H Shady, Esquire
(500) 200-4141

RESPONDENT'S POSITION STATEMENT

William B. Fair, EEOC Investigator
U.S. Equal Employment Opportunity Commission
Generic District Office
Generic, USA

Re: Reese Harrington v. AC Medical Lab
Charge Number 000-2012-99999

Dear Investigator Fair:

Respondent, AC Medical Lab, submits this position statement[1] in response to the above referenced charge of discrimination filed by Charging Party, Reese Harrington.[2] Harrington claims that AC Medical Labs discriminated against her based on her gender and disability when she was denied promotion to the position of Inventory Control Manager.

AC Medical Labs denies that it has unlawfully discriminated against Harrington in any way. Rather, Harrington did not get the promotion for a legitimate non-discriminatory reason, namely her behavior and disheveled appearance during the interview for the position resulting in her failure to finish among the top candidates. Clearly, AC Medical

[1] This position statement is a preliminary statement to the U. S. Equal Employment Opportunity Commission, which AC Medical Lab believes addresses issues raised in the Charge filed against it by Harrington, which contains factual inaccuracies. The submission is not intended to be a complete recitation of the law or facts upon which AC Medical Lab relies or will rely in the future, nor is it necessarily AC Medical's entire position regarding any such claims that Harrington may assert against AC Medical Lab. AC Medical Lab reserves the right to supplement its position.

[2] In previous correspondence, Harrington's counsel indicated the Harrington presents as a woman in her private life, and therefore referred to her client as female, using female pronouns and prefixes. Thus, in this position statement, AC Medical Lab respectfully refers to Harrington in the same manner.

Labs made its decision without any regard for Harrington's sex or disability. Therefore, the EEOC should dismiss this charge.

1. **Preliminary Jurisdiction Matter**

As a preliminary matter AC Medical Lab requests that this matter be dismissed, given that AC Medical Lab employs 12 people, including Harrington. Specifically, the AC Medical Lab has individuals in the following positions:

- Office/Lab Manager
- Inventory Control Manager
- Inventory Control Clerks – 3
- Lab Techs – 5
- Clerk
- Receptionist

In order to have jurisdiction to pursue this matter under Title VII of the Civil Rights Act of 1964, as amended and the Americans with Disabilities Act of 1990, as amended an employer must have 15 or more employees for each working day in each of 20 or more calendar weeks in the same calendar year as, or in the calendar year prior to when the alleged discrimination occurred. *See, EEOC Compliance Manual, Vol II, Threshold Issues.* This is well settled law.

Since AC Medical Labs only employs 12 people, it is obvious that the EEOC does not have jurisdiction to pursue this matter. Again, AC Medical Labs requests that this *meritless and non-jurisdictional charge* be dismissed.

2. **Relevant Facts**

Without waiving AC Medical Lab's legal assertion that the EEOC is without jurisdiction to investigate this charge of discrimination, respondent believes that a recitation of the facts relevant to this case is in order. As the EEOC must know, Harrington remains employed with AC Medical Lab as an Inventory Control Clerk. Respondent freely admits that Harrington has performed in an acceptable manner in this position and her continued employment with the company is greatly desired. Perhaps an understanding of the underlying facts concerning this matter would assist the parties in putting this matter to rest.

Reese Harrington began employment with AC Medical Lab in 1998. She has been employed as an Inventory Control Clerk. Her responsibilities included, among other duties, categorizing, coding and maintaining medical supplies; ensuring timely and documented supply distribution; ordering medical supplies; tracking the inventory of

medical supplies and controlled substances; coordinating with team members to distribute and replenish medical supplies.

During the early years of Harrington's employment she presented at work as a male. For approximately the past seven years, Harrington has been very open in the workplace about being transgendered and has presented at work as a female. AC Medical Lab has been very supportive of Harrington's decision to present as female and at no time has any member of the AC Medical Lab management staff made efforts to discourage Harrington. Further, Harrington never complained of any harassment or employment related issues pertaining to her transsexualism. AC Medical Lab has an anti-discrimination policy in place that clearly identifies the mechanisms to register an internal complaint and diversity training has been given to all staff members. Respondent, is quite frankly dismayed at Harrington's assertion that she was subjected to gender stereotyping regarding her being transgendered.

In June 2011 Harrington became ill. Harrington provided medical documentation verifying that she was unable to work due to thrombocytopenia and migraine headaches. Although her services were greatly needed in the lab, respondent approved Harrington's disability leave through the end of August 2011. Since that time Harrington has not experienced, at least to respondent's knowledge, any symptoms or manifestations of her condition. Given that respondent has demonstrated a history of working with Harrington regarding her medical condition and has reasonably accommodated her in the past, it is not plausible to believe that respondent would subject her to discriminatory treatment due to a disabling condition.

On February 15, 2012 AC Medical Labs posted a position for Inventory Control Manager. This position was vacated when Randall Olgetree resigned from his position to accept a position with another company. Harrington applied for the position and was interviewed by AC Medical Lab's President and Owner, Arnie Clark and Lab /Office Manager Melissa Torres. Before interviewing, Clark and Torres reviewed and discussed the responsibilities of the position and the traits and qualities to look for in each candidate. Those traits included strong communication ability, listening skills, and good attitude. One other candidate applied for and was selected for the position, Ryan McKendrick.[3]

The interview panel asked each candidate the same questions. The candidates were scored by the panel members in six categories: management related service skills; teamwork/fit with current workgroup; supervisory inventory management knowledge; communication skills; multi-tasking skills; and overall presentation. Harrington received high scores in the "inventory management knowledge" category, she ranked very low in other areas, namely the "communication skills," "multi-tasking," and "presentation"

[3] For the record, Mr. McKendrick, the candidate hired to fill the relevant position is an openly gay male.

categories. In fact, during the interview, she showed a lack of focus, was incoherent at times, mumbled her answers and had a disheveled appearance. Harrington did not interview well and as a result, she was not selected for the position.

3. Legal Analysis

In her charge, Harrington alleges that she was not promoted because of her gender and disability. Notwithstanding the fact that the EEOC does not have jurisdiction in this matter, AC Medical Lab did not consider Harrington's gender or alleged disability

Assuming, *arguendo,* that the EEOC has jurisdiction over this matter, Harrington will be unable to establish that she was intentionally discriminated against due to gender and disability. Since Harrington has no direct evidence of discrimination, her claim is subject to the burden shifting analysis set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). Under that framework, a charging party must first establish a *prima facie* case of discrimination. *Id.* If the initial burden is satisfied the burden then shifts to the respondent to rebut the *prima facie* case by articulating legitimate, nondiscriminatory reasons for any adverse actions taken against the charging party. *Id.* If the respondent meets the burden of production, the charging party must then prove "by a preponderance of the evidence" that the defendant's proffered reasons were not the true reasons, but were merely a pretext for illegal discrimination. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981).

4. Harrington Cannot Substantiate a Disability Discrimination Claim

Harrington cannot establish a *prima facie* case of disability discrimination or prove that AC Medical Lab's legitimate, non-discriminatory business reason for not promoting her are a pretext for discrimination. To establish a *prima facie* case of disability discrimination under the ADA, Harrington must show that: (1) she was "disabled" as defined by the ADA; (2) she was "otherwise qualified" for the position, with or without a reasonable accommodation; (3) she suffered an adverse employment decision with regard to the relevant position; (4) and, the position was filled by a non-disabled person. *Kocis v. Multi-Care Management, Inc.* 97 F.3d 876, 882-83 (6th Cir. 1996).

Assuming that Harrington can establish a *prima facie* case based on her prior diagnosis of thrombocytopenia and her migraine condition,[4] AC Medical Inc., has articulated a legitimate reason for hiring a candidate other than Harrington for the open position. Harrington simply cannot demonstrate that the reason she was not hired was a pretext for discrimination. To establish pretext, she must come forward "with sufficient evidence to

[4] It is unclear from the charge what Harrington is alleging as a disabling condition. If she is asserting that she is "disabled" because of her transsexualism, this claim must fail as a matter of law. The ADA specifically excludes transsexualism as a condition covered by that statute. 42 U.S.C. §12211(b)(1); *see also, Myers v. Cuyahoga County, Ohio*, 2006 WL 1479081 (6th Cir. 2006).

find that the employer's asserted justification [for the adverse employment action] is false." *Reeves* v. *Sanderson Plumbing,* 530 U.S. 133 (2000).

The facts and evidence shows that Ryan McKendrick received a higher interview score than Harrington and AC Medical Lab promoted the person with the highest-score. Apparently, Harrington believes that she was the best applicant for the position solely by virtue of her prior years of experience. However, as indicated on the interview score sheet, Harrington's knowledge of the position was taken into account and she received more points in that area than McKendrick. Nevertheless, her high score in that category alone was not enough to support her selection. Accordingly, based on the evidence, Harrington cannot establish that somehow her alleged disability was the reason for AC Medical Lab's decision not to promote her.

5. **Harrington's Discrimination Claim Lacks Merit**

In order to establish a *prima facie* case of discrimination for failure to promote under Title VII, a charging party must establish that she: (1) is a member of a protected class (sex); (2) applied for or expressed interest in a promotion and was not selected; (3) was qualified for the job; and (4) that a similarly situated person outside of the charging party's protected class received the job. *Seay* v. *TVA,* 339 F.3d 454, 463 (6th Cir. 2003).

Although Harrington's charge asserts that she was denied hire due to her sex, female and that a male had been hired, in actuality, the person selected for the position is the same gender as the charging party and is not "outside of the protected class" as required to make a *prima facie* case. Nevertheless, AC Medical Lab will address this allegation under the assumption that it is based on Harrington's previously announced female gender identity/transsexualism, although she did present at the interview as a male.

Assuming, *arguendo*, that Harrington can establish a *prima facie* case of sex based failure to promote, her claim must still fail. Harrington simply cannot establish that AC Medical Lab's reason for not promoting her, i.e. that she did not interview well, was pretext for unlawful discrimination.

Harrington is also attempting to allege that she was discriminated against "based on sex" because of a purported "failure to conform to sex stereotypes," as allowed under *Smith* v. *City of Salem, Ohio,* 378 F.3d 566 (6th Cir. 2004). This claim must also fail. In order for a "sex stereotype" claim to succeed, a charging party is required to produce sufficient evidence for a reasonable jury to find that the employer intentionally discriminated against her because of sex stereotypes (e.g., because her behavior or appearance did not conform to some gender stereotype). *Barnes* v. *City of Cincinnati,* 401 F.3d 729 (6th Cir. 2005). There is no evidence alleged or existing that indicates AC Medical Lab ever stereotyped Harrington based on her gender identity or had any belief that Harrington should act one way or another because of her gender. As stated earlier, Harrington has

been employed by AC Medical Lab since 1998 and has been presenting as a female for at least the last seven years. Harrington continues to be employed with AC Medical Lab. Given these facts it is simply not credible to believe that respondent harbored any discriminatory animus against Harrington based upon gender stereotyping. Without such evidence, Harrington cannot substantiate a sex discrimination claim on this basis.

Conclusion

In summary, AC Medical Lab reasserts our position that the EEOC does not have jurisdiction over this claim and therefore the charge must be dismissed. Furthermore, and assuming that the EEOC did have jurisdiction over this matter, Ms. Harrington has provided no evidence of discrimination and her efforts to create an inference of discrimination fall very short of the mark. Ms. Harrington's accomplishments and contributions to AC Medical Lab have been recognized and appreciated. She continues to be employed and is a highly regarded and well respected employee. For these and all the reasons outlined above, we believe the Commission should immediately dismiss the above referenced charge of discrimination.

Sincerely,

Joseph H Shady
Joseph H. Shady
Attorney for AC Medical Lab

HARRINGTON
PACKET C

Law Offices of Rina Paxon, P. C.
25000 Center Drive, Suite 516
Generic, US 00000
(500) 373-1409

May 7, 2012

Via First Class U.S. Mail

William B. Fair, EEOC Investigator
U.S. Equal Employment Opportunity Commission
Generic District Office
Generic, US 00000

Re: Reese Harrington v. AC Medical Lab
Charge No: 000-2012-99999

Dear Investigator Fair,

I have been retained by Reese Harrington with respect to the allegations asserted by Ms. Harrington in the above referenced charge of discrimination. Please consider this my letter of appearance on her behalf. I respectfully request that all efforts to contact my client relative to this matter and all communications with her be conducted through me.

Sincerely,

RinaPaxon
Rina Paxon

cc: Reese Harrington

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Generic District Office

477 Anyroad Avenue, Room 1865
Generic, USA 00000
Intake Information Group: (800) 669-4000
Intake Information Group TTY: (800) 669-6820
Generic Status Line: (866) 000-8075
Generic Direct Dial: (500) 000-7638
TTY (500) 000-7599
FAX (500) 000-2778
Website: www.eeoc.gov

MEMORANDUM

TO: File

FROM: William Fair
Investigator

DATE: July 18, 2012

SUBJECT: Phone Interview with Charging Party – Reese Harrington
Position Statement Rebuttal Interview

Reese Harrington v. AC Medical Lab
Charge No: 000-2012-99999

On July 16, 2012 I contacted Rina Paxon, attorney for Charging Party Reese Harrington in an effort to set up a telephone conference with Ms. Harrington. Attorney Paxon indicated that she was available on Wednesday, July 18, 2012 and that she could conference in at 2:00 pm. The Charging Party was also available on July 18, 2012 at 2:00 pm.

Telephone Interview Notes

I began the interview by notifying CP and her attorney that the EEOC had received R's Position Statement and that the purpose of this interview was to discuss the information received and seek CP's response/rebuttal to this information. I also reminded the CP and CP's attorney about PCHP and the fact that the EEOC determines how far it will go in any investigation and that the EEOC has the authority to stop investigating and issue a right to sue. The parties understood this.

I also indicated that it was important for CP to be able to provide information and evidence that would support her belief that she was intentionally denied the promotion due to gender stereotyping and/or because of her disabling condition.

The information below highlights the relevant parts of our discussion.

1. *As a preliminary matter, R states that the EEOC does not have jurisdiction because AC Medical Lab only employs 12 people. What information or evidence do you have to show that they employ 15 or more people?*

(Atty Paxon jumps in). That is just not true! This is a large company with numerous facilities. Arnie Clark, the owner, runs a number of labs in the tri-county area.

(CP) I am aware of a number of other medical labs owned and operated by Arnie Clark. Although I have not been to any of them, I know that each lab has at least 8 – 10 employees. My former supervisor, Randy Olgetree, used to go to the other labs as part of his Inventory Control Manager responsibilities.

That was one of the reasons that I was interested in the Inventory Control Manager position. It would have given me a chance to go manage the other facilities, meet with the staff members of the other labs and also meet with the pharmaceutical reps. I am a people person and I have wanted to branch out from the Inventory Control Clerk duties for a long time.

2. *Do you know the names of these labs or their location? Do you know anyone who works at any of them?*

(CP) Well, I know that Arnie Clark has his main office on Peabody Street in Anywhere USA. I don't have the address, but I know that it is listed. His main office is called Trust First Diagnostics and Medical Testing. He has quite a large contract with Anywhere General Hospital for referral testing.

I know that Randy Olgetree was trying to get a similar contract with Generic Regional Medical Center and I believe that Ryan McKendrick is currently working on that, as well.

(Atty Paxon) Clark also owns Clark Medical Lab, ARG Medical Lab, Trust US Medical Lab and a couple of more that I can't remember. I'm sure that they are all listed. Clark has been in business for a number of years. Quite a lucrative business, at that.

(Inv.) OK, well that helps. I will be doing some follow up to see what the relationship is, if any, between these businesses. I just wanted you to know that R raised this jurisdictional issue.

(Atty Paxon) Well, you aren't going to close the case for no jurisdiction, are you?

(Inv) No, not at this time. I have to look into the matter further.

3. *As to the promotion to Inventory Control Manager, R contends that they selected Ryan McKendrick because he scored higher than you in the interview. Specifically, R says that you scored high in "inventory management knowledge" but that you ranked very low in "communication skills, " multi-tasking" and "presentation."*

(CP) Well, I don't know anything about Ryan's score or how he did in the interview. All I can tell you is that I have been working for AC Medical since 1998 and that I have always performed my job in a conscientious and sound manner. Also, I was always willing take on additional duties and to help around the lab.

It is not surprising that I scored high in inventory management knowledge, since I have been there the longest and I know every aspect of the job. Like I said when I filed this charge, I trained Ryan when he came aboard. I think that was in 2005. I don't understand how I could be good enough to train him and then he scores higher than me. Have you seen the scores and notes?

(Inv.) No, not yet. But I am going to request a copy or the scores and interview notes.

(Atty Paxon) Good. You should also get the performance reviews.

(CP) As for their claim that I scored low in multi-tasking, well, I am not sure that they really questioned me on that in the interview. Besides, I multi-task every day. I coordinate with team members on distributing and stocking medical supplies, I categorize, code and maintain medical supplies, I track, order and inventory the controlled substances and I am one of only two ICCs with keys to the controlled substances locker. Even Ryan did not have a key to that locker when he was an ICC.

With respect to scoring low in the area of communication skills, well that is just laughable. I have a BA Degree in Communications. I am active member of the Parker Street Players. You may have heard of us. We are a local theatre group that performs at various venues throughout the year in Generic. I have been in stage plays at the Generic in the Round Festival and have participated in street art at the Generic StreetScape Fair.

Not only that, but my communication at work with my coworkers, supervisors and outside vendors is always thoughtful and respectful. No one has ever accused me of not being able to clearly communicate. This is very, very troubling to hear that I am viewed this way.

(Inv.) Ms. Harrington, I am just letting you know that this is what R has identified as the reason you were not selected. My purpose here is not to upset you, but to get your response and to find out what evidence you may have to show that R purposely did not select you due to your gender or disability.

(CP) I understand. It is just very hurtful to know that Arnie Clark and Melissa Torres view me this way. What was the other item that I scored low in?

(Atty Paxon) "Presentation"

(CP) Oh yeah. Well that one is not as much of a shock to me. I was uncomfortable that day and my interview presentation may have suffered because I went to the interview dressed as a man. I have not presented that way in any part of my life since 2005. I began presenting as a female at work around 7 years ago, but in my private life, I have been presenting as a female since 2000. When I made the decision to do this, it was a life changing moment and one that I am happy I have done. It wasn't a bed of roses and I had a number of challenges along the way. I have gone through my struggles and thought, foolishly, that I had finally been accepted for who I truly am. I could not believe it when Melissa Torres told me that I had to come to the interview dressed as a man. I mean, think about it. That is not who I am and her insistence that I do this was offensive. I really believe that she cost me that promotion.

4. *I can understand your strong feelings on this. It really gets us to the heart of the matter. R states that during the early years of your employment you presented as a male. For the past 7 years you have presented as a female and R says that they have been very supportive of your decision to do so. Would you agree with this or do you have evidence to the contrary?*

(CP) Well, I would say that during my early years of presenting as a woman it was a bit rocky. The transition was hard for Arnie Clark, but since all the techs and clerks wear hospital scrubs or lab coats, it was probably easier for him to accept. Over the past few years, it has just become accepted knowledge that this is me. Arnie Clark really has never said anything to me about it. I don't know whether I would say they were supportive. I would characterize it more to say that they were resigned to the fact that this is who I am.

(Inv.) What makes you say this? Can you be more specific?

(CP) It is hard to be more specific. It is not like Clark ever came up to me and said, "What are you doing dressed like that?" It was more through his sideways glances, making sure that he did not have to be alone to speak with me, walking down a different aisle in the supply room just to avoid me. You know, the kind of treatment that you can only feel, but you can't quite put your finger on.

(Inv.) So you do not agree with R's statement that they were supportive?

(CP) I do think that I was really fortunate that Randy Olgetree was hired as my Supervisor in 2006. It was a little less than a year after I began presenting at work as a female. He was very understanding and supportive and I truly believe that he ran interference for me with Clark and particularly with Torres. I would say that Randy was supportive. At best, Clark and Torres were indifferent.

(Inv.) How did Olgetree "run interference?"

(CP) Well, Randy was very encouraging. He would tell me not to let others opinions of me get me down. He would tell me that he thought I was courageous. He would make

me feel safe and comfortable. I know that he had a discussion with Melissa Torres about me, because he told me that Melissa did not want me meeting with the vendors and pharmaceutical reps. Randy would include me in his meetings anyway. This gave me an opportunity to see how it was done.

Everyone at AC Medical knows that Melissa Torres is deeply religious. In fact, she has vocalized some of her concerns about the lab stocking the morning after pill. She is also very opinionated and is never shy about telling you what she thinks. Although she never really said anything directly to me about my transition, I have heard from coworkers that she has made comments.

5. *What kinds of comments did Melissa Torres make and to who?*

(CP) Well, I am not sure that any of my coworkers want to get involved in this. After all, Melissa can have quite a temper and a mean streak when she thinks that she has been crossed. For example, even though I knew that Melissa did not approve of my transition, there was a time prior to my illness in 2011, where I thought that maybe we had made some strides in our working relationship. She had even become rather warm and friendly towards me. As I think back on it, I think she was being nice only because I was willing to take on extra duties to help her out. But that came to a screeching halt after I was off of work for the summer of 2011. When I came back from my illness, Torres was cool and distant. She seldom spoke to me.

Tanya Littleton, one of the Lab Techs, told me that Melissa had some snarky comments about me. Tanya said that Melissa thought that Arnie should force me to "dress appropriately." She also said that Melissa believed that I would not be favorably judged and that I would "burn in hell" for my actions. Knowing how Melissa is, I didn't let that bother me. By the time Tanya told me about this, I was already working under Randy's supervision and I had little interaction with Melissa. Tanya also told me that Melissa thought I was faking my illness and that she did not agree with Arnie Clark's decision to grant me additional time off.

Erica Bledsoe, another Lab Tech, told me that Melissa was mocking me and making fun of my community theatre projects. Melissa has openly criticized gay people and has said that this is contrary to her religious beliefs. I know that she had problem with me being active in the gay community, but she only shared this with Erica and not with me.

(Inv) You should know that R made a point in their position statement to say that Ryan McKendrick is an openly gay male.

(CP) Yes, he is and I know that Melissa is disdainful of that, as well. The other person who heard some of Melissa's comments about me was the Receptionist, Leslie Mitchell. Melissa would sit up front with her and gossip about a number of the staff members. I think Leslie may have shared some of Melissa's views about my transition, but that doesn't matter. Leslie was always ready to tell me about Melissa's crude remarks.

(Inv.) Which were?

(CP) According to Leslie Mitchell, Melissa would make comments about my looks. She would say that it was obvious that I wasn't a real woman. That no one would want someone who looked like a horse. Melissa would also make remarks about the way I wore my hair and my makeup, saying that I looked garish and that no amount of makeup would save me. Leslie also said that Melissa made a remark about my thrombocytopenia and migraine headaches and how a headache should not keep someone off of work for 3 months.

(Inv.) Do you think these three witnesses will corroborate this?

(CP) I hope so. But I don't really know. (By this point the CP was very dejected). You know, as I think about it, I do remember one time when Melissa was walking away from the Receptionist desk and she made a comment to me under her breathe that I should not be allowed to wear eye makeup and eyeliner. I am sure that Leslie Mitchell heard that remark.

(Inv.) Do you know why Melissa Torres told you to present as a male at your interview?

(CP) No. Like I said at our other interview, I was so shocked and surprised she said that to me. I asked her why, but she did not answer me. She just looked at me and said, "A word to the wise." I did not pursue it. I think I was afraid to rock the boat because I knew she would be interviewing me and I wanted the position very badly. I know that I was better qualified for the job and more experienced than Ryan.

6. *Ms. Harrington, R also contends that during your interview you lacked focus, mumbled some of your answers and appeared to be disheveled.*

(CP) Oh my. It is really going to be difficult to continue working there if that is what they think, but I'm not giving up or giving in. I know that I was focused at the interview, because I wanted the job so badly. I even called Randy and had him conduct a practice interview with me. He thought that I was ready to go.

I know that I did feel self conscious about my appearance. After all, it had been a number of years since I had presented as a man. I wasn't comfortable before and I certainly wasn't at the interview. But despite my discomfort, I was not disheveled. I was neatly dressed and I did not mumble. I realize that it is just my version of the interview against their version, but I was prepared and well spoken. The interview only lasted a half an hour. We talked about are all the things I have worked on every day since 1998. Clark and Torres both took notes, but I think Torres did more note taking.

(Atty Paxon) Are you intending to conduct interviews?

(Inv.) That is an option that is available to the EEOC.

7. *Ms. Harrington, you also asserted that you were denied the promotion due to your disability, but as I stated earlier, R states that you were not promoted due to scoring low in your interview. Why do you believe that R did not want to promote you due to your medical condition?*

(Atty Paxon) I wanted the ADA claim to be included because Arnie Clark had made some negative remarks about Ms. Harrington's need to be off of work in 2011. Also, as Ms. Harrington has indicated, Melissa Torres made some remarks about her condition and even breached confidentiality by telling Leslie Mitchell about her condition. Surely this is evidence of an intent to discriminate.

(Inv.) Ms. Paxon, I understand your advocacy for your client, but right now I really need to concentrate on gathering the facts. Ms. Harrington, please answer.

(CP) Yes. Like I said earlier, when I came back to work in September 2011 Melissa Torres was very cool and distant. I also remember telling you in my earlier interview about the remark that Arnie Clark made when I returned. He said, "Well look who finally decided to come back to work...did you have a nice summer vacation?" I realize that he had a business to run, but I was a dedicated employee since 1998. I did not see how it could be a problem to extend my leave when I was having difficulty getting my medication regulated. Arnie knew how hard I worked and that I would get right back to it as soon as I could.

(Inv)You state that you needed to extend your leave, does the company have a leave policy or a reasonable accommodation policy?

(CP) They have both. Under the policy an employee can take off 12 weeks for sick leave and then they have to come back. I needed an extra two weeks and fortunately, Arnie granted it, even though he was reluctant to do it. I think I am the only one who has ever gotten an extension. I know that Melissa was angry with him for doing so.

(Inv.) Is there anything else that you would like to add?

(CP) Not at this time. What is the next step?

(Inv.) I explained the next steps in the process.

From: William B Fair (GAIL COBER)
To: MABRY-THOMAS, CHERYL
Date: 6/14/2012 11:57 AM
Subject: Request for an Accurint Report

Cheryl,

Can you run an Accurint Report for me? I am working on a charge filed against AC Medical Lab, Charge No: 000-2012-99999. They are located at 1605 Raleigh here in Generic. The CP in this case mentioned that the owner of AC Medical Lab, Arnie Clark, owns some other labs and I wanted to check this out. She mentioned the following businesses:

Trust First Diagnostics and Medical Testing - Peabody Street, Anywhere, US
Clark Medical Lab
ARG Medical Lab
Trust US Medical Lab

The CP says that Clark owns some additional medical labs. I'm interested in knowing what they are and whether they are interrelated. Let me know if you need anything else and thanks for your help.

Will

WITHERSPOON

PACKET A

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
INTAKE QUESTIONNAIRE

Please immediately complete the entire form and return it to the U.S. Equal Employment Opportunity Commission ("EEOC"). **REMEMBER**, a charge of employment discrimination must be filed within the time limits imposed by law, generally within 180 days or in some places 300 days of the alleged discrimination. Upon receipt, this form will be reviewed to determine EEOC coverage. **Answer all questions as completely as possible, and attach additional pages if needed to complete your response(s). If you do not know the answer to a question, answer by stating "not known." If a question is not applicable, write "n/a." (PLEASE PRINT)**

1. **Personal Information**

Last Name: Witherspoon_____ First Name: Samantha_____MI: L._____

Street or Mailing Address: 2210 South Logan Street_____Apt Or Unit #:_____

City: Anywhere_____County: Anytime _____State: USA_____Zip: 00008_____

Phone Numbers: Home: (999) 999-9998_____ Work: (999) 999-9997_____

Cell: (999) 999-9996_____ Email Address: slw54@email.com_____

Date of Birth: 06/18/1972__ Sex: Male____ Female_X__ Do You Have a Disability? Yes ____ No _X__

Please answer each of the next three questions. i. Are you Hispanic or Latino? Yes ____ No _X___

ii. What is your Race? Please choose all that apply. ___ American Indian or Alaskan Native ____Asian _X__White

____Black or African American ____Native Hawaiian or Other Pacific Islander

iii. What is your National Origin (country of origin or ancestry)? American_____

Provide The Name Of A Person We Can Contact If We Are Unable To Reach You:

Name: John Witherspoon_____ Relationship: Spouse_____

Address: 2210 South Logan Street_____ City: Anywhere_____ State: USA_ Zip Code: 00008____

Home Phone: (999) 999-9998_____ Other Phone: (999) 999-9995_____

2. **I believe that I was discriminated against by the following organization(s): (Check those that apply)**

__X__Employer _____Union _____Employment Agency _____ Other (Please Specify) _____

Organization Contact Information (If the organization is an employer, provide the address where you actually worked. If you worked from home, check here _____ and provide the address of the office to which you reported.) **If more than one employer is involved, attach additional sheets.**

Organization Name: BankOnMe, Inc._____

Address: 3352 North Banking Blvd. _____**County:** Anytime_____

City: Anywhere_____ **State:** USA_ **Zip:** 00008_____ **Phone:** (999) 999-9991_____

Type of Business: Banking_____ Job Location if different from Org. Address: _____

Human Resources Director or Owner Name: Patricia Pepperdine, HR Director_____**Phone:** (999) 999-9990____

Number of Employees in the Organization at All Locations: Please Check (✓) One

_____Fewer Than 15 _____ 15 - 100 __X__ 101 - 200 _____201 - 500 _____More than 500

3. **Your Employment Data** (Complete as many items as you can) **Are you a Federal Employee?** ____ Yes _X__ No

Date Hired: 5/1/2010_____ Job Title At Hire: Personal Banker_____

Pay Rate When Hired: $32,000 per year_____ Last or Current Pay Rate: $35,000 per year_____

Job Title at Time of Alleged Discrimination: Personal Banker_____ Date Quit/Discharged:_____

Name and Title of Immediate Supervisor: Michael McIntire, Director Personal Banking_____

If Job Applicant, Date You Applied for Job _____ Job Title Applied For_____

4. **What is the reason (basis) for your claim of employment discrimination?**

FOR EXAMPLE ,if you feel that you were treated worse than someone else because of race, you should check the box next to Race. *If you feel you were treated worse for several reasons, such as your sex, religion, and national origin, you should check all that apply. If you complained about discrimination, participated in someone else's complaint, or filed a charge of discrimination, and a negative action was threatened or taken, you should click the box next to* Retaliation.

_____ Race __X__ Sex _____ Age _____ Disability _____ National Origin _____ Religion _____ Retaliation

_____ Pregnancy _____ Color (typically a difference in skin shade within the same race) _____Genetic Information; choose which type(s) of genetic information is involved:

_____ i. genetic testing _____ ii. family medicinal history _____ iii. genetic services (genetic services means counseling, education or testing)

If you check color, religion or national origin, please specify: _____

If you checked genetic information, how did the employer obtain the genetic information? _____

_____

Other reason (basis) for discrimination (Explain)._____

5. **What happened to you that you believe was discriminatory?** Include the date(s) of harm, the action(s), and title(s) of the person(s) who you believe discriminated against you. **Please attach additional pages if needed.**
(Example: 10/02/06 - Discharged by Mr. John Soto, Production Supervisor)

_____

A) Date: 8/1/2011 to Present_____ Action: My male co-worker, Paul Ketterhagen (Personal Banker) earns a higher salary than me for performance of the same job duties despite having less experience.

_____

Name and Title of Person(s) Responsible: Michael McIntire, Director Personal Banking

_____

B) Date: _____Action:_____

_____

Name and Title of Person(s) Responsible_____

6. **Why do you believe these actions were discriminatory? Please attach additional pages if needed.**

I have worked in my present position (as a Personal Banker) since May 1, 2010 at the bank's branch in Anyplace, USA. Paul Ketterhagen, my male counterpart at the bank's Anyway, USA branch was hired directly into the Personal Banker position at the beginning of August, 2011. It is my understanding that Paul earns $3,000-$5,000 more per year in salary than I do for performing the same job duties. I believe that Paul has less overall banking experience than I do, and he is less senior than me as well.

7. **What reason(s) were given to you for the acts you consider discriminatory? By whom? His or Her Job Title?**

My supervisor, Michael McIntire (Director of Personal Banking), would not discuss my salary concerns when I told him that I was upset because I believed that Paul was earning a higher annual salary than me despite his lesser experience. Mr. McIntire told me that it was inappropriate for me or any other employee to be discussing or speculating about employee salary information which is considered strictly confidential in nature.

8. **Describe who was in the same or similar situation as you and how they were treated. For example, who else applied for the same job you did, who else had the same attendance record, or who else had the same performance? Provide the race, sex, age, national origin, religion, or disability of these individuals, if known, and if it relates to your claim of discrimination. For example, if your complaint alleges race discrimination, provide the race of each person; if it alleges sex discrimination, provide the sex of each person; and so on. Use additional sheets if needed.**

Of the persons in the same or similar situation as you, who was treated *better* than you?

A. Full Name	Race, sex, age, national origin, religion or disability	Job Title
Paul Ketterhagen	Male	Personal Banker
Description of Treatment		

B. Full Name	Race, sex, age, national origin, religion or disability	Job Title
Description of Treatment		

Of the persons in the same or similar situation as you, who was treated *worse* than you?

A. Full Name	Race, sex, age, national origin, religion or disability	Job Title
Description of Treatment		

B. Full Name	Race, sex, age, national origin, religion or disability	Job Title
Description of Treatment		

Of the persons in the same or similar situation as you, who was treated the *same* as you?

A. Full Name	Race, sex, age, national origin, religion or disability	Job Title
Description of Treatment		

B. Full Name	Race, sex, age, national origin, religion or disability	Job Title
Description of Treatment		

Answer questions 9-12 only if you are claiming discrimination based on disability. If not, skip to question 13. Please tell us if you have more than one disability. Please add additional pages if needed.

9. Please check all that apply:

___ Yes, I have an actual disability

___ I have had an actual disability in the past

___ No disability but the organization treats me as if I am disabled

10. What is the disability that you believe is the reason for the adverse action taken against you? Does this disability prevent or limit you from doing anything? (e.g., lifting, sleeping, breathing, walking, caring for yourself, working, etc.)

_____

_____

_____

_____

11. Do you use medications, medical equipment or anything else to lessen or eliminate the symptoms of your disability?

_____ Yes _____ No

If "Yes," what medication, medical equipment or other assistance do you use?

_____

_____

12. Did you ask your employer for any changes or assistance to do your job because of your disability?

_____ Yes _____ No

If "Yes", when did you ask? _____ How did you ask (verbally or in writing)? _____

Who did you ask? (Provide full name and job title of person)

_____

_____

Describe the changes or assistance that you asked for:

_____

_____

How did your employer respond to your request?

_____

_____

13. Are there any witnesses to the alleged discriminatory incidents? If yes, please identify them below and tell us what they will say. (Please attach additional pages if needed to complete your response)

A. Full Name	Job Title	Address & Phone Number

What do you believe this person will tell us?

B. Full Name	Job Title	Address & Phone Number

What do you believe this person will tell us?

14. Have you filed a charge previously in this matter with EEOC or another agency? Yes _____ No _X___

15. If you have filed a complaint with another agency, provide name of agency and date of filing:

16. Have you sought help about this situation from a union, an attorney, or any other source? Yes _____ No _X___
Provide name of organization, name of person you spoke with and date of contact. Results, if any?

Please check one of the boxes below to tell us what you would like us to do with the information you are providing on this questionnaire. If you would like to file a charge of job discrimination, you must do so within 180 days from the day you knew about the discrimination, or within 300 days from the day you knew about the discrimination if the employer is located in a place where a state or local government agency enforces laws similar to the EEOC's laws. If you do not file a charge of discrimination within the time limits, you will lose your rights. If you would like more information before filing a charge or you have concerns about EEOC's notifying the employer, union, or employment agency about your charge, you may wish to check Box 1. If you want to file a charge, you should check Box 2.

BOX 1

_____	I want to talk to an EEOC employee before deciding whether to file a charge. I understand that by checking this box, I have not filed a charge with the EEOC. I also understand that I could lose my rights if I do not file a charge in time.

BOX 2

_X_	I want to file a charge of discrimination, and I authorize the EEOC to look into the discrimination I described above. I understand that the EEOC must give the employer, union, or employment agency that I accuse of discrimination information about the charge, including my name. I also understand that the EEOC can only accept charges of job discrimination based on race, color, religion, sex, national origin, disability, age, genetic information, or retaliation for opposing discrimination.

Signature _____ Today's Date _____

PRIVACY ACT STATEMENT: This form is covered by the Privacy Act of 1974: Public Law 93-579. Authority for requesting personal data and the uses thereof are.

1. FORM NUMBER/TITLE/DATE. EEOC Intake Questionnaire (9/20/06).
2. AUTHORITY. 42 U.S.C. § 2000e-5(b), 29 U.S.C. § 211, 29 U.S.C. § 626. 42 U.S.C. 12117(a), 42 U.S.C. § 2000ff-6.
3. PRINCIPAL PURPOSE. The purpose of this questionnaire is to solicit information about claims of employment discrimination, determine whether the EEOC has jurisdiction over those claims, and provide charge filing counseling, as appropriate. Consistent with 29 CFR 1601.12(b) and 29 CFR 1626.8(c), this questionnaire may serve as a charge if it meets the elements of a charge.
4. ROUTINE USES. EEOC may disclose information from this form to other state, local and federal agencies as appropriate or necessary to carry out the Commission's functions, or if EEOC becomes aware of a civil or criminal law violation. EEOC may also disclose information to respondents in litigation, to congressional offices in response to inquiries from parties to the charge, to disciplinary committees investigating complaints against attorneys representing the parties to the charge, or to federal agencies inquiring about hiring or security clearance matters.
5. WHETHER DISCLOSURE IS MANDATORY OR VOLUNTARY AND EFFECT ON INDIVIDUAL FOR NOT PROVIDING INFORMATION. Providing of this information is voluntary but the failure to do so may hamper the Commission's investigation of a charge. It is not mandatory that this form be used to provide the requested information.

Intake Notes

Witherspoon vs. BankOnMe

C/P started working for the company on May 1, 2010. She began her employment as a Personal Banker at the bank's branch in Anyplace, USA. This is C/P's current position as well. At the time of initial hire as a Personal Banker, C/P earned an annual salary of $32,000. She currently earns an annual salary of $35,000 in that same position. C/P is one of six Personal Bankers; there is one located at each of the bank's six branches. All but one of the current Personal Bankers are female. C/P doesn't know if there have ever been any other males employed in this position. The only male currently employed in this position is Paul Ketterhagen. He was hired directly into the Personal Banker position on August 1, 2011.

Shortly after he started working for the bank, C/P attended a meeting with Ketterhagen and the four other Personal Bankers employed by the bank. C/P had lunch with Ketterhagen at that meeting (on or about September 12, 2011). During lunch, C/P queried Ketterhagen about his education and past experience. Ketterhagen mentioned a degree (level of degree unknown) and past personal banking experience (amount of time not specified). Ketterhagen made mention of the fact that he took the Personal Banker position with BankOnMe because it paid "several" thousand dollars more than his last job. Later that same day, C/P heard Ketterhagen tell one of her co-workers that he had been earning $35,000 at his former job. C/P says that this means that Ketterhagen is earning "several" thousand dollars more than what she is currently earning in the same position, despite Ketterhagen's comparable or lesser qualifications. C/P asserts that the jobs they each perform at their respective branches are substantially similar in nature. C/P doesn't know for sure what her female counterparts earn in the Personal Banker position, but she estimates that their salaries range from $28,000 on the low end to $35,000 on the high end.

C/P's boss is the Director of Personal Banking, Michael McIntire. He was the person responsible for hiring Ketterhagen and for determining everyone's starting salary. McIntire also conducts the annual performance reviews for each of the Personal Bankers working for the bank. Depending upon how well these employees do performance-wise, they can receive anywhere from a one to three percent pay increase. C/P has received one pay increase while employed in the Personal Banker position, a 2% increase. C/P does not know how much other Personal Bankers have received in pay increases (or even if they received such increases). C/P says that salary discussions among employees are really discouraged and just pretty much "forbidden" by upper management. C/P says that there's just a lot of secrecy about this topic. C/P is not aware of anyone who has actually been disciplined for talking about this issue, but she says that she personally knows it's discouraged because of what her boss told her.

On or about September 18, 2011, C/P approached her boss (McIntire) and told him of her belief that Ketterhagen was unjustifiably earning a higher salary than she was. C/P told McIntire that she felt this was unfair (if true) because she had more seniority than Ketterhagen, more personal banking experience, and they both performed very similar job duties. McIntire admonished C/P for "gossiping" about employee salaries and refused to discuss the matter with her because of the highly confidential nature of the topic. McIntire advised C/P to concentrate on doing her job to the best of her ability rather than worrying or speculating about her co-workers and their salaries.

C/P did not feel like her pay complaint was adequately addressed by McIntire, but she decided not to pursue the matter further because of the negative tone of the discussion she had with McIntire.

C/P recently decided to bring this matter to the EEOC for investigation because she knew nothing would be done about it internally and because she believes Ketterhagen is continuing to receive preferential treatment at the bank. C/P says this because she has heard Ketterhagen is now receiving informal training in the area of commercial banking, something C/P has asked about receiving in the past, but never received. C/P says that there is no formal training process in place at the bank; you just express your interest in an area and then you receive informal, on the job training in that area when time and resources allow for it. Just as with personal banking, there is one Commercial Banker employed at each of the six branches as well. Each of these six branches is overseen by a Branch Manager. C/P is concerned that Ketterhagen is somehow being "fast-tracked" within the bank because of the opportunities she sees him receiving despite being the newest Personal Banker employed by the bank.

C/P is looking for a pay increase to whatever Ketterhagen is earning, with full back pay, and commercial banking training opportunities comparable to those which Ketterhagen is receiving.

EEOC Form 5 (11/09)

CHARGE OF DISCRIMINATION

This form is affected by the Privacy Act of 1974. See enclosed Privacy Act Statement and other information before completing this form.

Charge Presented To: Agency(ies) Charge No(s):

- [ ] FEPA
- [X] EEOC — 000-0000-00009

Anywhere Civil Rights Division and EEOC

State or local Agency, if any

Name *(indicate Mr., Ms., Mrs.)*	Home Phone *(Incl. Area Code)*	Date of Birth
Ms. Samantha L. Witherspoon	**(999) 999-9998**	**6/18/1972**

Street Address	City, State and ZIP Code
2210 South Logan Street	**Anywhere, USA 00008**

Named is the Employer, Labor Organization, Employment Agency, Apprenticeship Committee, or State or Local Government Agency That I Believe Discriminated Against Me or Others. *(If more than two, list under PARTICULARS below.)*

Name	No. Employees, Members	Phone No. *(Include Area Code)*
BankOnMe, Inc.	**101-200**	**(999) 999-9991**

Street Address	City, State and ZIP Code
3352 North Banking Blvd.	**Anywhere, USA 00008**

Name	No. Employees, Members	Phone No. *(Include Area Code)*

Street Address	City, State and ZIP Code

DISCRIMINATION BASED ON *(Check appropriate box(es).)*

- [ ] RACE
- [ ] COLOR
- [X] SEX
- [ ] RELIGION
- [ ] NATIONAL ORIGIN
- [ ] RETALIATION
- [ ] AGE
- [ ] DISABILITY
- [ ] GENETIC INFORMATION
- [X] OTHER *(Specify)* **EPA**

DATE(S) DISCRIMINATION TOOK PLACE

Earliest	Latest
8/1/2011	**Present**

- [X] CONTINUING ACTION

THE PARTICULARS ARE *(If additional paper is needed, attach extra sheet(s)):*

I began employment with the above-named Respondent on May 1, 2010 as a Personal Banker. On June 2, 2011, I was promoted to the position of Assistant Manager/Personal Banking at the Respondent's branch in Anyplace, USA. I am aware that since on or about August 1, 2011, my male counterpart has earned a higher salary than me.

On September 18, 2011, I complained to Michael McIntire, Director of Personal Banking about the difference in my salary as compared to my colleague, to no avail.

I believe that I have been and continue to be discriminated against on the basis of my sex, female, in violation of the Equal Pay Act of 1963 and Title VII of the Civil Rights Act of 1964, as amended.

I want this charge filed with both the EEOC and the State or local Agency, if any. I will advise the agencies if I change my address or phone number and I will cooperate fully with them in the processing of my charge in accordance with their procedures.

I declare under penalty of perjury that the above is true and correct.

Date *Charging Party Signature*

NOTARY – *When necessary for State and Local Agency Requirements*

I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.

SIGNATURE OF COMPLAINANT

SUBSCRIBED AND SWORN TO BEFORE ME THIS DATE
(month, day, year)

PRIVACY ACT STATEMENT: Under the Privacy Act of 1974, Pub. Law 93-579, authority to request personal data and its uses are:

1. FORM NUMBER/TITLE/DATE. EEOC Form 5, Charge of Discrimination (11/09).

2. AUTHORITY. 42 U.S.C. 2000e-5(b), 29 U.S.C. 211, 29 U.S.C. 626, 42 U.S.C. 12117, 42 U.S.C. 2000ff-6.

3. PRINCIPAL PURPOSES. The purposes of a charge, taken on this form or otherwise reduced to writing (whether later recorded on this form or not) are, as applicable under the EEOC anti-discrimination statutes (EEOC statutes), to preserve private suit rights under the EEOC statutes, to invoke the EEOC's jurisdiction and, where dual-filing or referral arrangements exist, to begin state or local proceedings.

4. ROUTINE USES. This form is used to provide facts that may establish the existence of matters covered by the EEOC statutes (and as applicable, other federal, state or local laws). Information given will be used by staff to guide its mediation and investigation efforts and, as applicable, to determine, conciliate and litigate claims of unlawful discrimination. This form may be presented to or disclosed to other federal, state or local agencies as appropriate or necessary in carrying out EEOC's functions. A copy of this charge will ordinarily be sent to the respondent organization against which the charge is made.

5. WHETHER DISCLOSURE IS MANDATORY; EFFECT OF NOT GIVING INFORMATION. Charges must be reduced to writing and should identify the charging and responding parties and the actions or policies complained of. Without a written charge, EEOC will ordinarily not act on the complaint. Charges under Title VII, the ADA or GINA must be sworn to or affirmed (either by using this form or by presenting a notarized statement or unsworn declaration under penalty of perjury); charges under the ADEA should ordinarily be signed. Charges may be clarified or amplified later by amendment. It is not mandatory that this form be used to make a charge.

NOTICE OF RIGHT TO REQUEST SUBSTANTIAL WEIGHT REVIEW

Charges filed at a state or local Fair Employment Practices Agency (FEPA) that dual-files charges with EEOC will ordinarily be handled first by the FEPA. Some charges filed at EEOC may also be first handled by a FEPA under worksharing agreements. You will be told which agency will handle your charge. When the FEPA is the first to handle the charge, it will notify you of its final resolution of the matter. Then, if you wish EEOC to give Substantial Weight Review to the FEPA's final findings, you must ask us in writing to do so within 15 days of your receipt of its findings. Otherwise, we will ordinarily adopt the FEPA's finding and close our file on the charge.

NOTICE OF NON-RETALIATION REQUIREMENTS

Please **notify** EEOC or the state or local agency where you filed your charge **if retaliation is taken against you or others** who oppose discrimination or cooperate in any investigation or lawsuit concerning this charge. Under Section 704(a) of Title VII, Section 4(d) of the ADEA, Section 503(a) of the ADA and Section 207(f) of GINA, it is unlawful for an *employer* to discriminate against present or former employees or job applicants, for an *employment agency* to discriminate against anyone, or for a *union* to discriminate against its members or membership applicants, because they have opposed any practice made unlawful by the statutes, or because they have made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under the laws. The Equal Pay Act has similar provisions and Section 503(b) of the ADA prohibits coercion, intimidation, threats or interference with anyone for exercising or enjoying, or aiding or encouraging others in their exercise or enjoyment of, rights under the Act.

_____ vs. _____

Charge Number_____

CP's allegations	R's defenses	Disputed	Evidence
Statute: Basis: Issue: Initial Assessment: PF Case:	Rebuttal:	(Y/N)	**PRETEXT?** **1. Is R's reason believable?** **We have:** **We need:** **2. Comps: how are folks outside the protected group treated?** **We have:** **We need:** **3. Is there evidence of bias by decision-makers towards the protected group?** **We have:** **We need:** **4. What do the stats say?** **We have:** **We need:** **Updated Assessment:**

3-Step Basic Investigative Plan

The Investigative Plan (IP) is an ever-evolving, fluid document which should contain the bulleted or summarized items that will become the skeleton of the Investigative Memorandum (IM) at the end of the process. As a tool, the IP can provide several benefits for the user. It can serve as a gateway for PCHP application in that it allows the Investigator to synthesize the information contained in a case file into one (or two) page(s). This will facilitate communication with management and Legal in order to receive guidance about steps in the investigative process. Additionally, it will arm the Investigator with the relevant information that should be conveyed to the Charging Party during a PDI.

While an IP may vary in complexity based on the case, 3 simple steps can assist in keeping an investigation on track:

1. Did CP present a prima facie case?
2. Did R articulate a legitimate, non-discriminatory reason for the action?
3. Does the EVIDENCE support the allegation or the defense?

WITHERSPOON

PACKET B

GOOD, BETTER, & BEST, PC
ATTORNEYS AND COUNSELORS
877 SOUTH LITIGATION BLVD.
SUITE 12100
ANYWHERE, USA 00008
(999) 999-9910

March 28, 2012

Patrick J. Payload
(999) 999-9911

RESPONDENT'S POSITION STATEMENT

Mr. Keith Richardson, EEOC Investigator
U.S. Equal Employment Opportunity Commission
USA District Office
12345 North Civil Rights Blvd.
Anywhere, USA 00008

Re: Samantha L. Witherspoon v. BankOnMe, Inc.
Charge Number 000-0000-00009

Dear Investigator Richardson:

Respondent, BankOnMe, Inc. respectfully submits this Statement of Position in response to the charge of discrimination filed by Samantha Witherspoon (Ms. Witherspoon) on February 28, 2012. As a federal contractor, BankOnMe, Inc. takes very seriously its obligation to ensure workplace equity with regard to all of its employment policies and practices. On a procedural note, BankOnMe specifically reserves all of the rights and defenses, including procedural rights and defenses, it now has or may later possess with respect to the subject charge or any like or related issues.

Ms. Witherspoon alleges sex discrimination but has, in fact, suffered no adverse employment action of any kind. Despite her lower than average job performance as compared to that of her peers similarly employed in the Personal Banker position, Ms. Witherspoon most recently received a 5% salary increase on May 1, 2011 and a 4% salary increase on November 1, 2011. Those increases provide her with a current annual salary of $35,000. Ms. Witherspoon is currently the third

highest paid Personal Banker employed by the bank. The other two more highly paid Personal Bankers are Teresa Chavez (female) and Paul Ketterhagen (male). Ms. Chavez currently earns a salary of $36,500, while Mr. Ketterhagen's current annual salary is $38,000. Each of the three remaining Personal Bankers employed by the bank (all females) earn less than Ms. Witherspoon, with current annual salaries of $28,800, $31,750, and $33,550 respectively (See attached salary chart/Exhibit A). This evidence clearly reflects that decisions which are made by this company with regard to initial salaries and subsequent pay increases are in no way the result of gender-based employment discrimination. In fact, the Director of Personal Banking, Michael McIntire ensures that all bank employees receive initial salaries and pay increases commensurate with their qualifications and performance, without regard to discriminatory considerations of any kind.

Personnel records reflect that Ms. Witherspoon began her employment with the bank on May 1, 2010 as a Personal Banker working out of the Anyplace, USA branch. Her starting annual salary in this position was $32,000. Ms. Witherspoon currently earns an annual salary of $35,000 in this position. Ms. Witherspoon last received a salary increase of 4% on November 1, 2011, which was slightly below average as compared to the raises which were received during this same time period by the other five Personal Bankers (See Exhibit A).

As reflected in Exhibit A, two employees in the Personal Banker position currently earn higher annual salaries than Ms. Witherspoon (i.e., Ms. Chavez and Mr. Ketterhagen), while all five of her counterparts (i.e., one male and four females) received higher percentage salary increases than she did. This evidence clearly demonstrates that gender was not a factor of consideration in any of the bank's decisions regarding initial salaries or subsequent salary increases. As a result, we respectfully request the prompt dismissal of the subject charge due to its patent lack of merit.

Please let me know if there is any additional assistance I might be able to provide with regard to this matter.

Sincerely,

Patrick J. Payload
Patrick J. Payload
Attorney at Law

Samantha Witherspoon v. BankOnMe, Inc.

Exhibit A

Name	Date of Position Assignment	Date of Last Salary Increase	Percentage of Increase	Current Salary
Samantha Witherspoon	May 1, 2010	November 1, 2011	4%	$35,000
Teresa Chavez	June 18, 2010	December 18, 2010	6%	$36,500
Paul Ketterhagen	August 1, 2011	February 1, 2012	8%	$38,000
Melissa Smith	November 25, 2011	none	none	$28,800
Lisa Lobo	October 13, 2011	none	none	$31,750
Claire Huxtable	July 22, 2011	January 22, 2011	5%	$33,550

WITHERSPOON

PACKET C

EEOC Charge Number 000-0000-00009
Witherspoon v. BankOnMe. Inc.

Charging Party Rebuttal Interview

The following reflects the substance of the rebuttal interview conducted with CP Samantha Witherspoon (via telephone) at 1:15 PM today (April 5, 2012).

I reviewed with CP the position statement and exhibit submitted by the Respondent attorney on behalf of BankOnMe. I asked the CP a series of questions. The information below is a summary of CP's response.

CP indicated that she was upset by the lack of information/documentation provided by the Respondent regarding the higher salary earned by Ketterhagen. CP inquired about Ketterhagen's past experience, background, and performance ratings as they related to how his initial salary and/or subsequent pay increases were determined by the bank. I advised CP that this documentation had not been provided by the Respondent.

CP admitted that she had experienced some performance issues in the position of Personal Banker, but felt that they were the sole result of her being new to the job. CP claims that most of these performance issues have since been resolved and she believes that she is now performing very well in the position. CP does not have any idea how her performance compared to that of the other Personal Bankers because they work at different branches and she had no occasion to observe them or their performance. CP felt she did at least as well as her peers did from a performance standpoint.

CP claims that Ketterhagen is being given preferential treatment by the Respondent and that he is being "fast- tracked" for promotional opportunities within the bank. CP believes this because Ketterhagen recently told her that he had been given several commercial banking accounts to handle in addition to his personal banking accounts, and that he was also receiving on the job training in this same area from the Commercial Banker assigned to his branch.

CP stated that you need to have commercial banking experience in order to be hired or promoted into a Branch Manager position with the bank. CP says that there is a Commercial Banker and a Branch Manager assigned to each of the bank's six branch locations.

Although CP has expressed her interest in learning the commercial banking side of Respondent's business, no one has ever discussed any training programs or opportunities with her, and she is not even sure who she would need to pursue this through or with. CP says that the Respondent pretty much seeks out candidates for these opportunities on an informal basis and she doesn't believe that they are ever advertised or posted anywhere.

I asked CP to share with me any additional information and/or rebuttal she might like to have considered in the investigative process. CP had no additional information. I explained the next steps in the investigative process.

Keith Richardson
EEOC Investigator
April 5, 2012

WITHERSPOON

PACKET D

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

Mr. Luke Atmi
OFCCP Area Director
Anywhere, US 00000

Dear Ms. Versity,

In accordance with the Memorandum of Understanding between OFCCP and EEOC on Shared Functions, we are requesting access to any information relating to the employment policies and/or practices of BankOnMe's Anywhere Branch. Such information may include, but is not

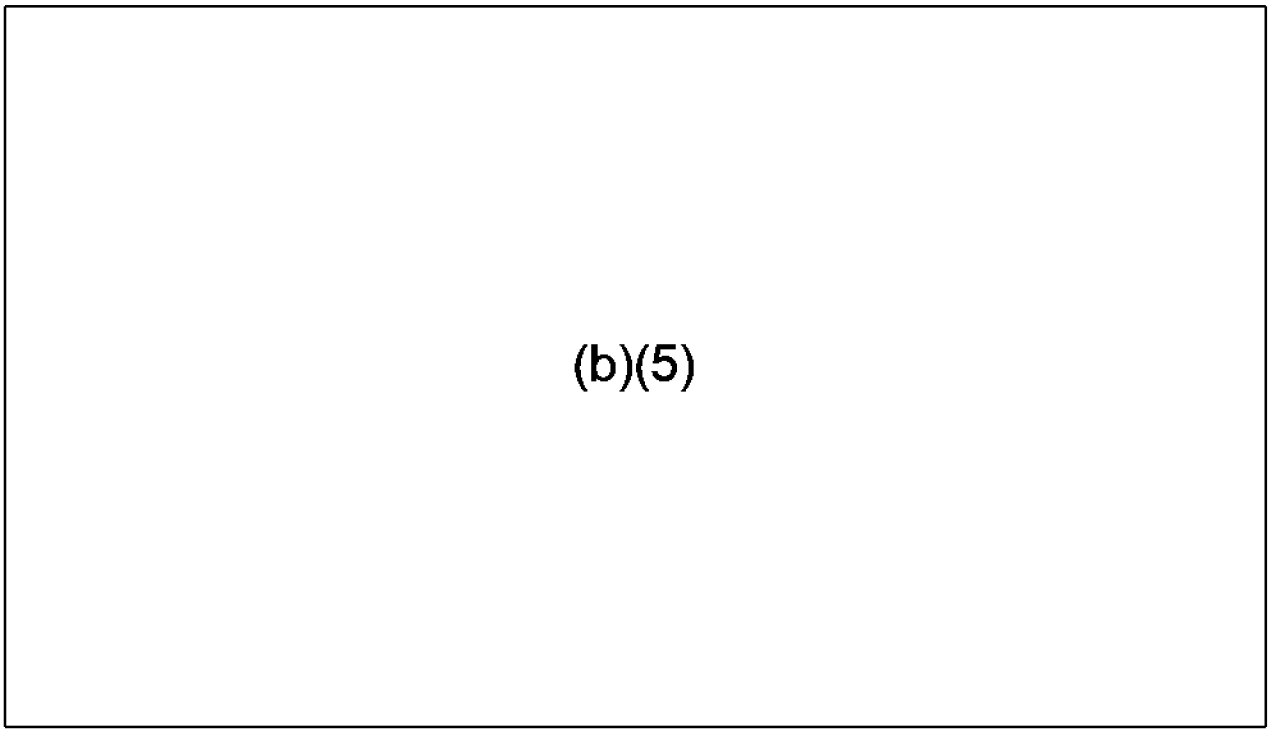
(b)(5)

Keith Richardson via email at keith.richardson@eeoc.gov or via telephone at (000) 000-0101.

Sincerely,

Dee Versity
Ms. Dee Versity,
District Director

Adverse Impact Analysis



Document Request
Samantha Witherspoon v. BankOnMe, Inc.
Charge Number: 000-0000-00009

1. Please submit an electronic database[1] identifying all individuals employed by Respondent in the state of Anywhere in the positions of Personal Banker, Commercial Banker, and Branch Manager at any time from January 1, 2010 to the present, and for each individual, provide:

   A. name,
   B. sex,
   C. date of hire,
   D. position(s) or title(s),
   E. salary when hired,
   F. date of promotion, if applicable,
   G. position title to which promoted, if applicable,
   H. salary after promotion, if applicable,
   I. date of separation and reason, if applicable,
   J. current or last known home address, and
   K. all known telephone numbers (including area codes).

2. Please submit documents[2] explaining the following for all positions held by or applied to by Charging Party:

   A. qualifications and requirements,
   B. job duties,
   C. pay or salary, and
   D. commission structure, if applicable.

---

[1] The term "electronic database" means an electronic file submitted on a compact disc (CD-ROM), DVD, USB drive, or other portable hard drive, that is readable by Microsoft Excel – e.g., Microsoft Excel Files (.XLS), comma separated values file (.CSV), or comma delimited text file (.TXT) – wherein the first row of the database contains the field or variable names of the requested information and each subsequent row of the database contains the requested information for each individual identified. Image files (such as PDF or TIFF files) and printed copies of the database do not satisfy this definition of an electronic database. If any codes are used in the database (e.g. "F" for "Female") please provide in a separate electronic database the definition of all codes.

[2] The term "document" is used in its broadest sense and means the complete original or a true, correct and complete copy and any non identical copies (whether different from the original because of notes or comments made on or attached to such copy or otherwise) of any written, graphic, typed, printed, filmed, recorded or electronic information, published or unpublished, no matter how produced, recorded, stored, or reproduced (including computer stored or generated data, together with instructions or programs necessary to search and retrieve such data), including, without limitation, any writing, letter, telegram, memorandum, note, electronic mail or message, telephone message, telephone or toll call record, statement, book, handbook, appointment book, calendar, minutes or record of meetings, report, manual, study, analysis, summary, log, digest, record, bill, statement, voucher, working paper, chart, graph, table, drawing, photograph, videotape, audio recording (including telephone answering machine messages), diary, tabulation, data sheet, directive, standard, pamphlet, brochure, circular, advertisement, announcement, application, list, permit, survey, punch card, witness statement, note of interview or communication or any other data compilation in the possession, custody, or control of Respondent, including all drafts of such documents.

3. Provide all application materials, including, but not limited to, application, resume, interview notes and scores for all applicants who applied for the positions of Personal Banker, Commercial Banker, and Branch Manager at any time between January 1, 2010 and the present date in the state of Anywhere.

4. Submit copies of all versions of Respondent's hiring and promotion policies for its facilities in the state of Anywhere that were in effect at any time between January 1, 2010 and the present date. For each version indicate the time frame during which each version was in effect.

GOOD, BETTER, & BEST, PC
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(999) 999-9910

Patrick J. Payload
(999) 999-9911

RESPONSE TO REQUEST FOR INFORMATION

Mr. Keith Richardson, EEOC Investigator
U.S. Equal Employment Opportunity Commission
USA District Office
12345 North Civil Rights Blvd.
Anywhere, USA 00008

Re: Samantha L. Witherspoon v. BankOnMe, Inc.
Charge Number 000-0000-00009

Dear Investigator Richardson:

Respondent, BankOnMe, Inc., respectfully submits this response to EEOC's request for information with regard to the charge of discrimination filed by Samantha Witherspoon (Ms. Witherspoon) on February 28, 2012.

On a procedural note, Respondent specifically objects to EEOC's requests for information relating to individuals who have not filed charges of discrimination with EEOC. While Respondent sees EEOC's attempts to obtain this information as an overreaching of the agency's statutory authority, Respondent is submitting the attached response in order to demonstrate its willingness to cooperate with the EEOC's investigation. Attached please find the requested employee information for the relevant time period along with copies of their position descriptions. Respondent has carefully crafted a culture of competence that goes far beyond anything that can be captured in a single document; therefore, the position descriptions do not encapsulate all that is required or expected of our employees. Instead,

Respondent provides extensive on the job training to its employees to ensure their full compliance with the professional corporate culture BankOnMe, Inc. strives to maintain.

Please note that the Respondent will only provide personal information about its employees, including addresses and telephone numbers, in response to a subpoena issued by your agency. For privacy reasons, Respondent has a legal obligation to safeguard the personal information of its employees, and that is an obligation that Respondent takes very seriously.

With regard to the applications and related materials requested by your agency, Respondent is unable to comply due to circumstances beyond its control. In February, Respondent's facility (where said documents were stored) experienced a devastating flood. Unfortunately, none of the employment records/documents survived. We apologize for any inconvenience this incident may create for your agency's investigation of this matter. Respondent did not, and does not, maintain electronic or computerized employment data/records of any kind because of the extremely burdensome cost this would require the bank to incur.

We believe that, once you review the attached information, your agency will agree that Charging Party was compensated fairly based upon her skills and performance. Nonetheless, Respondent welcomes the opportunity to meet with EEOC representatives to discuss an amicable and prompt resolution to this matter. Please feel free to contact me at your convenience via e-mail or telephone.

Sincerely,

Patrick Payload
Patrick Payload

BankOnMe Employees: Leaders in the Banking Industry

Personal Banker

In Personal Banking, employees are expected to meet the needs of our customers from the moment the individual steps into our branch. In order to accomplish that, the Personal Banker is responsible for the day to day operations of the Personal Banking department. This may include, but is not limited to, ensuring the successful completion of transactions, the satisfaction of each individual customer, and the ambiance set at the branch. Each of our Personal Bankers is expected to be knowledgeable about the BankOnMe culture and all general banking rules/regulations. In addition, Personal Bankers must be warm and approachable so that the customer feels welcome and comfortable doing business with our bank.

Commercial Banker

The world of Commercial Banking can be difficult to navigate without the proper determination. At BankOnMe, we strive to prove that we are number one in the industry with regard to aggressive investment and economic growth to the benefit of our customers. Employees working in the Commercial Banking area of our business are expected to be prepared to tackle all issues associated with accounts ranging from macro loans to product support. Our success depends upon the determination of our staff. To that end, Commercial Bankers must be confident, outspoken advocates for our customers.

Branch Manager

BankOnMe is a leader in innovation in the banking industry, and we expect to keep growing. The Branch Manager is responsible for ensuring the success of his/her individual branch. The successful Branch Manager serves as a bridge between staff and potential growth. At BankOnMe, the expectation is that a Branch Manager will possess extensive experience in handling the complex matters that arise in dealing with the challenging needs of today's businesses. Therefore, the Branch Manager provides expertise to his/her staff on all banking regulations, but specifically on the development of commercial revenue. Overall, the Branch Manager must possess confidence in his/her abilities to lead and guide.

Empl[redacted]ist

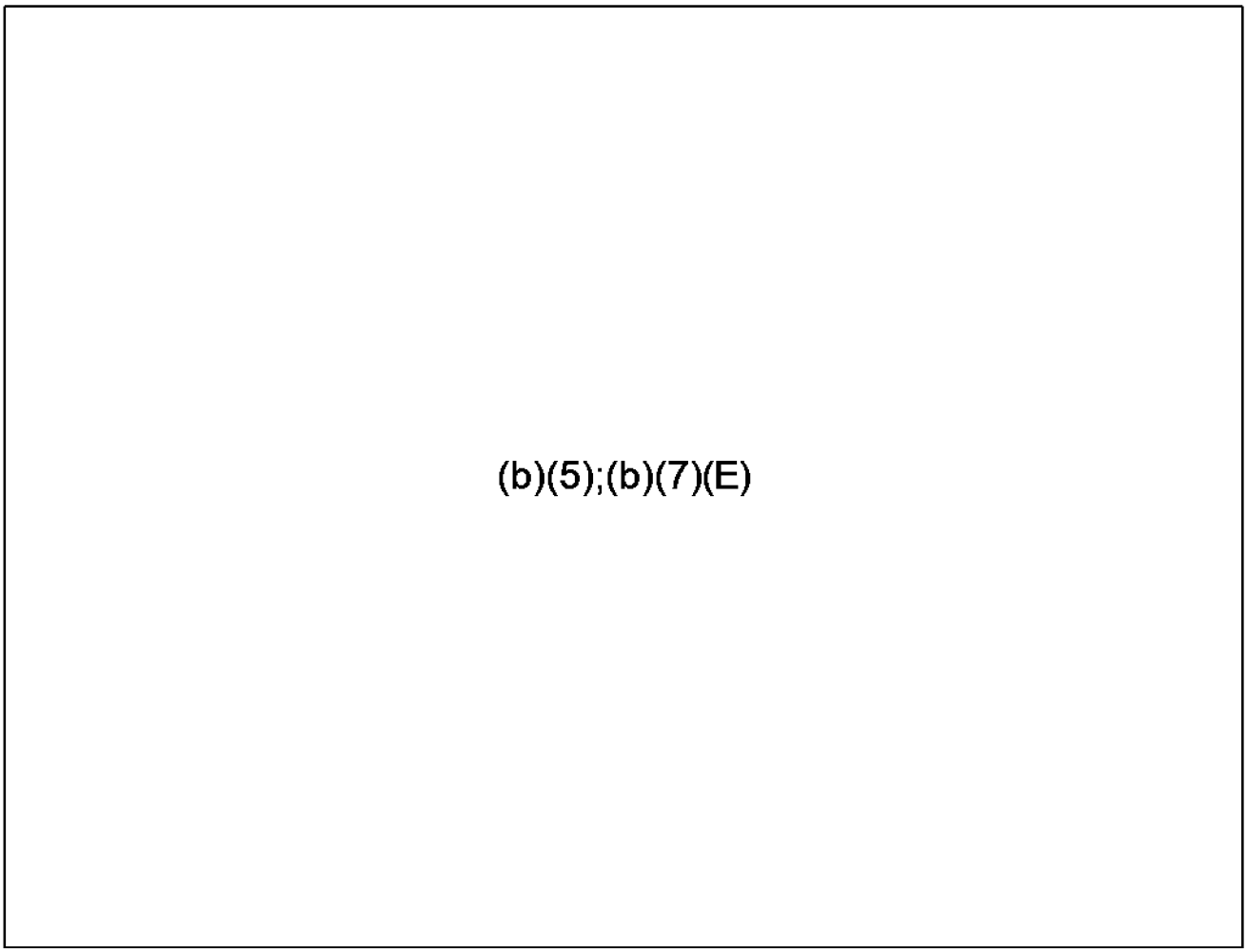
Name	Sex	Title	Pay	Effective Date	Branch	Date of Hire
Ben Johnson	M	Commercial Banker	40,500	3/8/2008	6	2/27/2004
Ben Johnson	M	Branch Manager	72,000	1/15/2010	6	2/27/2004
Ben Johnson	M	Branch Manager	78,000	1/15/2012	6	2/27/2004
Bill Perez	M	Commercial Banker	40,250	6/14/2008	2	4/5/2006
Bill Perez	M	Branch Manager	72,000	1/15/2011	2	4/5/2006
Bill Perez	M	Branch Manager	76,500	1/15/2012	2	4/5/2006
Brad Taylor	M	Commercial Banker	40,500	7/26/2008	1	1/25/2005
Brad Taylor	M	Branch Manager	72,000	12/1/2010	1	1/25/2005
Brad Taylor	M	Branch Manager	77,800	12/1/2011	1	1/25/2005
Claire Huxtable	F	Personal Banker	31,872	7/22/2011	6	5/15/2010
Claire Huxtable	F	Personal Banker	33,550	1/22/2011	6	5/15/2010
Eric Hamilton	M	Commercial Banker	40,500	6/12/2008	5	6/12/2008
Eric Hamilton	M	Branch Manager	72,000	3/17/2011	5	6/12/2008
Eric Hamilton	M	Branch Manager	75,000	9/17/2011	5	6/12/2008
Henry Brown	M	Commercial Banker	40,500	3/14/2007	4	3/14/2007
Henry Brown	M	Branch Manager	72,000	1/9/2011	4	3/14/2007
Henry Brown	M	Branch Manager	76,500	1/9/2012	4	3/14/2007
Jake Turner	M	Commercial Banker	40,500	8/3/2009	3	7/5/2006
Jake Turner	M	Branch Manager	72,000	2/25/2011	3	7/5/2006
Jamal Smith	M	Commercial Banker	43,500	2/9/2011	4	2/9/2011
Jamal Smith	M	Commercial Banker	45,000	8/9/2011	4	2/9/2011
Joe Garcia	M	Commercial Banker	43,500	3/25/2011	3	3/25/2011
Joe Garcia	M	Commercial Banker	45,000	9/25/2011	3	3/25/2011
John Harris	M	Commercial Banker	49,500	5/23/2011	6	4/23/2006
John Harris	M	Commercial Banker	55,000	11/23/2011	6	4/23/2006
Larry Fields	M	Commercial Banker	48,000	4/17/2011	5	3/18/2007
Larry Fields	M	Commercial Banker	52,000	10/17/2011	5	3/18/2007
Lisa Lobo	F	Personal Banker	31,750	10/13/2011	5	10/13/2011
Lou Phillips	M	Commercial Banker	46,375	2/15/2011	2	1/17/2010
Lou Phillips	M	Commercial Banker	47,375	8/15/2011	2	1/17/2010
Melissa Smith	F	Personal Banker	28,800	11/25/2011	4	11/25/2011
Paul Ketterhagen	M	Personal Banker	34,960	8/1/2011	3	8/1/2011
Paul Ketterhagen	M	Personal Banker	38,000	2/1/2012	3	8/1/2011

[redacted] Empl[redacted]ist [redacted]

Samantha Witherspoon	F	Personal Banker	33,600	5/1/2011	1	5/1/2010
Samantha Witherspoon	F	Personal Banker	35,000	11/1/2011	1	5/1/2010
Teresa Chavez	F	Personal Banker	34,310	6/18/2010	2	4/13/2009
Teresa Chavez	F	Personal Banker	36,500	12/18/2010	2	4/13/2009
Tim Jones	M	Commercial Banker	43,500	1/5/2011	1	1/5/2011
Tim Jones	M	Commercial Banker	45,500	7/5/2011	1	1/5/2011

Appendix

Models of Proof
Elements of Proof



Accurint Instructions

Models of Proof

Revised July 2014

I. DISPARATE TREATMENT

PROOF OF DISPARATE TREATMENT VIA CIRCUMSTANTIAL EVIDENCE (hiring/promotion)	
P.F. CASE:	(1) Charging Party (CP) is a member of the protected class (2) CP applied for a job for which CP met the stated qualifications (3) CP was rejected (4) Employer (ER) filled the job or continued to seek applications from persons with similar qualifications (ER's selection of person outside of CP's protected class supports inference of discrimination but this is not always a required element of proof)
REBUTTAL:	ER articulates a legitimate, nondiscriminatory reason for rejecting CP
PRETEXT:	The reasons advanced by ER are a pretext to hide discrimination. Examples of such evidence: (1) reason advanced by ER is not believable (2) similarly situated individuals outside CP's class were treated differently (3) evidence of bias by ER's decision makers towards persons of CP's class (4) Statistics showing underemployment of members of CP's class (this evidence may be helpful but usually not determinative)

PROOF OF DISPARATE TREATMENT VIA CIRCUMSTANTIAL EVIDENCE (discharge/discipline)	
P.F. CASE:	(1) CP is a member of the protected class (2) CP was performing at satisfactory level (3) CP was discharged or otherwise disciplined (4) CP was replaced by an employee outside the protected class (this is not always a required element of proof)
REBUTTAL:	ER articulates legitimate, nondiscriminatory reason for discharging or disciplining CP
PRETEXT:	The reasons advanced are a pretext to hide discrimination (see examples above)

NOTE: CP must be a member of a protected class and has to have suffered adverse treatment/action. CP's claim is not necessarily defeated if CP cannot provide comparative evidence, as long as there is other evidence which reasonably gives rise to an inference of discrimination. Also, a claim should not be dismissed based on lack of certain evidence if CP was not in a position to have access to such evidence.

DIRECT EVIDENCE OF EXCLUSIONARY POLICY UNDER TITLE VII, ADEA
P.F. CASE: Testimony or documentary evidence of an employment policy or practice to exclude CP from a job or otherwise adversely treat persons in CP's protected class
REBUTTAL: ER disproves discriminatory policy or practice, or proves statutory defense such as BFOQ

NOTE: *Under the ADA, an ER can justify a blanket policy that excludes persons with a particular covered disability if it can prove that the policy is job related and consistent with business necessity, and that the particular CP could not perform the job even with a reasonable accommodation.*

PROOF OF MIXED MOTIVES DEFENSE FOR DISPARATE TREATMENT
P.F. CASE: Circumstantial or direct evidence proves that discrimination against CP on the basis of his/her protected class was a motive in the challenged action
REBUTTAL: ER is unable to discredit proof of discriminatory motive but attempts to prove it would have taken the same action even without the discriminatory motive.
RELIEF: **Under Title VII, the ADA and the EPA,** ER is liable at minimum for injunctive relief and attorney's fees. If ER proves that the challenged action was <u>also</u> based on a legitimate motive and that this motive would have induced it to take same action regardless of the discrimination, it avoids liability for reinstatement, back pay or damages. If ER does not prove it would have taken the same action anyway, it is liable for full relief. **Note: The mixed motive theory is no longer available under the ADEA as the result of the Supreme Court decision in *Gross v. FBL Financial Services.*** Instead, the employee must establish that age was the "but for" cause of the employer's action.

AFTER ACQUIRED EVIDENCE OF LEGITIMATE MOTIVE FOR DISPARATE TREATMENT	
PROOF:	CP proves either through circumstantial or direct evidence that discrimination was the true motive operating at the time of the challenged action.
RELIEF:	If ER proves that there was a legitimate basis for the challenged action that ER discovered after-the-fact, and that this evidence would have induced it to take the same action regardless of the discrimination, then CP will usually not be entitled to reinstatement and other remedies will also be limited. Specifically, back pay and compensatory damages (other than damages for emotional harm) will be limited to the period prior to the discovery of the relevant evidence.

II. DISPARATE IMPACT

DISPARATE IMPACT UNDER TITLE VII	
P.F. CASE:	Neutral employment practice has disproportionate adverse effect on CP's protected class
REBUTTAL:	ER proves that challenged practice is job related and consistent with business necessity
ALTERNATIVES:	There is an alternative employment practice that would be substantially as effective but would have less adverse impact

DISPARATE IMPACT UNDER ADEA **(Note: The disparate impact theory of discrimination is available under the ADEA, but the scope of liability is narrower than under Title VII)**	
P.F. CASE:	Neutral employment practice has disproportionate adverse effect on older workers. CP must isolate and identify the specific employment practice(s) that are allegedly responsible for any observed statistical disparities.
REBUTTAL:	ER has to show that the practice is based on reasonable factors other than age. This is a different standard than that used under Title VII cases and narrows the scope of liability for the ER. As the Supreme Court noted: "Unlike the business necessity test [used in Title VII disparate impact cases], which asks whether there are other ways for the employer to achieve its goals that do not result in a disparate impact on a protected class, the reasonableness inquiry includes no such requirement."
NOTE:	The Commission issued a regulation entitled "Disparate Impact and Reasonable Factor Other than Age", in April 2012. 29 CFR Part 1625, which defines the RFOA defense to ADEA disparate impact claims. Investigators who encounter a possible ADEA disparate impact claim should consult with their Legal Unit. OLC is available for consultation as well.

DISCRIMINATORY QUALIFICATION STANDARDS AND SELECTION CRITERIA UNDER ADA NOTE: Investigators should refer to ADAAA regulations at 29 CFR Part 1630		
P.F. CASE:	(1)	CP has physical or mental impairment that substantially limits one or more major life activities
	(2)	A neutral qualification standard or selection criterion screens out CP on the basis of his or her disability and CP satisfies the other job requirements
REBUTTAL:	(1)	ER proves that challenged standard is job related and consistent with business necessity
	(2)	ER proves that CP could not meet the standard with reasonable accommodation

MODELS OF PROOF TO ESTABLISH DISABILITY COVERAGE UNDER THE ADAAA

For impairments that are on the (j)(3)(iii) list in the EEOC regulations:

(1) If a PCP has a "(j)(3)(iii)"physical or mental impairment, and
(2a) the impairment is readily observable, or
(2b) there is medical documentation of the impairment,
(3) then the impairment should easily be concluded to be a disability under the ADAAA. Impairments listed in (j)(3)(iii) are deafness; blindness; partially or completely missing limbs or mobility impairments requiring the use of a wheelchair; intellectual disability (formerly termed mental retardation); autism; cerebral palsy; major depressive disorder; bipolar disorder; post-traumatic stress disorder; obsessive compulsive disorder; schizophrenia; cancer; diabetes; epilepsy; HIV infection; multiple sclerosis; and muscular dystrophy.

For impairments that are not on the (j)(3)(iii) list:

Model of Proof for substantially limited major bodily functions:
(1) If there is medical evidence that a physical or mental impairment substantially limits a major bodily function; or
(2) a substantial limitation of a major bodily function is readily observable,
then the impairment is a disability under the ADAAA.

Model of Proof for substantially limited traditional major life activities:
(1) If a PCP has a physical or mental impairment, and
(2) there is evidence that the impairment substantially limits a traditional major life activity,
then the impairment is a disability under the ADAAA.
The evidence could be PCP's experience, medical evidence, or information from persons who know the PCP.

Model of Proof for mitigating measures: If there is evidence that:
(1) the impairment substantially limited a major life activity before using the mitigating measure; or
(2) the impairment would substantially limit a major life activity if the mitigating measure was stopped,
then the impairment is a disability under the ADAAA .
Major life activities could be major bodily functions, traditional major life activities or both.

Model of Proof for episodic impairments or impairments in remission: If there is evidence that (1a) an episodic impairment, or
(1b) an impairment in remission
(2) would substantially limit a major life activity when active,
then the impairment is a disability under the ADAAA.
Major life activities could be major bodily functions, traditional major life activities, or both.

Model of Proof for "record of a disability": If the evidence shows that a PCP
(1a) had an impairment that substantially limited a major life activity or
(1b) was misclassified as having an impairment that substantially limited a major life activity then the impairment is a disability under the "record of" prong.
Major life activities could be major bodily functions, traditional major life activities, or both.

Model of Proof for "regarded as" having a disability: If there is evidence that:
(1a) PCP has an impairment or
(1b) R believed PCP has an impairment;
(2) R took an adverse action against PCP;
(3) R took the adverse action because of the actual or perceived impairment; and
(4) the impairment is objectively not transitory and not minor, then PCP is "regarded as" having a disability.

III. OTHER FORMS OF UNLAWFUL DISCRIMINATION

EPA: SEX-BASED WAGE DISPARITY		
P.F. CASE:	(1)	Unequal pay between CP and other employee(s) of opposite sex
	(2)	The jobs at issue require substantially equal skill, effort, and responsibility and are performed under similar working conditions within the same establishment
REBUTTAL:		Wage difference is based on a seniority, merit, or incentive system, or on any other factor other than sex

TITLE VII: FAILURE TO PROVIDE RELIGIOUS ACCOMMODATION		
P.F. CASE:	(1)	CP sincerely holds religious belief that conflicts with job requirement
	(2)	CP informed supervisor of conflict and need for accommodation
	(3)	ER failed to provide a reasonable accommodation
REBUTTAL:		CP's requested accommodation would result in more than minimal hardship to ER

ADA: FAILURE TO PROVIDE REASONABLE ACCOMMODATION **NOTE: Investigators should refer to ADAAA regulations at 29 CFR Part 1630**		
P.F. CASE:	(1)	CP has a disability under prongs one (a physical or mental impairment that substantially limits one or more major life activities) or two (a record of a disability)
	(2)	CP notified ER of his/her disability and need for accommodation
	(3)	There is an accommodation that would allow CP to participate in the application process; to perform the essential functions of the job; or to enjoy equal benefits and privileges of employment
	(4)	ER failed to provide an effective accommodation
REBUTTAL:		The requested accommodation (as well as alternative effective accommodations) would pose an undue hardship.

RETALIATION		
P.F. CASE:	(1)	CP opposed what CP reasonably and in good faith believed to be an unlawful employment practice or CP participated in the EEO process
	(2)	ER subjected CP to adverse treatment
	(3)	There was a causal connection between CP's protected activity and the adverse treatment (shown, e.g., by timing of adverse treatment soon after CP's protected activity)
REBUTTAL:	ER articulates a legitimate nondiscriminatory reason for the adverse action	
PRETEXT:	Reasons advanced by ER are a pretext to cover retaliatory motive. Examples of such evidence:	
	(1)	reason advanced by ER is not believable
	(2)	similarly situated individuals who did not oppose discrimination or participate in the EEO process were treated differently

HARASSMENT (on any protected basis)		
P.F. CASE:	(1)	CP was subjected to unwelcome comments or conduct based upon his/her protected class status
	(2)	The conduct resulted in a tangible job action **or** was sufficiently severe or pervasive to interfere with CP's work performance to create a hostile environment (measured by standard of reasonable person in CP's situation)
	(3)	Basis exists for holding ER liable for harassment
REBUTTAL:	ER attempts to prove the harassment did not happen, or the CP welcomed the conduct, or it was not sufficiently severe or pervasive, or that it did not know about the harassment and therefore cannot be held liable.	

LIABILITY (for supervisory/management harassment):

ER is automatically liable if the harassment resulted in a tangible employment action. If it did not, ER is still liable unless it proves that it took reasonable care to prevent and correct the harassment promptly and that the CP unreasonably failed to take advantage of any preventive or corrective opportunities provided by the ER

LIABILITY (for co-worker harassment):

ER is liable if it knew or should have known of the harassment and failed to take immediate and appropriate corrective action

LIABILITY (for non-employee harassment):

ER is liable if it knew or should have known and failed to take immediate and appropriate corrective action and ER had some control over the harasser

GINA ACQUISITION MODEL OF PROOF	
P.F. CASE:	(1) CP is an applicant, employee, or former employee of ER (2) ER requested, required, purchased, or otherwise acquired genetic information about CP of his/her family member.
REBUTTAL:	ER asserts one of six exceptions to the general prohibition: (1) inadvertent request for medical information; (2) offer of health or genetic services, e.g. wellness program; (3) FMLA request to care for family member with serious health condition; (4) commercial and publicly available documents; (5) genetic monitoring of effects of toxic substances in the workplace; or (6) DNA testing for law enforcement of human remains identification purposes if used for quality control purposes.

GINA USE MODEL OF PROOF	
P.F. CASE:	(1) CP is an applicant, employee, or former employee of ER. (2) ER makes an adverse employment decision about CP (refusal to hire, termination, setting compensation, or altering any terms, conditions, or privileges of employment) based on genetic information ER has about CP, including his/her family member.
REBUTTAL:	ER articulates a legitimate, nondiscriminatory reason for its adverse action.
PRETEXT:	The reasons advanced by ER are a pretext to hide genetic discrimination. Examples of such evidence: (1) reason advanced by ER is not believable (2) similarly situated individuals outside CP's class (i.e. about whom ER had no, or different, genetic information) were treated differently (3) evidence of concern about genetic information expressed by ER's decision makers (4) similar treatment of other individuals whose genetic information is known to ER

ELEMENTS OF PROOF (BY IMS CODE)

ADVERTISING (A1)
In order to establish a violation on an Advertising issue, the evidence must show in the following order of proof; 1) Charging Party belongs to a protected group; 2) Respondent advertised a position specifying as a requirement of the position membership in a group other than Charging Party's or stating a preference that would "chill" Charging Party from making application; 3) Charging Party was otherwise qualified for the position; 4) Respondent is unable to establish a bona fide occupational qualification for the group advertised.

APPRENTICESHIP (A2)
In order to establish a violation on an Apprenticeship issue, the evidence must show in the following order of proof: 1) Charging Party is a member of a protected group; 2) Charging Party made an application for apprenticeship; 3) Charging Party was qualified but was not admitted; 4) Others similarly situated but not of Charging Party's group were admitted; and 5) Respondent cannot explain the difference in treatment or Respondent's explanation is in fact pretext for discrimination.

BENEFITS (B1)
In order to establish a violation on a Benefits issue, the evidence must show in the following order of proof: 1) Charging Party is a member of a protected group; 2) Charging Party was denied a benefit; 3) The denied benefit was extended to others similarly situated but not of Charging Party's group; and 4) Respondent cannot explain the difference in benefits or the explanation is in fact pretext for discrimination.

DEMOTION (D1)
In order to establish a violation on a Demotion issue, the evidence must show in the following order of proof: 1) Charging Party belongs to a protected group; 2) Charging Party was demoted; 3) Others similarly situated but not of Charging Party's group were not demoted; and 4) Respondent cannot explain the difference in treatment or Respondent's explanation is in fact pretext for discrimination.

DISCHARGE (D2)
In order to establish a violation on a Discharge issue, the evidence must show in the following order of proof: 1) Charging Party belongs to a protected group; 2) Charging Party was discharged; 3) Others similarly situated but not of Charging Party's group were not discharged; and 4) Respondent cannot explain the difference in treatment or Respondent's explanation is in fact pretext for discrimination.

DISCHARGE (CONSTRUCTIVE) (C1)
In order to establish a violation on a Constructive Discharge issue, the evidence must show in the following order of proof: 1) Charging Party belongs to a protected group; 2) Charging Party was subjected to an unlawful practice under the statute; 3) Charging Party protested the unlawful actions or Respondent management was already aware of the actions; 4) Although aware of the unlawful practices Respondent's management did nothing to correct these conditions; and 5) The

working conditions were so adverse that a reasonable person would not continue to subject themselves to the situation.

DISCIPLINE (D3)
In order to establish a violation on a Discipline issue, the evidence must show in the following order of proof: 1) Charging Party belongs to a protected group; 2) Charging Party was disciplined; 3) Others not of Charging Party's group were not disciplined or were not disciplined in the same manner although they committed the same or similar infractions; and 4) Respondent cannot explain the different treatment or Respondent's articulated reason is in fact pretext for discrimination.

EXCLUSION (E1)
In order to establish a violation on an Exclusion issue, the evidence must show in the following order of proof: 1) Charging Party belongs to a protected group; 2) Charging Party made an application or attempted to join a Union; 3) Charging party was denied membership in the Union; 4) Others similarly situated but not of Charging Party's group were accepted for membership; and 5) The Union cannot explain the difference in treatment or the Union's explanation is in fact pretext for discrimination.

HARASSMENT (H1)
In order to establish a violation on a Harassment issue, the evidence must show in the following order of proof: 1) Charging Party belongs to a protected group; 2) Charging Party has been subjected to objectionable or offensive treatment by co-workers having the affect of embarrassing, ridiculing, tormenting, bothering or coercing Charging Party because of Charging Party's group; 3) Charging Party made Respondent aware of the harassment or Respondent's management should have known through reasonable observation; 4) In spite of objectionable or offensive atmosphere, Respondent took no corrective action; and 5) Respondent cannot explain its lack of corrective action or the explanation is in fact pretext for discrimination.

HIRING (H2)
In order to establish a violation on a Hiring issue, the evidence must show in the following order of proof: 1) Charging Party belongs to a protected group; 2) Respondent had a vacant position; 3) Charging Party applied for the position; 4) Charging Party was qualified for the position; and 5) Charging Party was not selected but a lesser qualified person not of Charging Party's group was selected.

INTIMIDATION (I1)
In order to establish a violation on an Intimidation issue, the evidence must show in the following order of proof: 1) Charging Party belongs to a protected group; 2) Charging Party has been subjected to intimidating or offensive behavior by co-workers or management; 3) Charging Party made management aware of the intimidation or management was or should have been aware of it; 4) In spite of the objections by Charging Party or the objectionable nature of the actions, management continued to intimidate or permit the intimidation of Charging Party; and 5) Respondent cannot explain its actions or the explanation is in fact pretext for discrimination.

JOB CLASSIFICATION (J1)
In order to establish a violation on a Classification issue, the evidence must show in the following order of proof: 1) Charging Party is a member of a protected group; 2) Charging Party performs the same or substantially the same duties as others not of Charging Party's group but who are classified higher on the scales of salary or status; and 3) Respondent cannot explain the difference in classification or the explanation is in fact pretext for discrimination.

LAYOFF (L1)
In order to establish a violation on a Layoff issue, the evidence must show in the following order of proof: 1) Charging Party belongs to a protected group; 2) Charging Party was laid off from work; 3) Others similarly situated but not of Charging Party's group were not laid off; and 4) Respondent cannot explain the difference in treatment or Respondent's explanation is in fact pretext for discrimination.

MATERNITY (M1)
In order to establish a violation on a Maternity issue, the evidence must show in the following order of proof: 1) Charging Party is/was pregnant; 2) Charging Party told Respondent she was pregnant or Respondent had reason to know; 3) Respondent made an adverse employment decision affecting Charging Party; 4) Others similar in their ability to work but not pregnant were treated differently; and 5) Respondent either cannot explain the difference in treatment or Respondent's explanation is in fact pretext for discrimination.

PATERNITY (P1)
In order to establish a violation on a Paternity issue, the evidence must show in the following order of proof: 1) Charging Party is a father; 2) Charging Party told Respondent he has parental care responsibilities and sought accommodation equal to that granted mothers; 3) Respondent denied his request or made an adverse employment decision affecting Charging Party; 4) Others similar in their ability to work who are mothers were treated differently; and 5) Respondent either cannot explain the difference in treatment or Respondent's explanation is in fact pretext for discrimination.

PAY COMPARABILITY (P2)
In order to establish a violation on a pay comparability issue, the evidence must show in the following order of proof: 1) Charging Party is a member of a protected group; 2) Charging Party is/was paid less than others who are comparable for the purposes of the Respondent's wage and salary system; and 3) Respondent cannot explain the difference in pay or the explanation is in fact pretext for discrimination.

PAY (EQUAL PAY ACT) (PF or PM)
In order to establish a violation on an EPA basis, the evidence must show in the following order of proof: 1) Respondent pays a lesser rate to one sex than to the opposite sex to perform substantially the same work; 2) The work is performed in the same establishment; 3) The work is performed under similar working conditions; 4) The work requires equal skill; 5) The work requires equal effort; 6) The work requires equal responsibility; and 7) The wage differential is

not attributed to, (a) a seniority system, (b) a merit system, (c) a system which measures earnings by quality or quantity of production, or (d) a differential based upon any factor other than sex.

PROMOTION (P3)
In order to establish a violation on a Promotion issue, the evidence must show in the following order of proof: 1) Charging Party belongs to a protected group; 2) Respondent had a vacant position; 3) Charging Party applied for or expressed an interest in the position; 4) Charging Party was qualified for the position; and 5) Charging Party was not selected but a lesser qualified person not of Charging Party's group was selected.

QUALIFICATIONS (Q1)
In order to establish a disparate treatment violation on a Qualifications issue, the evidence must show in the following order of proof: 1) Charging Party is a member of a protected group; 2) Charging Party expressed interest in or applied for a position for which Charging Party was qualified; 3) After Charging Party expressed interest in the position, Respondent changed the stated qualifications for the position such that Charging Party was no longer qualified; 4) Another person not of Charging Party's group was selected for the position; and 5) Respondent cannot explain the change in qualifications for the position or the explanation is in fact pretext for discrimination.

QUALIFICATIONS (Q1, A1)
In order to establish an adverse impact violation on a Qualifications issue, the evidence must show in the following order of proof: 1) Charging Party is a member of a protected group; 2) Charging Party applied for a position but was not Qualified; 3) The stated qualification(s) which Charging Party failed to meet has an adverse impact upon Charging Party's group; and 4) Respondent is unable to establish a business necessity to validate the qualification in question.

RECALL (R1)
In order to establish a violation on a Recall issue, the evidence must show in the following order of proof: 1) Charging Party is a member of a protected group; 2) Charging Party was denied recall at the time Charging Party was entitled to be recalled from layoff; 3) Others not of Charging Party's group but similarly situated were recalled; and 4) Respondent cannot explain the difference in treatment or Respondent's explanation is in fact pretext for discrimination.

REFERENCES (R2)
In order to establish a violation on an Unfavorable Reference issue, the evidence must show in the following order of proof: 1) Charging Party is a member of a protected group; 2) Charging Party is a former employee or otherwise has a normal expectation of references from Respondent; 3) Charging Party received unfavorable references; 4) Others not of Charging Party's group but similarly situated received more favorable references - either neutral or favorable; and 5) Respondent cannot explain the difference in treatment or the explanation is in fact pretext for discrimination.

REFERRAL (R3)
In order to establish a violation on a Referral issue, the evidence must show in the following order of proof: 1) Charging Party is a member of a protected group; 2) Charging Party has applied for or sought referral for hire, training, or apprenticeship; 3) Charging Party it qualified for the referral sought; 4) Respondent has referred others not of Charging Party's group but in spite of Charging Party's qualifications has not referred Charging Party; and 5) Respondent cannot explain the difference in treatment or the explanation is in fact pretext for discrimination.

REASONABLE ACCOMMODATION - DISABILITY (R6)
In order to establish a violation on a Reasonable Accommodation – disability issue, the evidence must show in the following order of proof: 1) Charging Party has a disability under prongs one (impairment that substantially limits a major life activity) or two (record of); 2) Charging Party notified ER of his/her disability and need for accommodation; 3) There is an accommodation that would allow CP to participate in the application process; to perform the essential functions of the job; or to enjoy equal benefits and privileges of employment; 4) Respondent failed to provide an effective accommodation; and 5) Respondent has not shown that it would be an undue hardship to provide the accommodation.

RELIGIOUS ACCOMMODATION (R6)
In order to establish a violation on an Accommodation of Religion issue, the evidence must show in the following order of proof: 1) Charging Party made Respondent aware of Charging Party's religious beliefs and practices; 2) Charging Party requested accommodation for a religious observance or practice and was denied; 3) Respondent could have reasonably accommodated Charging Party's religious observance or practice without undue hardship; and 4) Respondent is unable to explain its failure to accommodate Charging Party or the explanation is in fact pretext for discrimination.

REINSTATEMENT (R4)
In order to establish a violation on a Reinstatement issue, the evidence must show in the following order of proof: 1) Charging Party is a member of a protected group; 2) Charging Party is a former employee no longer on employment status and has a reasonable expectation or right to reinstatement; 3) Charging Party has sought reinstatement; 4) Respondent has reinstated others similarly situated but not of Charging Party's group or continues to have vacant positions for which Charging Party is qualified; and 5) Respondent cannot explain the difference in treatment or the explanation is in fact pretext for discrimination.

RETALIATION (OR)
In order to establish a violation on the basis of Retaliation, the evidence must show in the following order of proof: 1) Charging Party has engaged in protected activity under the statute; 2) Respondent was aware of the involvement of Charging Party in protected activity; 3) Respondent acted to deny a right or a privilege or to harm Charging Party; 4) There was a causal connection between Charging Party's activity and Respondent's action; and 5) Respondent cannot provide a nondiscriminatory reason for the action against Charging Party.

RETIREMENT (R5)
In order to establish a violation on a Involuntary Retirement issue, the evidence must show in the following order of proof: 1) Charging Party is a member of a protected group; 2) Charging Party has been forced to accept retirement; 3) Others similarly situated but not of Charging Party's group or age have not been required to retire; and 4) Respondent cannot explain its disparate treatment or Respondent's explanation is in fact pretext for discrimination.

SEGREGATED FACILITIES (S1)
In order to establish a violation on a Segregated Facilities issue, the evidence must show in the following order of proof: 1) Charging Party is a member of a protected group; 2) Charging Party's group is required by instruction and practice to use separate facilities from members of other groups; and 3) Respondent cannot explain this segregation or the explanation is in fact pretext for discrimination.

SEGREGATED LOCALS (S2)
In order to establish a violation on a Segregated Locals issue, the evidence must show in the following order of proof: 1) Charging Party is a member of a protected group; 2) By tradition or practice union membership and union representation in Charging Party's occupation has been segregated along group lines with separate locals for different groups; 3) Charging Party is a member of such a Segregated Local or has been denied membership in a Local Union which does not admit individuals of Charging Party's group; 4) Charging Party is qualified by occupation or employment for membership in the Local Union; and 5) Respondent cannot explain this segregation or Respondent's explanation is in fact pretext for discrimination.

SENIORITY (S3)
In order to establish a violation on a Seniority issue, the evidence must show in the following order of proof: 1) Charging Party is a member of a protected group; 2) Charging Party is entitled to a right or rights by virtue of Charging party's length of employment with Respondent; 3) Respondent refused to honor or denied the exercise of Charging Party's right; 4) Others similarly situated but not of Charging Party's group were permitted to exercise their rights; and 5) Respondent cannot explain the difference in treatment or Respondent's explanation is in fact pretext for discrimination.

SEXUAL HARASSMENT (S4)
In order to establish a violation on a Sexual Harassment issue, the evidence must show in the following order of proof: 1) Charging Party was subjected to unwelcome physical advances, comments of a sexual nature or a sexually tainted work environment; 2) Charging Party objected to the advances, or the comments, or to the tainted work atmosphere; 3) When the advances, comments, or tainted atmosphere remained, Charging Party reported the situation to Respondent's management; and 4) Respondent, although aware of the sexual harassment, made no good faith effort to correct the conditions.

SUSPENSION (S5)
In order to establish a violation on a Suspension issue, the evidence must show in the following order of proof: 1) Charging Party is a member of a protected group; 2) Charging Party was

suspended; 3) Others similarly situated but not of Charging Party's group were not suspended; and 4) Respondent cannot explain the difference in treatment or the explanation is in fact pretext for discrimination.

TENURE (T1)
In order to establish a violation on a Tenure issue, the evidence must show in the following order of proof: 1) Charging Party is a member of a protected group; 2) Charging Party was eligible for tenure consideration and made an application for tenure; 3) Charging Party was denied tenure; 4) Others similarly situated but not of Charging Party's group were granted tenure; and 5) Respondent cannot explain the difference in treatment or Respondent's explanation is in fact pretext for discrimination.

TERMS AND CONDITIONS (T2)
In order to establish a violation on a Terms and Conditions of employment issue, the evidence must show in the following order of proof: 1) Charging Party belongs to a protected group; 2) Charging Party was denied equal terms or conditions of employment; 3) Others similarly situated but not of Charging Party's group were extended the terms or conditions denied Charging Party; end 4) Respondent is unable to explain the difference in treatment or Respondent's explanation is in fact pretext for discrimination.

TESTING (T3)
In order to establish a disparate treatment violation on a Testing issue, the evidence must show in the following order of proof: 1) Charging Party belongs to a protected group; 2) Charging Party participated in a testing process; 3) Charging Party failed or scored poorly because the test was administered in a biased or unequal manner; 4) Others not of Charging Party's group scored higher benefiting from the unequal or biased manner of the test; and 5) Respondent cannot explain the differences in treatment or Respondent's explanation is in fact pretext for discrimination.

TESTING (T3, A1)
In order to establish an adverse impact violation on a Class Testing issue, the evidence must show in the following order of proof: 1) Charging Party belongs to a protected group; 2) Charging Party participated in an employment related testing process; 3) Charging Party failed or scored poorly ; 4) Statistical analysis of the final scores of the test show an adverse impact on Charging Party's group; and 5) Respondent cannot establish that the test is valid under the "Uniform Guidelines for Employee Selection".

TRAINING (T4)
In order to establish a violation on a Training issue, the evidence must show in the following order of proof: 1) Charging Party is a member of a protected group; 2) Charging Party was qualified for and applied for or sought admittance to a training course or program; 3) Others similarly situated but not of Charging Party's group were admitted to training; and 4) Respondent cannot explain the difference in treatment or Respondent's explanation is in fact pretext for discrimination.

UNION REPRESENTATION (U1)
In order to establish a violation on a Union Representation issue, the evidence must show in the following order of proof: 1) Charging Party belongs to a protected group; 2) Charging Party is a member or was otherwise entitled to representation; 3) Charging Party sought the assistance of the Union to represent Charging Party's interests in a grievance or a dispute; 4) The Union did not represent Charging Party in a diligent fashion; 5) Others similarly situated but not of Charging Party's group have been or are being represented in a diligent fashion; and 6) The Union cannot explain the difference in treatment or its explanation is in fact pretext for discrimination.

WAGES (W1)
In order to establish a violation on a Wage issue, the evidence must show in the following order of proof: 1) Charging Party belongs to a protected group; 2) Charging Party was paid less than others similarly situated but not of Charging Party's group; 3) The positions involved required substantially equal skill, effort and responsibility; and 4) Respondent cannot explain the difference in treatment or Respondent's explanation is in fact pretext for discrimination.

McDONNELL DOUGLAS CORP. v. GREEN

No. 72-490

SUPREME COURT OF THE UNITED STATES

411 U.S. 792; 93 S. Ct. 1817; 36 L. Ed. 2d 668; 1973 U.S. LEXIS 154; 5 Fair Empl. Prac. Cas. (BNA) 965; 5 Empl. Prac. Dec. (CCH) P8607

March 28, 1973, Argued
May 14, 1973, Decided

PRIOR HISTORY: CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

DISPOSITION: *463 F.2d 337*, vacated and remanded.

SUMMARY:

After the plaintiff, a Negro who had been employed by the defendant as a mechanic, was laid off in the course of a general reduction in the defendant's work force, the plaintiff participated in a protest against alleged racial discrimination by the defendant in its employment practices. The protest included a "stall-in" whereby the plaintiff and others stopped their cars along roads leading to the defendant's plant, so as to block access to the plant during the morning rush hour. When the defendant subsequently advertised for mechanics, the plaintiff applied for reemployment, but the defendant rejected the plaintiff on the asserted ground of his participation in the "stall-in." The plaintiff then filed a complaint with the Equal Employment Opportunity Commission, claiming that the defendant had violated 703(a)(1) of the Civil Rights Act of 1964 by refusing to rehire him because of his race, and that the defendant had violated 704(a) of the Act by refusing to rehire him because of his activities in protesting against racial discrimination. The Commission made no finding on the plaintiff's 703(a)(1) claim, but found reasonable cause to believe that the defendant had violated 704(a). After the Commission unsuccessfully attempted conciliation, the plaintiff asserted his 703(a)(1) and 704(a) claims in the United States District Court for the Eastern District of Missouri. The District Court dismissed the 703(a)(1) claim (*299 F Supp 1100*), on the ground that the Commission had failed to make a determination of reasonable cause to believe that the defendant had violated 703(a)(1). After a trial, the District Court dismissed the 704(a) claim with prejudice (*318 F Supp 846*), on the ground that the defendant's refusal to rehire the plaintiff was based on the plaintiff's conduct during the "stall-in," which conduct was illegal and was unprotected by 704(a). The Court of Appeals for the Eighth Circuit affirmed the dismissal of the 704(a) claim, but the Court of Appeals held that a prior Commission determination of reasonable cause was not a jurisdictional prerequisite to raising a 703(a)(1) claim in federal court, and the Court of Appeals reversed the dismissal of the 703(a)(1) claim and set forth standards as to the parties' burden of proof, upon remand, with respect to the 703(a)(1) claim (*463 F2d 337*).

On certiorari, the United States Supreme Court remanded the case to the District Court. In an opinion by Powell, J., expressing the unanimous views of the court, it was held that a Commission finding of reasonable cause was not a jurisdictional prerequisite to a 703(a)(1) suit, and that on retrial the plaintiff must be afforded a fair opportunity to demonstrate, in connection with his 703(a)(1) claim, that the defendant's assigned reason for refusing to reemploy the plaintiff was pretextual or discriminatory in its application; and the court set forth standards somewhat different from those of the Court of Appeals with respect to the parties' burden of proof.

LAWYERS' EDITION HEADNOTES:

[***LEdHN1]

CIVIL RIGHTS §12.5

jurisdiction -- discriminatory employment practices --

Headnote:[1A][1B]

A person alleging that an employer has discriminated against him because of his race, in violation of 703(a)(1) of the Civil Rights Act of 1964 (*42 USCS 2000e-2(a)(1)*), which prohibits discriminatory employment practices, satisfies the jurisdictional prerequisites to a federal action (1) by filing timely charges of employment discrimination with the Equal Employment Opportunity Commission, and (2) by receiving and acting upon the Commission's statutory notice of the right to sue; a Commission finding of reasonable cause to believe that the employer has violated 703(a)(1) is not a jurisdictional prerequisite to a 703(a)(1) suit, and it is error for a Federal District Court to dismiss a 703(a)(1) claim on the ground of the absence of such a finding.

[***LEdHN2]

CIVIL RIGHTS §12.5

jurisdiction -- equal employment opportunities --

Headnote:[2]

Under Title VII of the Civil Rights Act of 1964 (*42 USCS 2000e et seq.*), which requires equal employment opportunities, a person's right to sue is not limited to those charges as to which the Equal Employment Opportunity Commission has made findings of reasonable cause to believe that the Act has been violated; thus, absence of a Commission finding of reasonable cause does not bar suit under an appropriate section of Title VII.

[***LEdHN3]

APPEAL AND ERROR §1536

CIVIL RIGHTS §7.5

CIVIL RIGHTS §12.5

discriminatory employment practices -- harmless error --

Headnote:[3]

A Federal District Court's erroneous dismissal of an action brought under 703(a)(1) of the Civil Rights Act of 1964 (*42 USCS 2000e-2 (a)(1)*), which prohibits discriminatory employment practices, does not constitute harmless error, where (1) it is not clear that the District Court's findings against the plaintiff on his claim under 704(a) of the Act (*42 USCS 2000e-3(a)*), which prohibits employers' retaliation against protests against discrimination, involved the identical issues raised by his claim under 703 (a)(1), since 704(a) relates solely to discrimination against an applicant or employee on account of his participation in legitimate civil rights activities or protests, while 703 (a)(1) deals with the broader and centrally important question under the Act of whether, for any reason, a racially discriminatory employment decision has been made, and (2) the District Court did not discuss the plaintiff's 703(a)(1) claim in its opinion and denied requests for discovery of statistical materials which may have been relevant to the 703(a)(1) claim; the plaintiff should have been accorded the right to prepare his case and to plan the strategy of trial with the knowledge that the 703(a)(1) cause of action was properly before the District Court.

[***LEdHN4]

CIVIL RIGHTS §7.5

equal employment opportunities -- purpose of statute --

Headnote:[4]

The purposes of Congress in enacting Title VII of the Civil Rights Act of 1964 (*42 USCS 2000e et seq.*), which requires equal employment opportunities, are to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens.

[***LEdHN5]

CIVIL RIGHTS §7.5

equal employment opportunities -- purpose of statute --

Headnote:[5]

Title VII of the Civil Rights Act of 1964 (*42 USCS 2000e et seq.*), which requires equal employment opportunities, is not intended by Congress to guarantee a job to every person regardless of qualifications.

[***LEdHN6]

CIVIL RIGHTS §7.5

discriminatory employment practices -- nature of statutory proscription --

Headnote:[6]

Title VII of the Civil Rights Act of 1964 (*42 USCS 2000e et seq.*), which requires equal employment opportunities, does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group; discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed; and what is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to dis-

criminate on the basis of racial or other impermissible classification.

[***LEdHN7]

CIVIL RIGHTS §7.5

discriminatory employment practices -- statutory proscription --

Headnote:[7]

Under Title VII of the Civil Rights Act of 1964 (*42 USCS 2000e et seq.*), which requires equal employment opportunities, the broad, overriding interest, shared by employer, employee, and consumer, is efficient and trustworthy workmanship assured through fair and racially neutral employment and personnel decisions; Title VII tolerates no racial discrimination, subtle or otherwise, in the implementation of such decisions.

[***LEdHN8]

EVIDENCE §383

burden of proof -- discriminatory employment practices --

Headnote:[8]

In a trial under Title VII of the Civil Rights Act of 1964 (*42 USCS 2000e et seq.*), which requires equal employment opportunities, the complainant must carry the initial burden of establishing a prima facie case of racial discrimination; this may be done by showing (1) that he belongs to a racial minority; (2) that he applied and was qualified for a job for which the employer was seeking applicants; (3) that despite his qualifications, he was rejected; and (4) that after his rejection, the position remained open and the employer continued to seek applicants from persons of the complainant's qualifications.

[***LEdHN9]

EVIDENCE §383

prima facie proof -- discriminatory employment practices --

Headnote:[9A][9B]

In an action alleging that the defendant's refusal to rehire the plaintiff as a mechanic violated 703(a)(1) of the Civil Rights Act of 1964 (*42 USCS 2000e-2(a)(1)*), which prohibits discriminatory employment practices, the plaintiff, a Negro who has been a long-time activist in the civil rights movement, proves a prima facie case, where (1) the evidence shows that the defendant sought to employ mechanics and continued to do so after rejecting the plaintiff's application for reemployment, and (2) the defendant does not dispute the plaintiff's qualifications and acknowledges that the plaintiff's past work performance as a mechanic in the defendant's employ was satisfactory.

[***LEdHN10]

EVIDENCE §383

burden of proof -- equal employment opportunities --

Headnote:[10]

Under Title VII of the Civil Rights Act of 1964 (*42 USCS 2000e et seq.*), which requires equal employment opportunities, employment tests and qualifications must be shown to bear a demonstrable relationship to successful performance of the job for which they are used, where employers have instituted such tests and qualifications with an exclusionary effect on minority applicants.

[***LEdHN11]

EVIDENCE §90

shifting of burden of proof --

Headnote:[11]

Once the plaintiff proves a prima facie case in an action alleging that the defendant's refusal to rehire the plaintiff violated 703(a)(1) of the Civil Rights Act of 1964 (*42 USCS 2000e-2(a)(1)*), which prohibits discriminatory employment practices, the burden then shifts to the defendant to articulate some legitimate, nondiscriminatory reason for the plaintiff's rejection.

[***LEdHN12]

EVIDENCE §904.3

sufficiency of evidence -- discriminatory employment practices --

Headnote:[12A][12B]

In an action alleging that the defendant's refusal to rehire the plaintiff, a Negro, violated 703(a)(1) of the Civil Rights Act of 1964 (*42 USCS 2000e-2(a)(1)*), which prohibits discriminatory employment practices, the defendant's assignment of the plaintiff's participation in unlawful conduct against the defendant as the cause of the plaintiff's rejection suffices to discharge the defendant's burden of proof and to meet the plaintiff's prima facie case of discrimination, where the plaintiff admittedly had taken part in a carefully planned "stall-in," designed to tie up access to the defendant's plant during the morning rush hour.

[***LEdHN13]

CIVIL RIGHTS §7.5

equal employment opportunities --

Headnote:[13]

Nothing in Title VII of the Civil Rights Act of 1964 (*42 USCS 2000e et seq.*), which requires equal employment opportunities, compels an employer to absolve and rehire one who has engaged in deliberate, unlawful activity which was directed specifically against the employer.

[***LEdHN14]

CIVIL RIGHTS §7.5

discriminatory employment practices --

Headnote:[14]

Title VII of the Civil Rights Act of 1964 (*42 USCS 2000e et seq.*), which requires equal employment opportunities, does not permit an employer to use an employee's deliberate, unlawful activity against the employer as a pretext for the sort of discrimination prohibited by 703(a)(1) of the Act (*42 USCS 2000e-2(a)(1)*), which prohibits discriminatory employment practices.

[***LEdHN15]

CIVIL RIGHTS §12.5

EVIDENCE §787

refusal to rehire -- racially discriminatory motive -- relevancy --

Headnote:[15A][15B]

In an action alleging that the defendant's refusal to rehire the plaintiff, a Negro, violated 703(a)(1) of the Civil Rights Act of 1964 (*42 USCS 2000e-2(a)(1)*), which prohibits discriminatory employment practices, the plaintiff is entitled to a full and fair opportunity to demonstrate by competent evidence that the stated, presumptively valid reason for the plaintiff's rejection--his participation in a "stall-in" whereby the plaintiff and others stopped their cars along roads leading to the defendant's plant, so as to block access to the plant during the morning rush hour--was in fact a pretextual coverup for a racially discriminatory decision; especially relevant to such a showing would be evidence that white employees involved in acts against the defendant of comparable seriousness to the "stall-in" were nevertheless retained or rehired; other evidence which may be relevant to any showing of pretextuality includes facts as to the defendant's treatment of the plaintiff during the plaintiff's prior term of employment, the defendant's reaction, if any, to the plaintiff's legitimate civil rights activities, and the defendant's general policy and practice with respect to minority employment; and although the trial court may determine, after reasonable discovery, that the racial composition of the defendant's labor force is itself reflective of restrictive or exclusionary practices, such general determinations may not be in and of themselves controlling as to an individualized hiring decision, particularly in the presence of an otherwise justifiable reason for refusing to rehire.

[***LEdHN16]

CIVIL RIGHTS §7.5

equal employment opportunities --

Headnote:[16]

Under Title VII of the Civil Rights Act of 1964 (*42 USCS 2000e et seq.*), which requires equal employment opportunities, an employer may justifiably refuse to rehire one who has engaged in unlawful, disruptive acts against it, but only if this criterion is applied alike to members of all races.

[***LEdHN17]

CIVIL RIGHTS §7.5

discriminatory employment practices --

Headnote:[17]

In the absence of proof of pretextual or discriminatory application of an employer's asserted reason for refusal to rehire, the employer's asserted refusal to rehire a Negro former employee on the ground of his unlawful conduct against the employer is not the kind of artificial, arbitrary, and unnecessary barrier to employment which Congress intended to remove under Title VII of the Civil Rights Act of 1964 (*42 USCS 2000e et seq.*), which requires equal employment opportunities.

[***LEdHN18]

CIVIL RIGHTS §7.5

refusal to rehire -- business justification --

Headnote:[18A][18B]

In view of the seriousness and harmful potential of a Negro former employee's participation in a "stall-in" whereby cars were stopped along roads leading to an employer's plant so as to block access to the plant during the morning rush hour, and in view of the accompanying inconvenience to other employees, the employer's subsequent refusal to rehire the former employee cannot be said to have lacked a rational and neutral business justification.

[***LEdHN19]

CIVIL RIGHTS §7.5

discriminatory employment practices. --

Headnote:[19]

If a Federal District judge finds that an employer's assigned, presumptively valid reason for refusing to reemploy a Negro former employee was pretextual or discriminatory in its application, the District judge must order a prompt and appropriate remedy, but in the absence of such a finding, the employer's refusal to rehire must stand.

SYLLABUS

Respondent, a black civil rights activist, engaged in disruptive and illegal activity against petitioner as part of his protest that his discharge as an employee of petitioner's and the firm's general hiring practices were racially motivated. When petitioner, who subsequently advertised for qualified personnel, rejected respondent's reemployment application on the ground of the illegal conduct, respondent filed a complaint with the Equal Employment Opportunity Commission (EEOC) charging violation of Title VII of the Civil Rights Act of 1964. The EEOC found that there was reasonable cause to believe that petitioner's rejection of respondent violated § 704 (a) of the Act, which forbids discrimination against applicants or employees for attempting to protest or correct allegedly discriminatory employment conditions, but made no finding on respondent's allegation that petitioner had also violated § 703 (a)(1), which prohibits discrimination in any employment decision. Following unsuccessful EEOC conciliation efforts, respondent brought suit in the District Court, which ruled that respondent's illegal activity was not protected by § 704 (a) and dismissed the § 703 (a)(1) claim because the EEOC had made no finding with respect thereto. The Court of Appeals affirmed the § 704 (a) ruling, but reversed with respect to § 703 (a)(1), holding that an EEOC determination of reasonable cause was not a jurisdictional prerequisite to claiming a violation of that provision in federal court. *Held*:

1. A complainant's right to bring suit under the Civil Rights Act of 1964 is not confined to charges as to which the EEOC has made a reasonable-cause finding, and the District Court's error in holding to the contrary was not harmless since the issues raised with respect to § 703 (a)(1) were not identical to those with respect to § 704 (a) and the dismissal of the former charge may have prejudiced respondent's efforts at trial. Pp. 798-800.

2. In a private, non-class-action complaint under Title VII charging racial employment discrimination, the complainant has the burden of establishing a prima facie case, which he can satisfy by showing that (i) he belongs to a racial minority; (ii) he applied and was qualified for a job the employer was trying to fill; (iii) though qualified, he was rejected; and (iv) thereafter the employer continued to seek applicants with complainant's qualifications. P. 802.

3. Here, the Court of Appeals, though correctly holding that respondent proved a prima facie case, erred in holding that petitioner had not discharged its burden of proof in rebuttal by showing that its stated reason for the rehiring refusal was based on respondent's illegal activity. But on remand respondent must be afforded a fair opportunity of proving that petitioner's stated reason was just a pretext for a racially discriminatory decision, such as by showing that whites engaging in similar illegal activity were retained or hired by petitioner. Other evidence that may be relevant, depending on the circumstances, could include facts that petitioner had discriminated against respondent when he was an employee or followed a discriminatory policy toward minority employees. Pp. 802-805.

COUNSEL: Veryl L. Riddle argued the cause for petitioner. With him on the briefs were R. H. McRoberts and Thomas C. Walsh.

Louis Gilden argued the cause for respondent. With him on the brief were Jack Greenberg, James M. Nabrit III, William L. Robinson, and Albert Rosenthal. *

* Milton A. Smith and Lawrence M. Cohen filed a brief for the Chamber of Commerce of the United States as amicus curiae urging reversal.

Solicitor General Griswold, Assistant Attorney General Pottinger, Deputy Solicitor General Wallace, Keith A. Jones, David L. Rose, Julia P. Cooper, and Beatrice Rosenberg filed a brief for the United States as amicus curiae urging affirmance.

JUDGES: Powell, J., delivered the opinion for a unanimous Court.

OPINION BY: POWELL

OPINION

[*793] [***673] [**1820] MR. JUSTICE POWELL delivered the opinion of the Court.

The case before us raises significant questions as to the proper order and nature of proof in actions under Title [*794] VII of the Civil Rights Act of 1964, 78 Stat. 253, *42 U. S. C. § 2000e et seq*

Petitioner, McDonnell Douglas Corp., is an aerospace and aircraft manufacturer headquartered in St.

Louis, Missouri, where it employs over 30,000 people. Respondent, a black citizen of St. Louis, worked for petitioner as a mechanic and laboratory technician from 1956 until August 28, 1964 [1] when he was laid off in the course of a general reduction in petitioner's work force.

> 1 His employment during these years was continuous except for 21 months of service in the military.

Respondent, a long-time activist in the civil rights movement, protested vigorously that his discharge and the general hiring practices of petitioner were racially motivated. [2] As part of this protest, respondent and other members of the Congress on Racial Equality illegally stalled their cars on the main roads leading to petitioner's plant for the purpose of blocking access to it at the time of the morning shift change. The District Judge described the plan for, and respondent's participation in, the "stall-in" as follows:

"Five teams, each consisting of four cars would 'tie up' five main access roads into McDonnell at the time of the morning rush hour. The drivers of the cars were instructed to line up next to each other completely blocking the intersections or roads. The drivers were also instructed to stop their cars, turn off the engines, pull the emergency brake, raise all windows, lock the doors, and remain in their cars until the police arrived. The plan was to have the cars remain in position for one hour.

[*795] "Acting under the 'stall in' plan, plaintiff [respondent in the present action] drove his car onto Brown Road, a McDonnell access road, at approximately 7:00 a. m., at the start of the morning rush hour. Plaintiff was aware of the traffic problems that would result. He stopped his car with the intent to block traffic. The police [**1821] arrived shortly and requested plaintiff to move his car. He refused to move his car voluntarily. Plaintiff's car was towed away by the police, and he was arrested for obstructing traffic. Plaintiff pleaded guilty to the charge of [***674] obstructing traffic and was fined." *318 F.Supp. 846, 849.*

> 2 The Court of Appeals noted that respondent then "filed formal complaints of discrimination with the President's Commission on Civil Rights, the Justice Department, the Department of the Navy, the Defense Department, and the Missouri Commission on Human Rights." *463 F.2d 337, 339 (1972).*

On July 2, 1965, a "lock-in" took place wherein a chain and padlock were placed on the front door of a building to prevent the occupants, certain of petitioner's employees, from leaving. Though respondent apparently knew beforehand of the "lock-in," the full extent of his involvement remains uncertain. [3]

> 3 The "lock-in" occurred during a picketing demonstration by ACTION, a civil rights organization, at the entrance to a downtown office building which housed a part of petitioner's offices and in which certain of petitioner's employees were working at the time. A chain and padlock were placed on the front door of the building to prevent ingress and egress. Although respondent acknowledges that he was chairman of ACTION at the time, that the demonstration was planned and staged by his group, that he participated in and indeed was in charge of the picket line in front of the building, that he was told in advance by a member of ACTION "that he was planning to chain the front door," and that he "approved of" chaining the door, there is no evidence that respondent personally took part in the actual "lock-in," and he was not arrested. App. 132-133.
>
> The Court of Appeals majority, however, found that the record did "not support the trial court's conclusion that Green 'actively cooperated' in chaining the doors of the downtown St. Louis building during the 'lock-in' demonstration." *463 F.2d, at 341.* See also concurring opinion of Judge Lay. *Id., at 345.* Judge Johnsen, in dissent, agreed with the District Court that the "chaining and padlocking [were] carried out as planned, [and that] Green had in fact given it . . . approval and authorization." *Id., at 348.*
>
> In view of respondent's admitted participation in the unlawful "stall-in," we find it unnecessary to resolve the contradictory contentions surrounding this "lock-in."

[*796] Some three weeks following the "lock-in," on July 25, 1965, petitioner publicly advertised for qualified mechanics, respondent's trade, and respondent promptly applied for re-employment. Petitioner turned down respondent, basing its rejection on respondent's participation in the "stall-in" and "lock-in." Shortly thereafter, respondent filed a formal complaint with the Equal Employment Opportunity Commission, claiming that petitioner had refused to rehire him because of his race and persistent involvement in the civil rights movement, in violation of §§ 703 (a)(1) and 704 (a) of the Civil Rights Act of 1964, *42 U. S. C. §§ 2000e-2 (a)(1)* and *2000e-3 (a).* [4] The former section generally prohibits racial discrimination in any employment decision while the latter forbids discrimination against applicants or employees for attempting to protest or correct allegedly discriminatory conditions of employment.

4 Section 703 (a)(1) of the Civil Rights Act of 1964, *42 U. S. C. § 2000e-2 (a)(1)*, in pertinent part provides:

"It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . ."

Section 704 (a) of the Civil Rights Act of 1964, *42 U. S. C. § 2000e-3 (a)*, in pertinent part provides:

"It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this subchapter . . ."

[*797] The Commission made no finding on respondent's allegation of racial bias under § 703 (a)(1), but it did find reasonable cause to believe petitioner [***675] had violated § 704 (a) by refusing to rehire respondent because of his civil rights activity. After the Commission unsuccessfully attempted to conciliate the dispute, it advised respondent in March 1968, of his right to institute a civil action in federal court within 30 days.

On April 15, 1968, respondent brought the present action, claiming initially a violation of § 704 (a) and, in an amended [**1822] complaint, a violation of § 703 (a)(1) as well. [5] The District Court dismissed the latter claim of racial discrimination in petitioner's hiring procedures on the ground that the Commission had failed to make a determination of reasonable cause to believe that a violation of that section had been committed. The District Court also found that petitioner's refusal to rehire respondent was based solely on his participation in the illegal demonstrations and not on his legitimate civil rights activities. The court concluded that nothing in Title VII or § 704 protected "such activity as employed by the plaintiff in the 'stall in' and 'lock in' demonstrations." *318 F.Supp., at 850.*

5 Respondent also contested the legality of his 1964 discharge by petitioner, but both courts held this claim barred by the statute of limitations. Respondent does not challenge those rulings here.

On appeal, the Eighth Circuit affirmed that unlawful protests were not protected activities under § 704 (a), [6] but reversed the dismissal of respondent's § 703 (a)(1) claim relating to racially discriminatory hiring practices, holding that a prior Commission determination of reasonable cause was not a jurisdictional prerequisite to raising a claim under that section in federal court. The court [*798] ordered the case remanded for trial of respondent's claim under § 703 (a)(1).

6 Respondent has not sought review of this issue.

In remanding, the Court of Appeals attempted to set forth standards to govern the consideration of respondent's claim. The majority noted that respondent had established a prima facie case of racial discrimination; that petitioner's refusal to rehire respondent rested on "subjective" criteria which carried little weight in rebutting charges of discrimination; that, though respondent's participation in the unlawful demonstrations might indicate a lack of a responsible attitude toward performing work for that employer, respondent should be given the opportunity to demonstrate that petitioner's reasons for refusing to rehire him were mere pretext. [7] In order to clarify the standards governing the disposition of an action challenging employment discrimination, we granted certiorari, *409 U.S. 1036 (1972).*

7 All references here are to Part V of the revised opinion of the Court of Appeals, 463 F.2d, at 352, which superseded Part V of the court's initial opinion with respect to the order and nature of proof.

I

[***LEdHR1A] [1A] [***LEdHR2] [2]We agree with the Court of Appeals that absence of a Commission finding of reasonable cause cannot bar suit under an appropriate section of Title VII and that the District Judge erred in dismissing respondent's claim of racial discrimination under § 703 (a)(1). Respondent satisfied the jurisdictional prerequisites to a federal action (i) by filing timely charges of employment discrimination with the Commission and (ii) by receiving and acting upon the Commission's statutory [***676] notice of the right to sue, *42 U. S. C. §§ 2000e-5 (a)* and *2000e-5 (e)*. The Act does not restrict a complainant's right to sue to those charges as to which the Commission has made findings of reasonable cause, and we will not engraft on the statute a requirement which may inhibit the review of [*799] claims of employment discrimination in the federal courts. The Commission itself does not consider the absence of a "reasonable cause" determination as providing employer immunity from similar charges in a federal court, *29 CFR § 1601.30*, and the courts of appeal have held that, in view of the large volume of complaints before the Commission and the nonadversary character of many of its proceedings, "court actions under Title VII are de novo proceedings [**1823] and . . . a Commis-

sion 'no reasonable cause' finding does not bar a lawsuit in the case." *Robinson v. Lorillard Corp., 444 F.2d 791, 800 (CA4 1971)*; *Beverly v. Lone Star Lead Construction Corp., 437 F.2d 1136 (CA5 1971)*; *Flowers v. Local 6, Laborers International Union of North America, 431 F.2d 205 (CA7 1970)*; *Fekete v. U.S. Steel Corp., 424 F.2d 331 (CA3 1970)*.

[***LEdHR3] [3]Petitioner argues, as it did below, that respondent sustained no prejudice from the trial court's erroneous ruling because in fact the issue of racial discrimination in the refusal to re-employ "was tried thoroughly" in a trial lasting four days with "at least 80%" of the questions relating to the issue of "race." [8] Petitioner, therefore, requests that the judgment below be vacated and the cause remanded with instructions that the judgment of the District Court be affirmed. [9] We cannot agree that the dismissal of respondent's § 703 (a)(1) claim was harmless error. It is not clear that the District Court's findings as to respondent's § 704 (a) contentions involved the identical issues raised by his claim under § 703 (a)(1). The former section relates solely to discrimination against an applicant or employee on account of his participation in legitimate civil rights activities or protests, while the latter section deals with the broader and centrally [*800] important question under the Act of whether, for any reason, a racially discriminatory employment decision has been made. Moreover, respondent should have been accorded the right to prepare his case and plan the strategy of trial with the knowledge that the § 703 (a)(1) cause of action was properly before the District Court. [10] Accordingly, we remand the case for trial of respondent's claim of racial discrimination consistent with the views set forth below.

8 Tr. of Oral Arg. 11.

9 Brief for Petitioner 40.

10 The trial court did not discuss respondent's § 703 (a)(1) claim in its opinion and denied requests for discovery of statistical materials which may have been relevant to that claim.

II

[***LEdHR4] [4] [***LEdHR5] [5] [***LEdHR6] [6]The critical issue before us concerns the order and allocation of proof in a private, non-class action challenging employment discrimination. The language of Title VII makes plain the purpose of Congress to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens. *Griggs v. Duke Power Co., 401 U.S. 424, 429 (1971)*; [***677] *Castro v. Beecher, 459 F.2d 725 (CA1 1972)*; *Chance v. Board of Examiners, 458 F.2d 1167 (CA2 1972)*; *Quarles v. Philip Morris, Inc., 279 F.Supp. 505 (ED Va. 1968)*. As noted in *Griggs, supra*:

"Congress did not intend by Title VII, however, to guarantee a job to every person regardless of qualifications. In short, the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed. [*801] What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification." *Id., at 430-431*.

[***LEdHR7] [7]There are societal as well as personal interests on both sides of this equation. The broad, overriding interest, shared by employer, employee, and consumer, is efficient and trustworthy workmanship assured through fair and racially neutral employment and personnel decisions. In the implementation of [**1824] such decisions, it is abundantly clear that Title VII tolerates no racial discrimination, subtle or otherwise.

In this case respondent, the complainant below, charges that he was denied employment "because of his involvement in civil rights activities" and "because of his race and color." [11] Petitioner denied discrimination of any kind, asserting that its failure to re-employ respondent was based upon and justified by his participation in the unlawful conduct against it. Thus, the issue at the trial on remand is framed by those opposing factual contentions. The two opinions of the Court of Appeals and the several opinions of the three judges of that court attempted, with a notable lack of harmony, to state the applicable rules as to burden of proof and how this shifts upon the making of a prima facie case. [12] We now address this problem.

11 The respondent initially charged petitioner in his complaint filed April 15, 1968, with discrimination because of his "involvement in civil rights activities." App. 8. In his amended complaint, filed March 20, 1969, plaintiff broadened his charge to include denial of employment because of race in violation of § 703 (a)(1). App. 27.

12 See original opinion of the majority of the panel which heard the case, *463 F.2d, at 338*; the concurring opinion of Judge Lay, *id., at 344*; the first opinion of Judge Johnsen, dissenting in part, *id., at 346*; the revised opinion of the majority, *id., at 352*; and the supplemental dissent of Judge Johnsen, *id., at 353*. A petition for rehearing en banc was denied by an evenly divided Court of Appeals.

[*802] [***LEdHR8] [8] [***LEdHR9A] [9A] [***LEdHR10] [10]The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination. This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications. [13] In the instant case, we [***678] agree with the Court of Appeals that respondent proved a prima facie case. *463 F.2d 337, 353.* Petitioner sought mechanics, respondent's trade, and continued to do so after respondent's rejection. Petitioner, moreover, does not dispute respondent's qualifications [14] and acknowledges that his past work performance in petitioner's employ was "satisfactory." [15]

13 The facts necessarily will vary in Title VII cases, and the specification above of the prima facie proof required from respondent is not necessarily applicable in every respect to differing factual situations.

14 We note that the issue of what may properly be used to test qualifications for employment is not present in this case. Where employers have instituted employment tests and qualifications with an exclusionary effect on minority applicants, such requirements must be "shown to bear a demonstrable relationship to successful performance of the jobs" for which they were used, *Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971). Castro v. Beecher, 459 F.2d 725 (CA1 1972); Chance v. Board of Examiners, 458 F.2d 1167 (CA2 1972).*

15 Tr. of Oral Arg. 3; *463 F.2d, at 353.*

[***LEdHR11] [11]The burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection. We need not attempt in the instant case to detail every matter which fairly could be [*803] recognized as a reasonable basis for a refusal to hire. Here petitioner has assigned respondent's participation in unlawful conduct against it as the cause for his rejection. We think that this suffices to discharge petitioner's burden of proof at this stage and to meet respondent's prima facie case of discrimination.

[***LEdHR12A] [12A] [***LEdHR13] [13]The Court of Appeals intimated, however, that petitioner's stated reason for refusing to rehire respondent was a "subjective" rather than objective criterion which "carr[ies] little weight in rebutting charges of discrimination," *463 F.2d, at 352.* This was among the statements which caused the dissenting judge [**1825] to read the opinion as taking "the position that such unlawful acts as Green committed against McDonnell would not legally entitle McDonnell to refuse to hire him, even though no racial motivation was involved . . . ." *Id., at 355.* Regardless of whether this was the intended import of the opinion, we think the court below seriously underestimated the rebuttal weight to which petitioner's reasons were entitled. Respondent admittedly had taken part in a carefully planned "stall-in," designed to tie up access to and egress from petitioner's plant at a peak traffic hour. [16] Nothing in Title VII compels an employer to absolve and rehire one who has engaged in such deliberate, unlawful activity against it. [17] In upholding, under the National Labor Relations Act, the discharge of employees who had seized and forcibly retained [*804] an employer's factory buildings in an illegal sit-down strike, the Court noted pertinently:

"We are unable to conclude that Congress intended to compel employers to retain persons in their employ regardless of their unlawful conduct, -- to invest those who go on strike with an immunity from discharge for acts of trespass or violence against the employer's property . . . . Apart [***679] from the question of the constitutional validity of an enactment of that sort, it is enough to say that such a legislative intention should be found in some definite and unmistakable expression." *NLRB v. Fansteel Corp., 306 U.S. 240, 255 (1939).*

16 The trial judge noted that no personal injury or property damage resulted from the "stall-in" due "solely to the fact that law enforcement officials had obtained notice in advance of plaintiff's [here respondent's] demonstration and were at the scene to remove plaintiff's car from the highway." *318 F.Supp. 846, 851.*

17 The unlawful activity in this case was directed specifically against petitioner. We need not consider or decide here whether, or under what circumstances, unlawful activity not directed against the particular employer may be a legitimate justification for refusing to hire.

[***LEdHR14] [14] [***LEdHR15A] [15A] [***LEdHR16] [16]Petitioner's reason for rejection thus suffices to meet the prima facie case, but the inquiry must not end here. While Title VII does not, without more, compel rehiring of respondent, neither does it permit petitioner to use respondent's conduct as a pretext for the sort of discrimination prohibited by § 703 (a)(1). On remand, respondent must, as the Court of Appeals recognized, be afforded a fair opportunity to show that

petitioner's stated reason for respondent's rejection was in fact pretext. Especially relevant to such a showing would be evidence that white employees involved in acts against petitioner of comparable seriousness to the "stall-in" were nevertheless retained or rehired. Petitioner may justifiably refuse to rehire one who was engaged in unlawful, disruptive acts against it, but only if this criterion is applied alike to members of all races.

Other evidence that may be relevant to any showing of pretext includes facts as to the petitioner's treatment of respondent during his prior term of employment; petitioner's reaction, if any, to respondent's legitimate civil rights activities; and petitioner's general policy and [*805] practice with respect to minority employment. [18] On the latter point, statistics as to petitioner's employment policy and practice may be helpful to a determination of whether petitioner's refusal to rehire respondent in this case conformed to a general pattern of discrimination against blacks. *Jones v. Lee Way Motor Freight, Inc., 431 F.2d 245* [**1826] *(CA10 1970)*; Blumrosen, Strangers in Paradise: *Griggs* v. *Duke Power Co.*, and the Concept of Employment Discrimination, 71 Mich. L. Rev. 59, 91-94 (1972). [19] In short, on the retrial respondent must be given a full and fair opportunity to demonstrate by competent evidence that the presumptively valid reasons for his rejection were in fact a coverup for a racially discriminatory decision.

18 We are aware that some of the above factors were, indeed, considered by the District Judge in finding under § 704 (a), that "defendant's [here petitioner's] reasons for refusing to rehire the plaintiff were motivated solely and simply by the plaintiff's participation in the 'stall in' and 'lock in' demonstrations." *318 F.Supp., at 850.* We do not intimate that this finding must be overturned after consideration on remand of respondent's § 703 (a)(1) claim. We do, however, insist that respondent under § 703 (a)(1) must be given a full and fair opportunity to demonstrate by competent evidence that whatever the stated reasons for his rejection, the decision was in reality racially premised.

19 The District Court may, for example, determine, after reasonable discovery that "the [racial] composition of defendant's labor force is itself reflective of restrictive or exclusionary practices." See Blumrosen, *supra*, at 92. We caution that such general determinations, while helpful, may not be in and of themselves controlling as to an individualized hiring decision, particularly in the presence of an otherwise justifiable reason for refusing to rehire. See generally *United States v. Bethlehem Steel Corp., 312 F.Supp. 977, 992 (WDNY 1970)*, order modified, *446 F.2d 652 (CA2 1971)*. Blumrosen, *supra*, n. 19, at 93.

[***LEdHR17] [17] [***LEdHR18A] [18A]The court below appeared to rely upon *Griggs v. Duke Power Co., supra*, in which the Court stated: "If an employment practice which operates to exclude Negroes cannot [*806] be shown to be related to job performance, the practice is prohibited." *401 U.S., at 431.* [***680] [20] But *Griggs* differs from the instant case in important respects. It dealt with standardized testing devices which, however neutral on their face, operated to exclude many blacks who were capable of performing effectively in the desired positions. *Griggs* was rightly concerned that childhood deficiencies in the education and background of minority citizens, resulting from forces beyond their control, not be allowed to work a cumulative and invidious burden on such citizens for the remainder of their lives. *Id., at 430.* Respondent, however, appears in different clothing. He had engaged in a seriously disruptive act against the very one from whom he now seeks employment. And petitioner does not seek his exclusion on the basis of a testing device which overstates what is necessary for competent performance, or through some sweeping disqualification of all those with any past record of unlawful behavior, however remote, insubstantial, or unrelated to applicant's personal qualifications as an employee. Petitioner assertedly rejected respondent for unlawful conduct against it and, in the absence of proof of pretext or discriminatory application of such a reason, this cannot be thought the kind of "artificial, arbitrary, and unnecessary barriers to employment" which the Court found to be the intention of Congress to remove. *Id., at 431.* [21]

20 See *463 F.2d, at 352.*

[***LEdHR18B] [18B]

21 It is, of course, a predictive evaluation, resistant to empirical proof, whether "an applicant's past participation in unlawful conduct directed at his prospective employer might indicate the applicant's lack of a responsible attitude toward performing work for that employer." *463 F.2d, at 353.* But in this case, given the seriousness and harmful potential of respondent's participation in the "stall-in" and the accompanying inconvenience to other employees, it cannot be said that petitioner's refusal to employ lacked a rational and neutral business justification. As the Court has noted elsewhere:

"Past conduct may well relate to present fitness; past loyalty may have a reasonable relation-

ship to present and future trust." *Garner v. Los Angeles Board, 341 U.S. 716, 720 (1951).*

[*807] III

[***LEdHR1B] [1B] [***LEdHR9B] [9B] [***LEdHR12B] [12B] [***LEdHR15B] [15B] [***LEdHR19] [19]In sum, respondent should have been allowed to pursue his claim under § 703 (a)(1). If the evidence on retrial is substantially in accord with that before us in this case, we think that respondent carried his burden of establishing a prima facie case of racial discrimination and that petitioner successfully rebutted that case. But this does not end the matter. On retrial, respondent must be afforded a fair opportunity to demonstrate [**1827] that petitioner's assigned reason for refusing to re-employ was a pretext or discriminatory in its application. If the District Judge so finds, he must order a prompt and appropriate remedy. In the absence of such a finding, petitioner's refusal to rehire must stand.

The judgment is vacated and the cause is hereby remanded to the District Court for further proceedings consistent with this opinion.

So ordered.

REFERENCES

15 Am Jur 2d, Civil Rights 58.3

5 Am Jur Pl n Pr Forms (Rev ed), Civil Rights, Forms 61-63; 16 Am Jur Pl & Pr Forms (Rev ed), Labor and Labor Relations, Forms 323-337

US L Ed Digest, Civil Rights 7.5, 12.5; Evidence 90, 383, 787, 904.3

ALR Digests, Civil Rights 1

L Ed Index to Anno, Labor and Employment

ALR Quick Index, Discrimination; Fair Employment Practices

Federal Quick Index, Civil Rights; Fair Employment Practices

Annotation References:

Racial discrimination in labor and employment. *28 L Ed 2d 928.*

GRIGGS ET AL. v. DUKE POWER CO.

No. 124

SUPREME COURT OF THE UNITED STATES

401 U.S. 424; 91 S. Ct. 849; 28 L. Ed. 2d 158; 1971 U.S. LEXIS 134; 3 Fair Empl. Prac. Cas. (BNA) 175; 3 Empl. Prac. Dec. (CCH) P8137

December 14, 1970, Argued
March 8, 1971, Decided

PRIOR HISTORY: CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

DISPOSITION: *420 F.2d 1225*, reversed in part.

SUMMARY:

Negro employees of a power company brought a class action against their employer in the United States District Court for the Middle District of North Carolina, alleging that the employer violated the Civil Rights Act of 1964 by requiring a high school diploma and a satisfactory intelligence test score for certain jobs previously limited to white employees, so as to preserve the effects of the employer's past racial discrimination. The District Court dismissed their complaint (*292 F Supp 243*). The United States Court of Appeals for the Fourth Circuit reversed the District Court's holding that residual discrimination arising from past employment practices was insulated from remedial action, but it affirmed the District Court's holding that absent a discriminatory purpose, the diploma and test requirements were proper (*420 F2d 1225*).

On certiorari, the Supreme Court of the United States reversed. In an opinion by Burger, Ch. J., expressing the unanimous view of the court, it was held that the Civil Rights Act prohibits an employer from requiring a high school education or passing of a standardized general intelligence test as a condition of employment in or transfer to jobs when (1) neither standard is shown to be significantly related to successful job performance, (2) both requirements operate to disqualify Negroes at a substantially higher rate than white applicants, and (3) the jobs in question formerly had been filled only by white employees as part of a longstanding practice of giving preference to whites.

Brennan, J., did not participate.

LAWYERS' EDITION HEADNOTES:

[***LEdHN1]

CIVIL RIGHTS §7.5

employment -- education -- ability test --

Headnote:[1]

Under 703(a)(2) of the Civil Rights Act of 1964 (*42 USC 2000e- 2 (a)(2)*), which forbids any employer to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his employee status, because of race, color, religion, sex, or national origin, even as modified by 703(h) of the Act (*42 USC 2000e-2(h)*), which permits an employer to give and to act upon the results of any professionally developed ability test provided such test, its administration, or action upon the results, is not designed, intended, or used to discriminate because of race, color, religion, sex, or national origin, an employer is prohibited from requiring a high school education or passing of a standardized general intelligence test as a condition of employment in or transfer to jobs when (1) neither standard is shown to be significantly related to successful job performance, (2) both requirements operate to disqualify Negroes at a substantially higher rate than white applicants, and (3) the jobs in question formerly had been filled only by white employees as part of a longstanding practice of giving preference to whites.

[***LEdHN2]

CIVIL RIGHTS §7.5

Civil Rights Act -- purpose --

Headnote:[2]

The congressional objective in enacting Title VII of the Civil Rights Act of 1964 (*42 USC 2000e--2000e-15*), which requires equal employment opportunities, was to achieve equality of employment opportunities and remove barriers which operated in the past to favor an identifiable group of white employees over other employees.

[***LEdHN3]

CIVIL RIGHTS §7.5

employment -- freezing discriminatory status quo --

Headnote:[3]

Under Title VII of the Civil Rights Act of 1964 (*42 USC 2000e--2000e-15*)--which requires equal employment opportunities, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to freeze the status quo of prior discriminatory practices.

[***LEdHN4]

CIVIL RIGHTS §7.5

Civil Rights Act -- purpose --

Headnote:[4]

In enacting Title VII of the Civil Rights Act of 1964 (*42 USC 2000e--2000e-15*), which requires equal employment opportunities, Congress did not intend to guarantee a job to every person regardless of qualifiations.

[***LEdHN5]

CIVIL RIGHTS §7.5

employment -- past discrimination --

Headnote:[5]

Title VII of the Civil Rights Act of 1964 (42 USC 2000--2000e- 15) which requires equal employment opportunities, does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group, but only proscribes discriminatory preference for any group, minority or majority; what is required is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.

[***LEdHN6]

CIVIL RIGHTS §7.5

employment -- discrimination --

Headnote:[6]

Title VII of the Civil Rights Act of 1964 (*42 USC 2000e--2000e-* 15), which requires equal employment opportunities, proscribes not only overt discrimination but also practices which are fair in form but discriminatory in operation.

[***LEdHN7]

CIVIL RIGHTS §7.5

employment practices -- business necessity --

Headnote:[7]

Business necessity is the touchstone of validity of employment practices under Title VII of the Civil Rights Act of 1964 (*42 USC 2000e--2000e-15*), which requires equal employment opportunities; if an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.

[***LEdHN8]

CIVIL RIGHTS §7.5

employment -- intent --

Headnote:[8]

Under Title VII of the Civil Rights Act of 1964 (*42 USC 2000e--2000e-15*), which requires equal employment opportunities, good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as "built-in headwinds" for minority groups and are unrelated to measuring job capability.

[***LEdHN9]

EVIDENCE §383

burden of proof -- job requirement --

Headnote:[9]

Under Title VII of the Civil Rights Act of 1964 (*42 USC 2000e--2000e-15*), which requires equal employment opportunities, the employer has the burden of showing that any given requirement has a manifest relationship to the employment in question.

[***LEdHN10]

CIVIL RIGHTS §4.4

JUDGES: Burger, C. J. , delivered the opinion of the Court, in which all members joined except Brennan, J., who took no part in the consideration or decision of the case.

OPINION BY: BURGER

OPINION

[*425] [***161] [**851] MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

[***LEdHR1] [1]We granted the writ in this case to resolve the question whether an employer is prohibited by the Civil Rights Act of 1964, Title VII, from requiring a high school education [*426] or passing of a standardized general intelligence test as a condition of employment in or transfer to jobs when (a) neither standard is shown to be significantly related to successful job performance, (b) both requirements operate to disqualify Negroes at a substantially higher rate than white applicants, and (c) the jobs in question formerly had been filled only by white employees as part of a longstanding practice of giving preference to whites. [1]

1 The Act provides:

"Sec. 703. (a) It shall be an unlawful employment practice for an employer --

. . . .

"(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

. . . .

"(h) Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer . . . to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. . . ." 78 Stat. 255, *42 U. S. C. § 2000e-2*.

Congress provided, in Title VII of the Civil Rights Act of 1964, for class actions for enforcement of provisions of the Act and this proceeding was brought by a group of incumbent Negro employees against Duke Power Company. All the petitioners are employed at the Company's Dan River Steam Station, a power generating facility located at Draper, North Carolina. At the time this action was instituted, the Company had 95 employees at the Dan River Station, 14 of whom were Negroes; 13 of these are petitioners here.

The District Court found that prior to July 2, 1965, the effective date of the Civil Rights Act of 1964, the [*427] Company openly discriminated on the basis of race in the hiring and assigning of employees at its Dan River plant. The plant was organized into five operating departments: (1) Labor, (2) Coal Handling, (3) Operations, (4) Maintenance, and (5) Laboratory and Test. Negroes were employed only in the Labor Department where the highest paying jobs paid less than the lowest paying jobs in the other four "operating" [***162] departments in which only whites were employed. [2] Promotions were normally made within each department on the basis of job seniority. Transferees into a department usually began in the lowest position.

2 A Negro was first assigned to a job in an operating department in August 1966, five months after charges had been filed with the Equal Employment Opportunity Commission. The employee, a high school graduate who had begun in the Labor Department in 1953, was promoted to a job in the Coal Handling Department.

In 1955 the Company instituted a policy of requiring a high school education for initial assignment to any department except Labor, and for transfer from the Coal Handling to any "inside" department (Operations, Maintenance, or Laboratory). When the Company abandoned its policy of restricting Negroes to the Labor Department in 1965, completion of high school also was made a prerequisite to transfer from Labor to any other department. From the time the high school requirement was instituted to the time of trial, however, white employees hired before the time of the high school education requirement continued to perform satisfactorily and achieve promotions in the "operating" [**852] departments. Findings on this score are not challenged.

The Company added a further requirement for new employees on July 2, 1965, the date on which Title VII became effective. To qualify for placement in any but the Labor Department it became necessary to register satisfactory scores on two professionally prepared aptitude [*428] tests, as well as to have a high school education. Completion of high school alone continued to render employees eligible for transfer to the four desirable departments from which Negroes had been excluded if the incumbent had been employed prior to the time of the new requirement. In September 1965 the Company began to permit incumbent employees who lacked a high school education to qualify for transfer from Labor or Coal Handling to an "inside" job by passing two tests -- the Wonderlic Personnel Test, which purports to measure

general intelligence, and the Bennett Mechanical Comprehension Test. Neither was directed or intended to measure the ability to learn to perform a particular job or category of jobs. The requisite scores used for both initial hiring and transfer approximated the national median for high school graduates. [1]

3 The test standards are thus more stringent than the high school requirement, since they would screen out approximately half of all high school graduates.

The District Court had found that while the Company previously followed a policy of overt racial discrimination in a period prior to the Act, such conduct had ceased. The District Court also concluded that Title VII was intended to be prospective only and, consequently, the impact of prior inequities was beyond the reach of corrective action authorized by the Act.

The Court of Appeals was confronted with a question of first impression, as are we, concerning the meaning of Title VII. After careful analysis a majority of that court concluded that a subjective test of the employer's intent should govern, particularly in a close case, and that in this case there was no showing of a discriminatory purpose in the adoption of the diploma and test requirements. On this basis, the [***163] Court of Appeals concluded there was no violation of the Act.

[*429] The Court of Appeals reversed the District Court in part, rejecting the holding that residual discrimination arising from prior employment practices was insulated from remedial action. [4] The Court of Appeals noted, however, that the District Court was correct in its conclusion that there was no showing of a racial purpose or invidious intent in the adoption of the high school diploma requirement or general intelligence test and that these standards had been applied fairly to whites and Negroes alike. It held that, in the absence of a discriminatory purpose, use of such requirements was permitted by the Act. In so doing, the Court of Appeals rejected the claim that because these two requirements operated to render ineligible a markedly disproportionate number of Negroes, they were unlawful under Title VII unless shown to be job related. [5] We [**853] granted the writ on these claims. *399 U.S. 926.*

4 The Court of Appeals ruled that Negroes employed in the Labor Department at a time when there was no high school or test requirement for entrance into the higher paying departments could not now be made subject to those requirements, since whites hired contemporaneously into those departments were never subject to them. The Court of Appeals also required that the seniority rights of those Negroes be measured on a plantwide, rather than a departmental, basis. However, the Court of Appeals denied relief to the Negro employees without a high school education or its equivalent who were hired into the Labor Department after institution of the educational requirement.

5 One member of that court disagreed with this aspect of the decision, maintaining, as do the petitioners in this Court, that Title VII prohibits the use of employment criteria that operate in a racially exclusionary fashion and do not measure skills or abilities necessary to performance of the jobs for which those criteria are used.

[***LEdHR2] [2] [***LEdHR3] [3]The objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and remove [*430] barriers that have operated in the past to favor an identifiable group of white employees over other employees. Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to "freeze" the status quo of prior discriminatory employment practices.

[***LEdHR4] [4] [***LEdHR5] [5]The Court of Appeals' opinion, and the partial dissent, agreed that, on the record in the present case, "whites register far better on the Company's alternative requirements" than Negroes. [6] *420 F.2d 1225, 1239 n. 6.* This consequence would appear to be directly traceable to race. Basic intelligence must have the means of articulation to manifest itself fairly in a testing process. Because they are Negroes, petitioners have long received inferior education in segregated schools and this Court expressly recognized these differences in *Gaston County v. United States, 395 U.S. 285* [***164] *(1969)*. There, because of the inferior education received by Negroes in North Carolina, this Court barred the institution of a literacy test for voter registration on the ground that the test would abridge the right to vote indirectly on account of race. Congress did not intend by Title VII, however, to guarantee a job to every person regardless of qualifications. In short, the Act does not command that any [*431] person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed. What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.

6 In North Carolina, 1960 census statistics show that, while 34% of white males had completed

high school, only 12% of Negro males had done so. U.S. Bureau of the Census, U.S. Census of Population: 1960, Vol. 1, Characteristics of the Population, pt. 35, Table 47.

Similarly, with respect to standardized tests, the EEOC in one case found that use of a battery of tests, including the Wonderlic and Bennett tests used by the Company in the instant case, resulted in 58% of whites passing the tests, as compared with only 6% of the blacks. Decision of EEOC, CCH Empl. Prac. Guide, para. 17,304.53 (Dec. 2, 1966). See also Decision of EEOC 70-552, CCH Empl. Prac. Guide, para. 6139 (Feb. 19, 1970).

[***LEdHR6] [6] [***LEdHR7] [7]Congress has now provided that tests or criteria for employment or promotion may not provide equality of opportunity merely in the sense of the fabled offer of milk to the stork and the fox. On the contrary, Congress has now required that the posture and condition of the job-seeker be taken into account. It has -- to resort again to the fable -- provided that the vessel in which the milk is proffered be one all seekers can use. The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.

On the record before us, neither the high school completion requirement nor the general intelligence test is shown to bear a demonstrable relationship to successful performance of the jobs for which it was used. Both were adopted, as the Court of Appeals noted, without meaningful study of their relationship to job-performance ability. Rather, a vice president of the Company testified, the requirements were instituted on the Company's judgment that they generally would improve the overall quality of the work force.

[**854] The evidence, however, shows that employees who have not completed high school or taken the tests have continued to perform satisfactorily and make progress in departments for which the high school and test criteria [*432] are now used. [7] The promotion record of present employees who would not be able to meet the new criteria thus suggests the possibility that the requirements may not be needed even for the limited purpose of preserving the avowed policy of advancement within the Company. In the context of this case, it is unnecessary to reach the question whether testing requirements that take into account capability for the next succeeding position or related future promotion might be utilized upon a showing that such long-range requirements fulfill a genuine business need. In the present case the Company has made no such showing.

7 For example, between July 2, 1965, and November 14, 1966, the percentage of white employees who were promoted but who were not high school graduates was nearly identical to the percentage of nongraduates in the entire white work force

[***LEdHR8] [8]The [***165] Court of Appeals held that the Company had adopted the diploma and test requirements without any "intention to discriminate against Negro employees." *420 F.2d, at 1232*. We do not suggest that either the District Court or the Court of Appeals erred in examining the employer's intent; but good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as "built-in headwinds" for minority groups and are unrelated to measuring job capability.

[***LEdHR9] [9]The Company's lack of discriminatory intent is suggested by special efforts to help the undereducated employees through Company financing of two-thirds the cost of tuition for high school training. But Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation. More than that, Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question.

[*433] The facts of this case demonstrate the inadequacy of broad and general testing devices as well as the infirmity of using diplomas or degrees as fixed measures of capability. History is filled with examples of men and women who rendered highly effective performance without the conventional badges of accomplishment in terms of certificates, diplomas, or degrees. Diplomas and tests are useful servants, but Congress has mandated the commonsense proposition that they are not to become masters of reality.

The Company contends that its general intelligence tests are specifically permitted by § 703 (h) of the Act. [8] That section authorizes the use of "any professionally developed ability test" that is not "designed, intended *or used* to discriminate because of race . . . ." (Emphasis added.)

8 Section 703 (h) applies only to tests. It has no applicability to the high school diploma requirement.

[***LEdHR10] [10]The Equal Employment Opportunity Commission, having enforcement responsibility, has issued guidelines interpreting § 703 (h) to permit only the use of job-related tests. [9] The administrative

[***LEdHR11A] [11A] [**855] interpretation of the [*434] Act by the enforcing agency is entitled to great deference. See, *e. g., United States v. City of Chicago, 400 U.S. 8 (1970), Udall v. Tallman, 380 U.S. 1 (1965);Power Reactor Co.* v. *Electricians, 367 U.S. 396 (1961)*. Since the Act and its legislative history support the Commission's construction, this affords good reason to treat the [***166] guidelines as expressing the will of Congress.

9 EEOC Guidelines on Employment Testing Procedures, issued August 24, 1966, provide:

"The Commission accordingly interprets 'professionally developed ability test' to mean a test which fairly measures the knowledge or skills required by the particular job or class of jobs which the applicant seeks, or which fairly affords the employer a chance to measure the applicant's ability to perform a particular job or class of jobs. The fact that a test was prepared by an individual or organization claiming expertise in test preparation does not, without more, justify its use within the meaning of Title VII."

The EEOC position has been elaborated in the new Guidelines on Employee Selection Procedures, 29 CFR § 1607, *35 Fed. Reg. 12333* (Aug. 1, 1970). These guidelines demand that employers using tests have available "data demonstrating that the test is predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated." *Id.*, at § 1607.4 (c).

Section 703 (h) was not contained in the House version of the Civil Rights Act but was added in the Senate during extended debate. For a period, debate revolved around claims that the bill as proposed would prohibit all testing and force employers to hire unqualified persons simply because they were part of a group formerly subject to job discrimination. [10] Proponents of Title VII sought throughout the debate to assure the critics that the Act would have no effect on job-related tests. Senators Case of New Jersey and Clark of Pennsylvania, comanagers of the bill on the Senate floor, issued a memorandum explaining that the proposed Title VII "expressly protects the employer's right to insist that any prospective applicant, Negro or white, *must meet the applicable job qualifications*. Indeed, the very purpose of Title VII is to promote hiring on the basis of job qualifications, rather than on the basis of race or color." 110 Cong. Rec. 7247. [11] (Emphasis added.) Despite [*435] these assurances, Senator Tower of Texas introduced an amendment authorizing "professionally developed ability tests." Proponents of Title VII opposed the amendment because, as written, it would permit an employer to give any test, "whether it was a good test or not, so long as it was professionally designed. Discrimination could actually exist under the [**856] guise of compliance with the statute." 110 Cong. Rec. 13504 (remarks of Sen. Case).

10 The congressional discussion was prompted by the decision of a hearing examiner for the Illinois Fair Employment Commission in *Myart* v. *Motorola Co.* (The decision is reprinted at 110 Cong. Rec. 5662.) That case suggested that standardized tests on which whites performed better than Negroes could never be used. The decision was taken to mean that such tests could never be justified even if the needs of the business required them. A number of Senators feared that Title VII might produce a similar result. See remarks of Senators Ervin, 110 Cong. Rec. 5614-5616; Smathers, *id.*, at 5999-6000; Holland, *id.*, at 7012-7013; Hill, *id.*, at 8447; Tower, *id.*, at 9024; Talmadge, *id.*, at 9025-9026; Fulbright, *id.*, at 9599-9600; and Ellender, *id.*, at 9600.

11 The Court of Appeals majority, in finding no requirement in Title VII that employment tests be job related, relied in part on a quotation from an earlier Clark-Case interpretative memorandum addressed to the question of the constitutionality of Title VII. The Senators said in that memorandum:

"There is no requirement in Title VII that employers abandon bona fide qualification tests where, because of differences in background and education, members of some groups are able to perform better on these tests than members of other groups. An employer may set his qualifications as high as he likes, he may test to determine which applicants have these qualifications, and he may hire, assign, and promote on the basis of test performance." 110 Cong. Rec. 7213.

However, nothing there stated conflicts with the later memorandum dealing specifically with the debate over employer testing, 110 Cong. Rec. 7247 (quoted from in the text above), in which Senators Clark and Case explained that tests which measure "applicable job qualifications" are permissible under Title VII. In the earlier memorandum Clark and Case assured the Senate that employers were not to be prohibited from using tests that determine *qualifications*. Certainly a

reasonable interpretation of what the Senators meant, in light of the subsequent memorandum directed specifically at employer testing, was that nothing in the Act prevents employers from requiring that applicants be fit for the job.

[***LEdHR11B] [11B]The amendment was defeated and two days later Senator Tower offered a substitute amendment which was adopted verbatim and is now the testing provision of § 703 (h). Speaking for the supporters [***167] of Title VII, Senator Humphrey, who had vigorously opposed the *first amendment*, endorsed the substitute amendment, stating: "Senators on both sides of the aisle who were deeply interested in title VII have examined the text of this [*436] amendment and have found it to be in accord with the intent and purpose of that title." 110 Cong. Rec. 13724. The amendment was then adopted. [12] From the sum of the legislative history relevant in this case, the conclusion is inescapable that the EEOC's construction of § 703 (h) to require that employment tests be job related comports with congressional intent.

12 Senator Tower's original amendment provided in part that a test would be permissible "if . . . in the case of any individual who is seeking employment with such employer, such test is designed to determine or predict whether such individual is suitable or trainable with respect to his employment in the particular business or enterprise involved . . . ." 110 Cong. Rec. 13492. This language indicates that Senator Tower's aim was simply to make certain that job-related tests would be permitted. The opposition to the amendment was based on its loose wording which the proponents of Title VII feared would be susceptible of misinterpretation. The final amendment, which was acceptable to all sides, could hardly have required less of a job relation than the first.

[***LEdHR12] [12]Nothing in the Act precludes the use of testing or measuring procedures; obviously they are useful. What Congress has forbidden is giving these devices and mechanisms controlling force unless they are demonstrably a reasonable measure of job performance. Congress has not commanded that the less qualified be preferred over the better qualified simply because of minority origins. Far from disparaging job qualifications as such, Congress has made such qualifications the controlling factor, so that race, religion, nationality, and sex become irrelevant. What Congress has commanded is that any tests used must measure the person for the job and not the person in the abstract.

The judgment of the Court of Appeals is, as to that portion of the judgment appealed from, reversed.

MR. JUSTICE BRENNAN took no part in the consideration or decision of this case.

REFERENCES

Racial discrimination in labor and employment

15 Am Jur 2d, Civil Rights 58.3

5 Am Jur Pl & Pr Forms (Rev ed), Civil Rights, Forms 61, 62

US L Ed Digest, Civil Rights 7.5

ALR Digests, Civil Rights 1

L Ed Index to Anno, Civil Rights

ALR Quick Index, Discrimination

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Annotation References:

Racial discrimination in labor and employment. *28 L Ed 2d 928.*

Race discrimination. *94 L Ed 1121, 96 L Ed 1291, 98 L Ed 882, 100 L Ed 488, 3 L Ed 2d 1556, 6 L Ed 2d 1302, 10 L Ed 1105, 15 L Ed 2d 990, 21 L Ed 2d 915.*

Fair employment statutes designed to eliminate racial, religious or national origin discrimination in private employment. *44 ALR2d 1138.*

Text

SMITH *et al. v.* CITY OF JACKSON, MISSISSIPPI, *et al.*

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 03-1160.Argued November 3, 2004--Decided March 30, 2005

In revising its employee pay plan, respondent City granted raises to all police officers and police dispatchers in an attempt to bring their starting salaries up to the regional average. Officers with less than five years' service received proportionately greater raises than those with more seniority, and most officers over 40 had more than five years of service. Petitioners, a group of older officers, filed suit under the Age Discrimination in Employment Act of 1967 (ADEA), claiming, *inter alia*, that they were adversely affected by the plan because of their age. The District Court granted the City summary judgment. Affirming, the Fifth Circuit ruled that disparate-impact claims are categorically unavailable under the ADEA, but it assumed that the facts alleged by petitioners would entitle them to relief under *Griggs* v. *Duke Power Co.*, 401 U. S. 424, which announced a disparate-impact theory of recovery for cases brought under Title VII of the Civil Rights Act of 1964 (Title VII).

Held: The judgment is affirmed.

351 F. 3d 183, affirmed.

Justice Stevens delivered the opinion of the Court with respect to Parts I, II, and IV, concluding.

1. The ADEA authorizes recovery in disparate-impact cases comparable to *Griggs*. Except for the substitution of "age" for "race, color, religion, sex, or national origin," the language of ADEA §4(a)(2) and Title VII §703(a)(2) is identical. Unlike Title VII, however, ADEA §4(f)(1) significantly narrows its coverage by permitting any "otherwise prohibited" action "where the differentiation is based on reasonable factors other than age" (hereinafter RFOA provision) Pp. 2-4.

2. Petitioners have not set forth a valid disparate-impact claim. Two textual differences between the ADEA and Title VII make clear that the disparate-impact theory's scope is narrower under the ADEA than under Title VII. One is the RFOA provision. The other is the amendment to Title VII in the Civil Right Act of 1991, which modified this Court's *Wards Cove Packing Co.* v. *Atonio*, 490 U. S. 642, holding that narrowly construed the scope of liability on a disparate-impact theory. Because the relevant 1991 amendments expanded Title VII's coverage but did not amend the ADEA or speak to age discrimination, *Wards Cove*'s pre-1991 interpretation of Title VII's identical language remains applicable to the ADEA. Congress' decision to limit the ADEA's coverage by including the RFOA provision is consistent with the fact that age, unlike Title VII's protected classifications, not uncommonly has relevance to an individual's capacity to engage in certain types of employment. Here, petitioners have done little more than point out that the pay plan is relatively less generous to older workers than to younger ones. They have not, as required by *Wards Cove*, identified any specific test, requirement, or practice within the pay plan that has an adverse impact on older workers. Further, the record makes clear that the City's plan was based on reasonable factors other than age. The City's explanation for the differential between older and younger workers was its perceived need to make junior officers' salaries competitive with comparable positions in the market. Thus, the disparate impact was attributable to the City's decision to give raises based on seniority and position. Reliance on these factors is unquestionably reasonable given the City's goal. Pp. 11-14.

Justice Stevens, joined by *Justice Souter*, *Justice Ginsburg*, and *Justice Breyer*, concluded in Part III that the ADEA's text, the RFOA provision, and Equal Employment Opportunity Commission (EEOC) regulations all support the conclusion that a disparate-impact theory is cognizable under the ADEA. Pp. 4-11.

Justice Scalia concluded that the reasoning in Part III of *Justice Stevens'* opinion is a basis for deferring, pursuant to *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, to the EEOC's reasonable view that the ADEA authorizes disparate-impact claims. Pp. 1-5.

Justice O'Connor, joined by *Justice Kennedy* and *Justice Thomas*, concluded that the judgment should be affirmed on the ground that disparate impact claims are not cognizable under the ADEA. Pp. 1-22.

Stevens, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, and IV, in which *Scalia, Souter, Ginsburg,* and *Breyer, JJ.*, joined, and an opinion with respect to Part III, in which *Souter, Ginsburg,* and *Breyer, JJ.*, joined. *Scalia, J.*, filed an opinion concurring in part and concurring in the judgment. *O'Connor, J.*, filed an opinion concurring in the judgment, in which *Kennedy* and *Thomas, JJ.*, joined. *Rehnquist, C. J.*, took no part in the decision of the case

AZEL P. SMITH, *et al.*, PETITIONERS v. CITY OF JACKSON, MISSISSIPPI, *et al.*
on writ of certiorari to the united states court of appeals for the fifth circuit

[March 30, 2005]

Justice Stevens announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, and IV, and an opinion with respect to Part III, in which *Justice Souter, Justice Ginsburg, and Justice Breyer* join.

Petitioners, police and public safety officers employed by the city of Jackson, Mississippi (hereinafter City), contend that salary increases received in 1999 violated the Age Discrimination in Employment Act of 1967 (ADEA) because they were less generous to officers over the age of 40 than to younger officers. Their suit raises the question whether the "disparate-impact" theory of recovery announced in *Griggs* v. *Duke Power Co.*, 401 U. S. 424 (1971), for cases brought under Title VII of the Civil Rights Act of 1964, is cognizable under the ADEA. Despite the age of the ADEA, it is a question that we have not yet addressed. See *Hazen Paper Co.* v. *Biggins*, 507 U. S. 604, 610 (1993); *Markham* v. *Geller*, (1981) (*Rehnquist*, J., dissenting from denial of certiorari).

I

On October 1, 1998, the City adopted a pay plan granting raises to all City employees. The stated purpose of the plan was to "attract and retain qualified people, provide incentive for performance, maintain competitiveness with other public sector agencies and ensure equitable compensation to all employees regardless of age, sex, race and/or disability."1 On May 1, 1999, a revision of the plan, which was motivated, at least in part, by the City's desire to bring the starting salaries of police officers up to the regional average, granted raises to all police officers and police dispatchers. Those who had less than five years of tenure received proportionately greater raises when compared to their former pay than those with more seniority. Although some officers over the age of 40 had less than five years of service, most of the older officers had more.

Petitioners are a group of older officers who filed suit under the ADEA claiming both that the City deliberately discriminated against them because of their age (the "disparate-treatment" claim) and that they were "adversely affected" by the plan because of their age (the "disparate-impact" claim). The District Court granted summary judgment to the City on both claims. The Court of Appeals held that the ruling on the former claim was premature because petitioners were entitled to further discovery on the issue of intent, but it affirmed the dismissal of the disparate-impact claim. 351 F. 3d 183 (CA5 2003). Over one judge's dissent, the majority concluded that disparate-impact claims are categorically unavailable under the ADEA. Both the majority and the dissent assumed that the facts alleged by petitioners would entitle them to relief under the reasoning of *Griggs*.

We granted the officers' petition for certiorari, 541 U. S. ___ (2004), and now hold that the ADEA does authorize recovery in "disparate-impact" cases comparable to *Griggs*. Because, however, we conclude that petitioners have not set forth a valid disparate-impact claim, we affirm.

II

During the deliberations that preceded the enactment of the Civil Rights Act of 1964, Congress considered and rejected proposed amendments that would have included older workers among the classes protected from employment discrimination.2 *General Dynamics Land Systems, Inc.* v. *Cline*, 540 U. S. 581, 587 (2004). Congress did, however, request the Secretary of Labor to "make a full and complete study of the factors which might tend to result in discrimination in employment because of age and of the consequences of such discrimination on the economy and individuals affected." §715, 78 Stat. 265. The Secretary's report, submitted in response to Congress' request, noted that there was little discrimination arising from dislike or intolerance of older people, but that "arbitrary" discrimination did result from certain age limits. Report of the Secretary of Labor, The Older American Worker: Age Discrimination in Employment 22 (June 1965), reprinted in U. S. Equal Employment Opportunity Commission, Legislative History of the Age Discrimination in Employment Act (1981) (hereinafter Wirtz Report). Moreover, the report observed that discriminatory effects resulted from "[i]nstitutional arrangements that indirectly restrict the employment of older workers." *Id.*, at 15.

In response to that report Congress directed the Secretary to propose remedial legislation, see Fair Labor Standards Amendments of 1966, Pub. L. 89-601, §606, 80 Stat. 845, and then acted favorably on his proposal. As enacted in 1967, §4(a)(2) of the ADEA, now codified as 29 U.S.C. 623(a)(2), provided that it shall be unlawful for an employer "to limit, segregate, or classify his employees in any

way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status

as an employee, because of such individual's age ... ," 81 Stat. 603. Except for substitution of the word "age" for the words "race, color, religion, sex, or national origin," the language of that provision in the ADEA is identical to that found in §703(a)(2) of the Civil Rights Act of 1964 (Title VII). Other provisions of the ADEA also parallel the earlier statute.3 Unlike Title VII, however, §4(f)(1) of the ADEA, 81 Stat. 603, contains language that significantly narrows its coverage by permitting any "otherwise prohibited" action "where the differentiation is based on reasonable factors other than age" (hereinafter RFOA provision).

III

In determining whether the ADEA authorizes disparate-impact claims, we begin with the premise that when Congress uses the same language in two statutes having similar purposes, particularly when one is enacted shortly after the other, it is appropriate to presume that Congress intended that text to have the same meaning in both statutes. *Northcross* v. *Board of Ed. of Memphis City Schools*, 412 U. S. 427 , 428 (1973) *(per curiam)*. We have consistently applied that presumption to language in the ADEA that was "derived *in haec verba* from Title VII."

Lorillard v. *Pons*, 434 U. S. 575, 584 (1978). 4 Our unanimous interpretation of §703(a)(2) of the Title VII in *Griggs* is therefore a precedent of compelling importance.

In *Griggs*, a case decided four years after the enactment of the ADEA, we considered whether §703 of Title VII prohibited an employer "from requiring a high school education or passing of a standardized general intelligence test as a condition of employment in or transfer to jobs when (a) neither standard is shown to be significantly related to successful job performance, (b) both requirements operate to disqualify Negroes at a substantially higher rate than white applicants, and (c) the jobs in question formerly had been filled only by white employees as part of a longstanding practice of giving preference to whites." 401 U. S., at 425-426. Accepting the Court of Appeals' conclusion that the employer had adopted the diploma and test requirements without any intent to discriminate, we held that good faith "does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability." *Id*., at 432.

We explained that Congress had "directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation." *Ibid*. We relied on the fact that history is "filled with examples of men and women who rendered highly effective performance without the conventional badges of accomplishment in terms of certificates, diplomas, or degrees. Diplomas and tests are useful servants, but Congress has mandated the commonsense proposition that they are not to become masters of reality." *Id*., at 433. And we noted that the Equal Employment Opportunity Commission (EEOC), which had enforcement responsibility, had issued guidelines that accorded with our view. *Id*., at 433-434. We thus squarely held that §703(a)(2) of Title VII did not require a showing of discriminatory intent.5

While our opinion in *Griggs* relied primarily on the purposes of the Act, buttressed by the fact that the EEOC had endorsed the same view, we have subsequently noted that our holding represented the better reading of the statutory text as well. See *Watson* v. *Fort Worth Bank & Trust*, 487 U. S. 977, 991 (1988). Neither §703(a)(2) nor the comparable language in the ADEA simply prohibits actions that "limit, segregate, or classify" persons; rather the language prohibits such actions that "deprive any individual of employment opportunities or *otherwise adversely affect* his status as an employee, because of such individual's" race or age. *Ibid*. (explaining that in disparate-impact cases, "the employer's practices may be said to 'adversely affect [an individual's status] as an employee' " (alteration in original) (quoting 42 U.S.C. § *2000e*-2(a)(2))). Thus the text focuses on the *effects* of the action on the employee rather than the motivation for the action of the employer.6

Griggs, which interpreted the identical text at issue here, thus strongly suggests that a disparate-impact theory should be cognizable under the ADEA.7 Indeed, for over two decades after our decision in *Griggs*, the Courts of Appeal uniformly interpreted the ADEA as authorizing recovery on a "disparate-impact" theory in appropriate cases.8 It was only after our decision in *Hazen Paper Co*. v. *Biggins*, (1993), that some of those courts concluded that the ADEA did not authorize a disparate-impact theory of liability.9 Our opinion in *Hazen Paper*, however, did not address or comment on the issue we decide today. In that case, we held that an employee's allegation that he was discharged shortly before his pension would have vested did not state a cause of action under a *disparate-treatment* theory. The motivating factor was not, we held, the employee's age, but rather his years of service, a factor that the ADEA did not prohibit an employer from considering when terminating an employee. *Id*., at 612.10 While we noted that disparate-treatment "captures the essence of what Congress sought to prohibit in the ADEA," *id*., at 610, we were careful to explain that we were not deciding "whether a disparate impact theory of liability is available under the ADEA ... ." *Ibid*. In sum, there is nothing in our opinion in *Hazen Paper* that precludes an interpretation of the ADEA that parallels our holding in *Griggs*.

The Court of Appeals' categorical rejection of disparate-impact liability, like *Justice O'Connor*'s, rested primarily on the RFOA provision and the majority's analysis of legislative history. As we have already explained, we think the history of the enactment of the ADEA, with particular reference to the Wirtz Report, supports the pre-*Hazen Paper* consensus concerning disparate-impact liability. And *Hazen Paper* itself contains the response to the concern over the RFOA provision.

The RFOA provision provides that it shall not be unlawful for an employer "to take any action otherwise prohibited under subsectio[n] (a) ... where the differentiation is based on reasonable factors other than age discrimination ... ." 81 Stat. 603. In

most disparate-treatment cases, if an employer in fact acted on a factor other than age, the action would not be prohibited under subsection (a) in the first place. See *Hazen Paper*, 507 U. S., at 609 ("[T]here is no disparate treatment under the ADEA when the factor motivating the employer is some feature other than the employee's age."). In those disparate-treatment cases, such as in *Hazen Paper* itself, the RFOA provision is simply unnecessary to avoid liability under the ADEA, since there was no prohibited action in the first place. The RFOA provision is not, as *Justice O'Connor* suggests, a "safe harbor from liability," *post*, at 5 (emphasis deleted), since there would be no liability under §4(a). See *Texas Dept. of Community Affairs* v. *Burdine*, 450 U. S. 248, 254 (1981) (noting, in a Title VII case, that an employer can defeat liability by showing that the employee was rejected for "a legitimate, nondiscriminatory reason" without reference to an RFOA provision).

In disparate-impact cases, however, the allegedly "otherwise prohibited" activity is not based on age. *Ibid.* (" '[C]laims that stress "disparate impact" [by contrast] involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another ...' " (quoting *Teamsters* v. *United States*, 431 U. S. 324, 335-336, n. 15 (1977))). It is, accordingly, in cases involving disparate-impact claims that the RFOA provision plays its principal role by precluding liability if the adverse impact was attributable to a nonage factor that was "reasonable." Rather than support an argument that disparate impact is unavailable under the ADEA, the RFOA provision actually supports the contrary conclusion.[1]

Finally, we note that both the Department of Labor, which initially drafted the legislation, and the EEOC, which is the agency charged by Congress with responsibility for implementing the statute, 29 U.S.C. 628, have consistently interpreted the ADEA to authorize relief on a disparate-impact theory. The initial regulations, while not

mentioning disparate impact by name, nevertheless permitted such claims if the employer relied on a factor that was not related to age. 29 CFR §860.103(f)(1)(i) (1970) (barring physical fitness requirements that were not "reasonably necessary for the specific work to be performed"). See also §1625.7 (2004) (setting forth the standards for a disparate-impact claim).

The text of the statute, as interpreted in *Griggs*, the RFOA provision, and the EEOC regulations all support petitioners' view. We therefore conclude that it was error for the Court of Appeals to hold that the disparate-impact theory of liability is categorically unavailable under the ADEA.

IV

Two textual differences between the ADEA and Title VII make it clear that even though both statutes authorize recovery on a disparate-impact theory, the scope of disparate-impact liability under ADEA is narrower than under Title VII. The first is the RFOA provision, which we have already identified. The second is the amendment to Title VII contained in the Civil Rights Act of 1991, 105 Stat. 1071. One of the purposes of that amendment was to modify the Court's holding in *Wards Cove Packing Co.* v. *Atonio*, (1989), a case in which we narrowly construed the employer's exposure to liability on a disparate-impact theory. See Civil Rights Act of 1991, §2, 105 Stat. 1071. While the relevant 1991 amendments expanded the coverage of Title VII, they did not amend the ADEA or speak to the subject of age discrimination. Hence, *Wards Cove*'s pre-1991 interpretation of Title VII's identical language remains applicable to the ADEA.

Congress' decision to limit the coverage of the ADEA by including the RFOA provision is consistent with the fact that age, unlike race or other classifications protected by Title VII, not uncommonly has relevance to an individual's capacity to engage in certain types of employment. To be sure, Congress recognized that this is not always the case, and that society may perceive those differences to be larger or more consequential than they are in fact. However, as Secretary Wirtz noted in his report, "certain circumstances ... unquestionably affect older workers more strongly, as a group, than they do younger workers." Wirtz Report 28. Thus, it is not surprising that certain employment criteria that are routinely used may be reasonable despite their adverse impact on older workers as a group. Moreover, intentional discrimination on the basis of age has not occurred at the same levels as discrimination against those protected by Title VII. While the ADEA reflects Congress' intent to give older workers employment opportunities whenever possible, the RFOA provision reflects this historical difference.

Turning to the case before us, we initially note that petitioners have done little more than point out that the pay plan at issue is relatively less generous to older workers than to younger workers. They have not identified any specific test, requirement, or practice within the pay plan that has an adverse impact on older workers. As we held in *Wards Cove*, it is not enough to simply allege that there is a disparate impact on workers, or point to a generalized policy that leads to such an impact. Rather, the employee is " 'responsible for isolating and identifying the *specific* employment practices that are allegedly responsible for any observed statistical disparities.' " 490 U. S., at 656 (emphasis added) (quoting *Watson*, 487 U. S., at 994). Petitioners have failed to do so. Their failure to identify the specific practice being challenged is the sort of omission that could "result in employers being potentially liable for 'the myriad of innocent causes that may lead to statistical imbalances ...' " 490 U. S., at 657. In this case not only did petitioners thus err by failing to identify the relevant practice, but it is also clear from the record that the City's plan was based on reasonable factors other than age.

The plan divided each of five basic positions--police officer, master police officer, police sergeant, police lieutenant, and deputy police chief--into a series of steps and half-steps. The wage for each range was based on a survey of comparable communities in the Southeast. Employees were then assigned a step (or half-step) within their position that corresponded to the lowest step that

would still give the individual a 2% raise. Most of the officers were in the three lowest ranks; in each of those ranks there were officers under age 40 and officers over 40. In none did their age affect their compensation. The few officers in the two highest ranks are all over 40. Their raises, though higher in dollar amount than the raises given to junior officers, represented a smaller percentage of their salaries, which of course are higher than the salaries paid to their juniors. They are members of the class complaining of the "disparate impact" of the award.

Petitioners' evidence established two principal facts: First, almost two-thirds (66.2%) of the officers under 40 received raises of more than 10% while less than half (45.3%) of those over 40 did.12 Second, the average percentage increase for the entire class of officers with less than five years of tenure was somewhat higher than the percentage for those with more seniority.13 Because older officers tended to occupy more senior positions, on average they received smaller increases when measured as a percentage of their salary. The basic explanation for the differential was the City's perceived need to raise the salaries of junior officers to make them competitive with comparable positions in the market.

Thus, the disparate impact is attributable to the City's decision to give raises based on seniority and position. Reliance on seniority and rank is unquestionably reasonable given the City's goal of raising employees' salaries to match those in surrounding communities. In sum, we hold that the City's decision to grant a larger raise to lower echelon employees for the purpose of bringing salaries in line with that of surrounding police forces was a decision based on a "reasonable factor other than age" that responded to the City's legitimate goal of retaining police officers. Cf. *MacPherson* v. *University of Montevallo*, 922 F. 2d 766, 772 (CA11 1991).

While there may have been other reasonable ways for the City to achieve its goals, the one selected was not unreasonable. Unlike the business necessity test, which asks whether there are other ways for the employer to achieve its goals that do not result in a disparate impact on a protected class, the reasonableness inquiry includes no such requirement.

Accordingly, while we do not agree with the Court of Appeals' holding that that the disparate-impact theory of recovery is never available under the ADEA, we affirm its judgment.

It is so ordered.

The Chief Justice took no part in the decision of this case.

SUPREME COURT OF THE UNITED STATES

Syllabus

MEACHAM ET AL. *v.* KNOLLS ATOMIC POWER LABORATORY, AKA KAPL, INC., ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 06-1505. Argued April 23, 2008-Decided June 19, 2008

When the National Government ordered its contractor, respondent

Knolls, to reduce its work force, Knolls had its managers score their subordinates on "performance," "flexibility," and "critical skills"; these scores, along with points for years of service, were used to determine who was laid off. Of the 31 employees let go, 30 were at least 40 years old. Petitioners (Meacham, for short) were among those laid off, and they filed this suit asserting, *inter alia*, a disparate-impact claim under the Age Discrimination in Employment Act of 1967 (ADEA), 29 U. S. C. §621 *et seq.* To show such an impact, Meacham relied on a statistical expert's testimony that results so skewed according to age could rarely occur by chance; and that the scores for "flexibility" and "criticality," over which managers had the most discretionary judgment, had the firmest statistical ties to the outcomes. The jury found for Meacham on the disparate-impact claim, and the Second Circuit initially affirmed. This Court vacated the judgment and remanded in light of its intervening decision in *Smith* v. *City of Jackson*, 544 U. S. 228. The Second Circuit then held for Knolls, finding its prior ruling untenable because it had applied a "business necessity" standard rather than a "reasonableness" test in assessing the employer's reliance on factors other than age in the layoff decisions, and because Meacham had not carried the burden of persuasion as to the reasonableness of Knolls's non-age factors.

Held: An employer defending a disparate-impact claim under the ADEA bears both the burden of production and the burden of persuasion for the "reasonable factors other than age" (RFOA) affirmative defense under §623(f)(1). Pp. 5-17.

(a) The ADEA's text and structure indicate that the RFOA exemption creates an affirmative defense, for which the burden of persuasion falls on the employer. The RFOA exemption is listed alongside one for bona fide occupational qualifications (BFOQ), which the Court has recognized to be an affirmative defense: "It shall not be unlawful for an employer . . . to take any action otherwise prohibited under subsections (a), (b), (c), or (e) . . . where age is a [BFOQ] reasonably necessary to the normal operation of the particular business, or where the differentiation is based on [RFOA] . . . ." §623(f)(1). Given that the statute lays out its exemptions in a provision separate from the general prohibitions in §§623(a)-(c), (e), and expressly refers to the prohibited conduct as such, it is no surprise that this Court has spoken of both the BFOQ and RFOA as being among the ADEA's "five affirmative defenses," *Trans World Airlines, Inc.* v. *Thurston*, 469 U. S. 111, 122. This reading follows the familiar principle that "[w]hen a proviso . . . carves an exception out of the body of a statute or contract those who set up such exception must prove it," *Javierre* v. *Central Altagracia*, 217 U. S. 502, 508. As this longstanding convention is part of the backdrop against which the Congress writes laws, the Court respects it unless there is compelling reason to think that Congress put the burden of persuasion on the other side. See *Schaffer* v. *Weast*, 546 U. S. 49, 57-58. The Court has given this principle particular weight in enforcing the Fair Labor Standards Act of 1968, *Corning Glass Works* v. *Brennan*, 417 U. S. 188, 196-197; and it has also recognized that "the ADEA [is] enforced in accordance with the 'powers, remedies, and procedures' of the FLSA," *Lorillard* v. *Pons*, 434 U. S. 575, 580. Nothing in §623(f)(1) suggests that Congress meant it to march out of step with either the general or specifically FLSA default rules placing the burden of proving an exemption on the party claiming it. Any further doubt would be dispelled by the natural implication of the "otherwise prohibited" language prefacing the BFOQ and RFOA defenses. Pp. 5-9.

(b) Knolls argues that because the RFOA clause bars liability where action is taken for reasons "other than age," it should be read as mere elaboration on an element of liability. But *City of Jackson* confirmed that §623(a)(2)'s prohibition extends to practices with a disparate impact, inferring this result in part from the presence of the RFOA provision. 544 U. S., at 239, 243. And *City of Jackson* made it clear that action based on a "factor other than age" is the very premise for disparate-impact liability, not a negation of it or a defense to it. Thus, it is assumed that a non-age factor was at work in such a case, and the focus of the RFOA defense is on whether the factor relied on was

"reasonable." Pp. 10-11.

(c) The business necessity test has no place in ADEA disparate-impact cases; applying both that test and the RFOA defense would entail a wasteful and confusing structure of proof. The absence of a business necessity enquiry does not diminish, however, the reasons already given for reading the RFOA as an affirmative defense. *City of Jackson* cannot be read as implying that the burden of proving any business-related defense falls on the plaintiff, for it confirmed that the BFOQ is an affirmative defense, see 544 U. S., at 233, n. 3. Moreover, in referring to "*Wards Cove*'s interpretation of identical language [in Title VII]," *City of Jackson* could not have had the RFOA clause in mind, for Title VII has no like-worded defense. And as *Wards Cove* did not purport to construe any Title VII defenses, only an over-reading of *City of Jackson* would find in it an assumption that *Wards Cove* has anything to say about statutory defenses in the ADEA. Pp. 12-15.

(d) *City of Jackson* confirmed that an ADEA disparate-impact plaintiff must " ' "isolat[e] and identif[y] the *specific* employment practices that are allegedly responsible for any observed statistical disparities." ' " 544 U. S., at 241. This is not a trivial burden, and it ought to allay some of the concern that recognizing an employer's burden of persuasion on an RFOA defense will encourage strike suits or nudge plaintiffs with marginal cases into court; but in the end, such concerns have to be directed at Congress, which set the balance by both creating the RFOA exemption and writing it in the orthodox format of an affirmative defense. Pp. 15-17. 461 F. 3d 134, vacated and remanded.

SOUTER, J., delivered the opinion of the Court, in which ROBERTS, C. J., and STEVENS, KENNEDY, GINSBURG, and ALITO, JJ., joined, and in which THOMAS, J., joined as to Parts I and II-A. SCALIA, J., filed an opinion concurring in the judgment. THOMAS, J., filed an opinion concurring in part and dissenting in part. BREYER, J., took no part in the consideration or decision of the case.

SUPREME COURT OF THE UNITED STATES

No. 06-1505

CLIFFORD B. MEACHAM, ET AL., PETITIONERS v. KNOLLS ATOMIC POWER LABORATORY, AKA KAPL, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

[June 19, 2008]

JUSTICE SOUTER delivered the opinion of the Court. A provision of the Age Discrimination in Employment Act of 1967 (ADEA), 81 Stat. 602, as amended, 29 U. S. C. §621 *et seq.*, creates an exemption for employer actions "otherwise prohibited" by the ADEA but "based on reasonable factors other than age" (RFOA). §623(f)(1). The question is whether an employer facing a disparate-impact claim and planning to defend on the basis of RFOA must not only produce evidence raising the defense, but also persuade the factfinder of its merit. We hold that the employer must do both.

I

The National Government pays private companies to do some of the work maintaining the Nation's fleet of nuclear-powered warships. One such contractor is respondent KAPL, Inc. (Knolls), the operator of the Government's Knolls Atomic Power Laboratory, which has a history dating back to the first nuclear-powered submarines in the 1950s. The United States Navy and the Department of Energy jointly fund Knolls's operations, decide what projects it should pursue, and set its annual staffing limits. In recent years, Knolls has been charged with designing prototype naval nuclear reactors and with training Navy personnel to run them.

The demands for naval nuclear reactors changed with the end of the Cold War, and for fiscal year 1996 Knolls were ordered to reduce its work force. Even after a hundred or so employees chose to take the company's ensuing buyout offer, Knolls was left with thirty-some jobs to cut.1 Petitioners (Meacham, for short) are among those laid off in the resulting "involuntary reduction in force." In order to select those for layoff, Knolls told its managers to score their subordinates on three scales, "performance," "flexibility," and "critical skills."2 The scores were summed, along with points for years of service, and the totals determined who should be let go.

Of the 31 salaried employees laid off, 30 were at least 40 years old.3 Twenty-eight of them sued, raising both disparate-treatment (discriminatory intent) and disparate-impact (discriminatory result) claims under the ADEA and state law, alleging that Knolls "designed and implemented its workforce reduction process to eliminate older employees and that, regardless of intent, the process had a discriminatory impact on ADEA-protected employees." *Meacham* v. *Knolls Atomic Power Laboratory*, 381 F. 3d 56, 61 (CA2 2004) *(Meacham I)*. To show a disparate impact, the workers relied on a statistical expert's testimony to the effect that results so skewed according to age could rarely occur by chance;4 and that the scores for "flexibility" and "criticality," over which managers had the most discretionary judgment, had the firmest statistical ties to the outcomes. *Id.*, at 65.

The jury found for Meacham on the disparate-impact claim (but not on the disparate-treatment claim). The Court of Appeals affirmed, after examining the verdict through the lens of the so-called "burden shifting" scheme of inference spelled out in *Wards Cove Packing Co.* v. *Atonio*, 490 U. S. 642 (1989). See *Meacham I*, *supra*, at 74-76.5 After Knolls sought certiorari, we vacated the judgment and remanded for further proceedings in light of *Smith* v. *City of Jackson*, 544 U. S. 228 (2005), decided while Knolls's petition was pending. See 544 U. S. 957 (2005).

On remand, the same Court of Appeals panel ruled in favor of Knolls, over a dissent. 461 F. 3d 134 (CA2 2006) (case below) *(Meacham II)*. The majority found its prior ruling "untenable" because it had applied the *Wards Cove* "business necessity" standard rather than a "reasonableness" test, contrary to *City of Jackson*; and on the latter standard, Meacham, the employee, had not carried the burden of persuasion. 461 F.3d, at 140-141, 144.6 In dissent, Judge Pooler took issue with the majority for confusing business justifications under *Wards Cove* with the statutory RFOA exemption, which she read to be an affirmative defense with the burden of persuasion falling on defendants. 461 F.3d, at 147, 149-152.7

Meacham sought certiorari, noting conflicting decisions assigning the burden of persuasion on the reasonableness of the factor other than age; the Court of Appeals in this case placed it on the employee (to show the non-age factor unreasonable), but the Ninth Circuit in *Criswell* v. *Western Airlines, Inc.*, 709 F. 2d 544, 552 (1983), had assigned it to the employer (to show the factor was a reasonable one). In fact it was in *Criswell* that we first took up this question, only to find it not well posed in that case. *Western Air Lines, Inc.* v. *Criswell*, 472 U. S. 400, 408, n. 10 (1985). We granted certiorari, 552 U. S. ___ (2007), and now vacate the judgment of the Second Circuit and remand.8

II

A

The ADEA's general prohibitions against age discrimination, 29 U. S. C. §§623(a)-(c), (e), are subject to a separate provision, §623(f), creating exemptions for employer practices "otherwise prohibited under subsections (a), (b), (c), or (e)." The RFOA exemption is listed in §623(f) alongside one for bona fide occupational qualifications (BFOQ): "It shall not be unlawful for an employer . . . to take any action otherwise prohibited under subsections (a), (b), (c), or (e) . . . where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age . . . ." §623(f)(1).

Given how the statute reads, with exemptions laid out apart from the prohibitions (and expressly referring to the prohibited conduct as such), it is no surprise that we have already spoken of the BFOQ and RFOA provisions as being among the ADEA's "five affirmative defenses," *Trans World Airlines, Inc.* v. *Thurston*, 469 U. S. 111, 122 (1985). After looking at the statutory text, most lawyers would accept that characterization as a matter of course, thanks to the familiar principle that "[w]hen a proviso . . . carves an exception out of the body of a statute or contract those who set up such exception must prove it." *Javierre* v. *Central Altagracia*, 217 U. S. 502, 508 (1910) (opinion for the Court by Holmes, J.); see also *FTC* v. *Morton Salt Co.*, 334 U. S. 37, 44-45 (1948) ("[T]he burden of proving justification or exemption under a special exception to the prohibitions of a statute generally rests on one who claims its benefits . . ."); *United States* v. *First City Nat. Bank of Houston*, 386 U. S. 361, 366 (1967) (citing *Morton Salt*, *supra*, at 44-45). That longstanding convention is part of the backdrop against which the Congress writes laws, and we respect it unless we have compelling reasons to think that Congress meant to put the burden of persuasion on the other side. See *Schaffer* v. *Weast*, 546 U. S. 49, 57-58 (2005) ("Absent some reason to believe that Congress intended otherwise, therefore, we will conclude that the burden of persuasion lies where it usually falls, upon the party seeking relief").

We have never been given any reason for a heterodox take on the RFOA clause's nearest neighbor, and our prior cases recognize that the BFOQ clause establishes an affirmative defense against claims of disparate treatment. See, *e.g.*, *City of Jackson*, *supra*, at 233, n. 3; *Western Air Lines, Inc.*, *supra*, at 414-419, and nn. 24, 29. We have likewise given the affirmative defense construction to the exemption in the Equal Pay Act of 1963 for pay differentials based on "any other factor other than sex," *Corning Glass Works* v. *Brennan*, 417 U. S. 188, 196 (1974) (internal quotation marks omitted); and there, we took account of the particular weight given to the interpretive convention already noted, when enforcing the Fair Labor Standards Act of 1938 (FLSA), *id.*, at 196-197 ("[T]he general rule [is] that the application of an exemption under the Fair Labor Standards Act is a matter of affirmative defense on which the employer has the burden of proof").

This focus makes the principle of construction the more instructive in ADEA cases: "[i]n enacting the ADEA, Congress exhibited both a detailed knowledge of the FLSA provisions and their judicial interpretation and a willingness to depart from those provisions regarded as undesirable or inappropriate for incorporation," *Lorillard* v. *Pons*, 434 U. S. 575, 581 (1978). And we have remarked and relied on the "significant indication of Congress' intent in its directive that the ADEA be enforced in accordance with the 'powers, remedies, and procedures' of the FLSA." *Id.*, at 580 (quoting 29 U. S. C. §626(b); emphasis deleted); see also *Fogerty* v. *Fantasy, Inc.*, 510 U. S. 517, 528 (1994) (applying reasoning of *Lorillard*); *Thurston*, *supra*, at 126 (same). As against this interpretive background, there is no hint in the text that Congress meant §623(f)(1) to march out of step with either the general or specifically FLSA default rules placing the burden of proving an exemption on the party claiming it.

With these principles and prior cases in mind, we find it impossible to look at the text and structure of the ADEA and imagine that the RFOA clause works differently from the BFOQ clause next to it. Both exempt otherwise illegal conduct by reference to a further item of proof, thereby creating a defense for which the burden of persuasion falls on the "one who claims its benefits," *Morton Salt Co.*, *supra*, at 44-45, the "party seeking relief," *Schaffer*, *supra*, at 57-58, and here, "the employer," *Corning Glass Works*, *supra*, at 196.

If there were any doubt, the stress of the idiom "other-wise prohibited," prefacing the BFOQ and RFOA conditions, would dispel it.9 The implication of affirmative defense is underscored by contrasting §623(f)(1) with the section of the ADEA at issue in *Public Employees Retirement System of Ohio* v. *Betts*, 492 U. S. 158 (1989), and by the way Congress responded to our decision there. In *Betts*, we said the issue was whether a provision in a former version of §623(f)(2), one about employee benefit plans, merely "redefine[d] the elements of a plaintiff's prima facie case," or instead "establish[ed] a defense" to what "otherwise would be a violation of the Act." *Id.*, at 181.10 Although the provision contained no "otherwise prohibited" kind of language, we said that it "appears on first reading to describe an affirmative defense." *Ibid.* We nonetheless thought that this more natural view (which we had taken in *Thurston*) was overridden by evidence of legislative history, by the peculiarity of a pretext-revealing condition in the phrasing of the provision (that a benefit plan "not [be] a subterfuge to evade the purposes" of the ADEA), and by the parallel with a prior case construing an "analogous provision of Title VII" (analogous because it also contained a pretext-revealing condition). 492 U. S., at 181. A year later, however, Congress responded to *Betts* by enacting the Older Workers Benefit Protection Act, Pub. L. 101-433, 104 Stat. 978, avowedly to "restore the original congressional intent" that the ADEA's benefits provision be read as an affirmative defense, *id.*, §101. What is instructive on the question at hand is that, in clarifying that §623(f)(2) specifies affirmative defenses, Congress not only set the burden in so many words but also added the phrase "otherwise prohibited" as a part of the preface (just as in the text of §623(f)(1)).11 Congress thus confirmed the natural implication that we find in the "otherwise prohibited" language in §623(f)(1): it refers to an excuse or justification for behavior that, standing alone, violates the statute's prohibition. The amendment in the aftermath of *Betts* shows that Congress understands the phrase the same way we naturally read it, as a clear signal that a defense to what is "otherwise prohibited" is an affirmative defense, entirely the responsibility of the party raising it.

B.

Knolls ventures that, regardless, the RFOA provision should be read as mere elaboration on an element of liability. Because it bars liability where action is taken for reasons "other than age," the argument goes, the provision must be directed not at justifying age discrimination by proof of some extenuating fact but at negating the premise of liability under §623(a)(2), "because of age."

The answer to this argument, however, is *City of Jackson*, where we confirmed that the prohibition in §623(a)(2) extends to practices with a disparate impact, inferring this result in part from the presence of the RFOA provision at

issue here.12 We drew on the recognized distinction between disparate-treatment and disparate-impact forms of liability, and explained that "the very definition of disparate impact" was that "an employer who classifies his employees without respect to age may still be liable under the terms of this paragraph if such classification adversely affects the employee because of that employee's age." 544 U. S., at 236, n. 6 (plurality opinion); *id.*, at 243 (SCALIA, J., concurring in part and concurring in judgment) (expressing agreement with "all of the Court's reasoning" in the plurality opinion, but finding it a basis for deference to the EEOC rather than for independent judicial decision). We emphasized that these were the kinds of employer activities, "otherwise prohibited" by §623(a)(2), that were mainly what the statute meant to test against the RFOA condition: because "[i]n disparate-impact cases . . . the allegedly 'otherwise prohibited' activity is not based on age," it is "in cases involving disparate-impact claims that the RFOA provision plays its principal role by precluding liability if the adverse impact was attributable to a nonage factor that was 'reasonable.' " *Id.*, at 239 (plurality opinion).

Thus, in *City of Jackson*, we made it clear that in the typical disparate-impact case, the employer's practice is "without respect to age" and its adverse impact (though "because of age") is "attributable to a nonage factor"; so action based on a "factor other than age" is the very premise for disparate-impact liability in the first place, not a negation of it or a defense to it. The RFOA defense in a disparate-impact case, then, is not focused on the asserted fact that a non-age factor was at work; we assume it was. The focus of the defense is that the factor relied upon was a "reasonable" one for the employer to be using. Reasonableness is a justification categorically distinct from the factual condition "because of age" and not necessarily correlated with it in any particular way: a reasonable factor may lean more heavily on older workers, as against younger ones, and an unreasonable factor might do just the opposite.13

III

The Court of Appeals majority rejected the affirmative defense reading and arrived at its position on the burden of proof question by a different route: because it read our decision in *City of Jackson* as ruling out the so-called "business necessity" enquiry in ADEA cases, the court concluded that the RFOA defense "replaces" it and therefore must conform to its burden of persuasion resting on the complaining party. But the court's premise (that *City of Jackson* modified the "business necessity" enquiry) is mistaken; this alone would be reason enough to reject its approach. And although we are now satisfied that the business necessity test should have no place in ADEA disparate-impact cases, we agree with the Government that this conclusion does not stand in the way of our holding that the RFOA exemption is an affirmative defense. See Brief for United States as *Amicus Curiae* 25-27.

To begin with, when the Court of Appeals further inferred from the *City of Jackson* reference to *Wards Cove* that the *Wards Cove* burden of persuasion (on the employee, for the business necessity enquiry) also applied to the RFOA defense, it gave short shrift to the reasons set out in Part II-A, *supra*, for reading RFOA as an affirmative defense (with the burden on the employer). But we think that even on its own terms, *City of Jackson* falls short of supporting the Court of Appeals's conclusion.

Although *City of Jackson* contains the statement that "*Wards Cove*'s pre-1991 interpretation of Title VII's identical language remains applicable to the ADEA," 544 U. S., at 240, *City of Jackson* made only two specific references to aspects of the *Wards Cove* interpretation of Title VII that might have "remain[ed] applicable" in ADEA cases. One was to the existence of disparate-impact liability, which *City of Jackson* explained was narrower in ADEA cases than under Title VII. The other was to a plaintiff-employee's burden of identifying which particular practices allegedly cause an observed disparate impact, which is the employee's burden under both the ADEA and the pre-1991 Title VII. See 544 U. S., at 241. Neither of these references, of course, is at odds with the view of RFOA as an affirmative defense.

If, indeed, *City of Jackson*'s reference to *Wards Cove* could be read literally to include other aspects of the latter case, beyond what mattered in *City of Jackson* itself, the untoward consequences of the broader reading would rule it out. One such consequence is embraced by Meacham, who argues both that the Court of Appeals was wrong to place the burden of persuasion for the RFOA defense on the employee, and that the court was right in thinking that *City of Jackson* adopted the *Wards Cove* burden of persuasion on what Meacham views as one element of an ADEA impact claim. For Meacham takes the position that an impact plaintiff like himself has to negate business necessity in order to show that the employer's actions were "otherwise prohibited"; only then does the RFOA (with the burden of persuasion on the employer) have a role to play. To apply both tests, however, would force the parties to develop (and the court or jury to follow) two overlapping enquiries: first, whether the employment practice at issue (based on

a factor other than age) is supported by a business justification; and second, whether that factor is a reasonable one. Depending on how the first enquiry proceeds, a plaintiff might directly contest the force of the employer's rationale, or else try to show that the employer invoked it as a pretext by pointing (for example) to alternative practices with less of a disparate impact. See *Wards Cove*, 490 U. S., at 658 ("first, a consideration of the justifications an employer offers for his use of these practices; and second, the availability of alternative practices to achieve the same business ends, with less racial impact"); see also *id.*, at 658-661. But even if the plaintiff succeeded at one or the other, in Meacham's scheme the employer could still avoid liability by proving reasonableness.

Here is what is so strange: as the Government says, "[i]f disparate-impact plaintiffs have already established that a challenged practice is a pretext for intentional age discrimination, it makes little sense then to ask whether the discriminatory practice is based on reasonable factors *other than age*." Brief for United States as *Amicus Curiae* 26 (emphasis in original). Conversely, proving the reasonableness defense would eliminate much of the point a plaintiff would have had for showing alternatives in the first place: why make the effort to show alternative practices with a less discriminatory effect (and besides, how would that prove pretext?), when everyone knows that the choice of a practice relying on a "reasonable" non-age factor is good enough to avoid liability?14 At the very least, developing the reasonableness defense would be substantially redundant with the direct contest over the force of the business justification, especially when both enquiries deal with the same, narrowly specified practice. It is not very fair to take the remark about *Wards Cove* in *City of Jackson* as requiring such a wasteful and confusing structure of proof.

Nor is there any good way to read the same line from *City of Jackson* as implying that the burden of proving any business-related defense falls on the plaintiff; most obviously, this would entail no longer taking the BFOQ clause to be an affirmative defense, which *City of Jackson* confirmed that it is, see 544 U. S., at 233, n. 3. What is more, *City of Jackson* could not have had the RFOA clause in mind as "identical" to anything in Title VII (for which a *Wards Cove*'s reading might be adopted), for that statute has no like-worded defense. And as *Wards Cove* did not purport to construe any statutory defenses under Title VII, only an over-reading of *City of Jackson* would find lurking in it an assumption that *Wards Cove* has anything to say about statutory defenses in the ADEA (never mind one that Title VII does not have).

IV

As mentioned, where *City of Jackson* did get help from our prior reading of Title VII was in relying on *Wards Cove* to repeat that a plaintiff falls short by merely alleging a disparate impact, or "point[ing] to a generalized policy that leads to such an impact." *City of Jackson*, 544 U. S., at 241. The plaintiff is obliged to do more: to "isolat[e] and identif[y] the *specific* employment practices that are allegedly responsible for any observed statistical disparities." *Ibid.* (quoting *Wards Cove*, *supra*, at 656; emphasis in original; internal quotation marks omitted). The aim of this requirement, as *City of Jackson* said, is to avoid the "result [of] employers being potentially liable for 'the myriad of innocent causes that may lead to statistical imbalances.' " 544 U. S., at 241 (quoting *Wards Cove*, *supra*, at 657; some internal quotation marks omitted). And as the outcome in that case shows, the requirement has bite: one sufficient reason for rejecting the employees' challenge was that they "ha[d] done little more than point out that the pay plan at issue [was] relatively less generous to older workers than to younger workers," and "ha[d] not identified any specific test, requirement, or practice within the pay plan that ha[d] an adverse impact on older workers." *City of Jackson*, *supra*, at 241.

Identifying a specific practice is not a trivial burden, and it ought to allay some of the concern raised by Knolls's *amici*, who fear that recognizing an employer's burden of persuasion on an RFOA defense to impact claims will encourage strike suits or nudge plaintiffs with marginal cases into court, in turn inducing employers to alter business practices in order to avoid being sued. See, *e.g.*, Brief for General Electric Co. as *Amicus Curiae* 18-31. It is also to the point that the only thing at stake in this case is the gap between production and persuasion; nobody is saying that even the burden of production should be placed on the plaintiff. Cf. *Schaffer*, 546 U. S., at 56 (burden of persuasion answers "which party loses if the evidence is closely balanced"); *id.*, at 58 ("In truth, however, very few cases will be in evidentiary equipoise"). And the more plainly reasonable the employer's "factor other than age" is, the shorter the step for that employer from producing evidence raising the defense, to persuading the factfinder that the defense is meritorious. It will be mainly in cases where the reasonableness of the non-age factor is obscure for some reason, that the employer will have more evidence to reveal and more convincing to do in going from production to persuasion.

That said, there is no denying that putting employers to the work of persuading factfinders that their choices are

reasonable makes it harder and costlier to defend than if employers merely bore the burden of production; nor do we doubt that this will sometimes affect the way employers do business with their employees. But at the end of the day, *amici*'s concerns have to be directed at Congress, which set the balance where it is, by both creating the RFOA exemption and writing it in the orthodox format of an affirmative defense. We have to read it the way Congress wrote it.

As we have said before, Congress took account of the distinctive nature of age discrimination, and the need to preserve a fair degree of leeway for employment decisions with effects that correlate with age, when it put the RFOA clause into the ADEA, "significantly narrow[ing] its coverage." *City of Jackson*, 544 U. S.at 233. And as the outcome for the employer in *City of Jackson* shows, "it is not surprising that certain employment criteria that are routinely used may be reasonable despite their adverse impact on older workers as a group." *Id.*, at 241. In this case, we realize that the Court of Appeals showed no hesitation in finding that Knolls prevailed on the RFOA defense, though the court expressed its conclusion in terms of Meacham's failure to meet the burden of persuasion. Whether the outcome should be any different when the burden is properly placed on the employer is best left to that court in the first instance. The judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

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Memorandum of Understanding Between OFCCP and EEOC on Shared Functions

Following is the text of a Memorandum of Understanding entered into between the Equal Employment Opportunity Commission and the Office of Federal Contract Compliance Programs, effective Nov. 7, 2011 (see 76 Fed. Reg. 71,029, Nov. 16, 2011). The purpose of the MOU is to coordinate enforcement efforts and share information regarding discrimination claims under Title VII of the Civil Rights Act of 1964 and Executive Order No. 11,246.

Memorandum of Understanding Between U.S. Department of Labor and Equal Employment Opportunity Commission

The U.S. Department of Labor, Office of Federal Contract Compliance Programs (OFCCP) and the Equal Employment Opportunity Commission (EEOC) first entered into this Memorandum of Understanding(MOU) in 1970 to further the objectives of Congress under Title VII of the Civil Rights Act of 1964, as amended (Title VII), in coordination with Executive Order 11246, 30 FR 12319, as amended (E.O. 11246), and Executive Order 12067, 43 FR 28967 (E.O. 12067) (the EEOC's government-wide coordination authority). This MOU broadly promotes interagency coordination in the enforcement of equal employment opportunity (EEO) laws and also serves to maximize effort, promote efficiency, and eliminate conflict, competition, duplication, and inconsistency among the operations, functions and jurisdictions of the parties to the MOU. It includes specific coordination procedures for complaints/charges of employment discrimination filed with OFCCP under E.O. 11246 and/or Title VII, which deal with discrimination on the basis of race, color, religion, sex, or national origin. Further, the MOU includes provisions for sharing information as appropriate and to the extent allowable under law.

This MOU sets forth the complaint/charge referral procedures and information sharing provisions between the agencies as they relate to the enforcement of Title VII and E.O. 11246. However, the agencies'Compliance Coordination Committees (¶ 6) are not limited to these two requirements, and may consult on any other topic that will enhance the agencies' mutual enforcement interests under any of the laws within their respective jurisdiction. This MOU does not extensively discuss interagency coordination efforts involving disability and other bases, apart from the broad mandate for the agencies' Compliance Coordination Committees (¶ 6). In 1992, the EEOC and OFCCP issued joint procedural regulations providing for information sharing, confidentiality, and complaint/charge referral under Title I of the Americans with Disabilities Act and Section 503 of the Rehabilitation Act. See 29 CFR part 1641 (EEOC), and 41 CFR part 60–742 (OFCCP).

The parties to this MOU agree as follows:

1. Sharing Information

(a) EEOC and OFCCP shall share any information relating to the employment policies and/or practices of employers holding government contracts or subcontracts that supports the enforcement mandates of each agency as well as their joint enforcement efforts. Such information shall include, but is not limited to, affirmative action programs, annual employment reports, complaints, charges, investigative files, and compliance evaluation reports and files.

(b) OFCCP shall make available to the appropriate requesting official of the EEOC or his or her designee for inspection and copying and/or loan, any documents in its possession pertaining to the effective enforcement or administration of any laws or requirements enforced by the EEOC including: (i) Title VII; (ii) the Equal Pay Act of 1963 (EPA); (iii) the Age Discrimination in Employment Act of 1967 (ADEA); (iv) the Genetic Information Nondiscrimination Act of 2008 (GINA); (v) the Americans with Disabilities Act (ADA) (in accordance with 29 CFR part 1641);and (vi) E.O. 12067. All documents will be made available within ten days of such request, or as soon as practical thereafter. Disclosure of such material by EEOC shall be in accordance with paragraphs 4 and 5 of this Agreement. All transfers of information under this and other paragraphs of this MOU shall only be made where not otherwise prohibited by law and in accordance with paragraph 5 of this Agreement.

(c) The EEOC shall make available to the appropriate requesting official of the OFCCP or his or her designee for inspection and copying and/or loan any documents pertaining to the enforcement and administration of (i) E.O. 11246;(ii) the affirmative action provisions of the Vietnam Era Veterans'Readjustment Assistance Act of 1974, 38 U.S.C. § 4212; (iii) Section 503 of the Rehabilitation Act of 1973 (in accordance with 41 CFR part 60–742); and (iv) E.O. 12067. All documents in its possession(or to which it has access through a work-sharing agreement as described in paragraph 4(b) of this Agreement) will be made available within ten days of such request, or as soon as practical thereafter. Disclosure of such material by OFCCP shall be in accordance with paragraphs 4 and 5 of this Agreement.

2. "Appropriate Requesting Officials"shall, for the purpose of this Agreement, include the following officials and staff:

(a) For the EEOC—

(1) The Chair

(2) A Commissioner

(3) The General Counsel

(4) The Deputy General Counsel

(5) The Associate General Counsel

(6) The Legal Counsel

(7) The Director of the Office of Research, Information and Planning

(8) Any Regional Attorney

(9) Any EEOC District, Field, Area or Local Office Director

(10) Director, Office of Field Programs

(b) For the DOL/OFCCP—

(1) The Secretary or Deputy Secretary of Labor

(2) The Solicitor or Deputy Solicitor of Labor

(3) The Director or Deputy Director, OFCCP

(4) Any Associate Solicitor

(5) Any OFCCP Regional, District or Area Office Director

(6) Any Regional Solicitor of Labor

(7) Any OFCCP Division Director

3. Requests directed to a headquarters office of one agency from a field office of the other shall first be forwarded through the headquarters of the requesting agency. Responses to all requests for information shall be made to the official making such request, or his/her designee.

4. Disclosure of Information

(a) All requests by third parties to this Agreement, including charging parties, respondents, and their attorneys, for disclosure of information shall be coordinated with the agency that initially compiled or collected the information. The decision of that agency regarding disclosure shall be honored.

(b) Subparagraph 4(a), above, is not applicable to requests for data in EEOC files made by any state or local agency designated as a 706 agency with whom EEOC has a current charge resolution contract and a work-sharing agreement containing provisions required by Sections 706 and 709 of Title VII. Provided, however, that any such agency shall not disclose to third parties, including charging parties, respondents, and their attorneys, any of the information initially collected or compiled by OFCCP without express written approval by the Director, OFCCP.

5. Confidentiality

(a) When EEOC provides information to OFCCP, the confidentiality requirements of sections 706(b) and 709(e) of Title VII, apply to that information. When OFCCP receives the same information from a source independent of EEOC, the preceding sentence does not preclude disclosure of the information received from the independent source. However, OFCCP will also observe any confidentiality requirements imposed on such information by the Trade Secrets Act or the Privacy Act.

(b) When OFCCP obtains information from its receipt, investigation, and processing of the Title VII component of a dual filed charge, or when OFCCP creates documents that exclusively concern the Title VII component of a dual filed charge, OFCCP will observe any confidentiality requirements imposed on such information by the Trade Secrets Act, the Privacy Act, and sections 706(b) and 709(e)of the Civil Rights Act of 1964.

(c) Questions concerning confidentiality under Title VII, the EPA, the ADA or GINA shall be directed to EEOC's Office of Legal Counsel.

(d) Questions concerning confidentiality under E.O. 11246, 38 U.S.C. § 4212 (Section 402 of VEVRAA), or Section 503 of the Rehabilitation Act shall be directed to OFCCP, Director, Division of Program Operations.

6. EEOC and OFCCP shall establish procedures for notification and consultation at various stages of their respective compliance activities in order to develop potential joint enforcement initiatives, increase efficiency, ensure coordination and minimize duplication. Such procedures shall include:

(a) Establishment of ongoing Compliance Coordination Committees (CCC)--

1. Field Committees: OFCCP's and EEOC's District Directors and Regional Attorneys will meet, not less than biannually, to review enforcement priorities, systemic investigations of mutual interest, compliance review schedules, potential Commissioner Charges, and potential litigation. The Field Committees will work to increase efficiency, and eliminate competition and duplication, and may engage in consultation regarding any topic that enhances the agencies' mutual enforcement interests. In addition to sharing information about investigations of discrimination based on race, color, religion, sex, and national origin, the Field Committees may also share information related to the enforcement of the EPA, the ADEA, GINA, and the ADA and Section 503 of the Rehabilitation Act (in accordance with 29 CFR part 1641 (EEOC) and 41 CFR part 60–742 (OFCCP)).

2. Headquarters Committee: Representatives from OFCCP's and EEOC's Headquarters shall meet not less than biannually to discuss topics of mutual interest to both agencies, including, but not limited to:

(i) Procedures for routine access to and exchanges of electronic databases, including, but not limited to, lists of proposed and completed compliance evaluations; systemic and individual investigation files; and conciliation agreements and settlements;

(ii) Consistent analytical approaches to identifying and remedying employment discrimination under Title VII;

(iii) Joint and cross-training programs and materials;

(iv) Joint policy statements; and

(v) Procedures for coordinated collection, sharing and analysis of data.

(b) Contact by each agency at the commencement of and during a field investigation or compliance evaluation where appropriate to obtain information in the possession of the agency on the employer being investigated.

(c) Notification of OFCCP when EEOC has made a finding of cause, determined that attempts to conciliate have been unsuccessful, decided not to file a lawsuit, and learned or believes that the respondent is a federal contractor subject to E.O. 11246.

(d) Consultation with the appropriate field office of OFCCP when an EEOC field office is contemplating recommending a Commissioner Charge or litigation, and coordination of its activities.

(e) Consultation with the appropriate field office of EEOC when an OFCCP Regional Office is contemplating recommending the issuance of an administrative complaint and coordination of its activities.

7. Receipt, Investigation, Processing, and Resolution of Complaints Filed with OFCCP

(a) Dual-Filed Complaints/Charges—Pursuant to this MOU, OFCCP shall act as EEOC's agent for the purposes of receiving the Title VII component of all complaints/charges. All complaints/charges of employment discrimination filed with OFCCP alleging a Title VII basis (race, color, religion, sex, national origin, or retaliation)shall be received as complaints/charges simultaneously dual-filed under Title VII. In determining the timeliness of such complaint/charge, the date the matter is received by OFCCP, acting as EEOC's agent, shall be deemed the date it is received by EEOC. When OFCCP receives such a complaint/charge and determines that the employer is not a federal contractor subject to E.O. 11246, it shall transfer the charge to EEOC within 10 days of that determination and notify the parties. Such notification shall explain that OFCCP, as EEOC's agent, has received the Title VII charge and that the date OFCCP received it will be deemed the date it was received by EEOC.

(b) Systemic or Class Allegations—OFCCP will retain, investigate, process, and resolve allegations of discrimination of a systemic or class nature on a Title VII basis in dual filed complaints/charges. OFCCP will promptly notify EEOC of OFCCP's receipt of such allegations, by forwarding a copy of the complaint/charge (and third party certificate, if any). OFCCP shall make available to EEOC, upon request, information obtained in processing such allegations, pursuant to paragraphs 1 and 6(b) herein. However, in appropriate cases, the EEOC may request that it be referred such allegations to avoid duplication of effort and to ensure effective law enforcement.

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(c) Individual Allegations—OFCCP will refer to EEOC allegations of discrimination of an individual nature on a Title VII basis in dual filed complaints/charges. However, in appropriate cases, OFCCP may request that it retain such allegations so as to avoid duplication and to ensure effective law enforcement.

(d) Investigating, Processing and Resolving Dual-Filed Complaints/Charges — OFCCP will act as EEOC's agent for the purposes of investigating, processing and resolving the Title VII component of dual filed complaints/charges that it retains under this paragraph. OFCCP shall investigate, process and resolve such complaints/charges as set forth in this subparagraph, and in a manner consistent with Title VII principles on liability and relief.

(1) Notice of Receipt of Complaint/Charge—Within ten days of receipt, OFCCP shall notify the contractor/respondent that it has received a complaint/charge of employment discrimination under E.O. 11246 and Title VII. This notification shall include a copy of the complaint/charge, if taken on OFCCP's complaint form, or otherwise state the name of the charging party, respondent, date, place and circumstances of the alleged unlawful employment practice(s).

(2) Fair Employment Practice Agency (FEPA) Deferral Period—Pursuant to work-sharing agreements between EEOC and state and local agencies designated as fair employment practice agencies, the deferral period for dual filed Title VII complaints/charges that OFCCP receives will be waived.

(3) Not Reasonable Cause Findings—If the OFCCP investigation of a dual filed complaint/charge results in a not reasonable cause finding under Title VII, OFCCP will issue a Title VII dismissal and notice of right-to-sue, close the Title VII component of the complaint/charge and promptly notify EEOC's Director, Office of Field Programs, of the closure.

(4) Reasonable Cause Findings—If the OFCCP investigation of a dual filed complaint/charge results in a reasonable cause finding under Title VII, OFCCP will issue a reasonable cause finding under Title VII. OFCCP will attempt conciliation to obtain relief, consistent with EEOC's standards for remedies, for all aggrieved persons covered by the Title VII finding.

(i) Successful Conciliation—Conciliation agreements will state that the complainant/charging party agrees to waive the right to pursue the subject issues further under Title VII. OFCCP will close the Title VII component of the complaint/charge, and promptly notify EEOC.

(ii) Unsuccessful Conciliation—If conciliation is not successful, OFCCP will consider the E.O. 11246 component of the complaint/charge for further processing under its usual procedures. At the conclusion of OFCCP processing, it shall transmit the Title VII charge component to EEOC for any action EEOC deems appropriate. If EEOC declines to pursue further action, it will close the Title VII charge and issue a notice of right-to-sue.

(5) Issuance of Notice of Right-to-Sue Upon Request—Consistent with 29 C.F.R. § 1601.28, once 180 days have passed from the date the complaint/charge was filed, OFCCP shall promptly issue upon

request a notice of right-to-sue on the Title VII component of a complaint/charge that it has retained. Issuance of a notice of right-to-sue shall terminate OFCCP processing of the Title VII component of the complaint/charge unless it is determined at that time, or at a later time, that it would effectuate the purposes of Title VII to further process the Title VII component of the complaint/charge.

(6) Subsequent Attempts to File a Charge with EEOC Covering the Same Facts and Issues—If an individual who has already filed an OFCCP complaint/charge that is dual-filed under Title VII subsequently files a Title VII charge with EEOC covering the same facts and issues, EEOC will forward the charge to OFCCP for consolidated processing.

8. Complaints Misfiled with EEOC—When EEOC receives a complaint not within its purview, but over which it believes OFCCP has jurisdiction, it will refer the complaint to OFCCP. In determining the timeliness of such complaint, the date the matter is received by EEOC shall be deemed the date it is received by OFCCP.

9. EEOC and OFCCP shall conduct periodic reviews of the implementation of this agreement, on an ongoing basis.

10. Coordination Advocate—OFCCP and EEOC seek to ensure consistent compliance and enforcement standards and procedures, and to make the most efficient use of their available resources through coordination. Therefore, within sixty (60) days of the effective date of this MOU, the headquarters offices of each agency shall appoint a Coordination Advocate who will be available to assist, as necessary, in obtaining a full understanding of, and compliance with, the procedures set forth in this MOU.

11. Effect of Agreement

This agreement is an internal Government agreement and is not intended to confer any rights against the United States, its agencies, or its officers upon any private person.

Nothing in this agreement shall be interpreted as limiting, superseding or otherwise affecting either party's normal operations or decisions in carrying out its statutory, Executive Order, or regulatory duties. This agreement does not limit or restrict the parties from participating in similar activities or arrangements with other entities.

This agreement does not itself authorize the expenditure or reimbursement of any funds. Nothing in this agreement obligates the parties to expend appropriations or enter into any contract or other obligations.

12. Effective Date. This MOU will take effect once signed by both parties.

13. Signatures

Dated: 11/7/2011.

/s/

Patricia A. Shiu,

Director, Office of Federal Contract Compliance Programs.

Dated: 11/7/2011.

/s/

Jacqueline A. Berrien,

Labor and Employment Law Resource Center
ISSN 2156-2849

Chair, Equal Employment Opportunity Commission.

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Withheld pursuant to exemption

(b)(5);(b)(7)(E)

of the Freedom of Information and Privacy Act

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Withheld pursuant to exemption

(b)(5);(b)(7)(E)

of the Freedom of Information and Privacy Act

Guidance Regarding the Employment of Transgender Individuals in the Federal Workplace

Policy and Purposes

It is the policy of the Federal Government to treat all of its employees with dignity and respect and to provide a workplace that is free from discrimination whether that discrimination is based on race, color, religion, sex (including gender identity or pregnancy), national origin, disability, political affiliation, marital status, membership in an employee organization, age, sexual orientation, or other non-merit factors. Agencies should review their anti-discrimination policies to ensure that they afford a non-discriminatory working environment to employees irrespective of their gender identity or perceived gender non-conformity.

The purpose of this memorandum is not to address legal rights and remedies, but instead to provide guidance to address some of the common questions that agencies have raised with OPM regarding the employment of transgender individuals in the federal workplace. Because the guidance is of necessity general in nature, managers, supervisors, and transitioning employees should feel free to consult with their human resources offices and with the Office of Personnel Management to seek advice in individual circumstances.

Core Concepts

Gender identity is the individual's internal sense of being male or female. Gender identity is generally determined in the early years of an individual's life and, if different from the individual's physical gender, may result in increasing psychological and emotional discomfort and pain. The way an individual expresses his or her gender identity is frequently called "gender expression," and may or may not conform to social stereotypes associated with a particular gender.

Transgender: Transgender individuals are people with a gender identity that is different from the sex assigned to them at birth. Someone who was assigned the male sex at birth but who identifies as female is a *transgender woman*. Likewise, a person assigned the female sex at birth but who identifies as male is a *transgender man*. Some individuals who would fit this definition of transgender do not identify themselves as such, and identify simply as men and women, consistent with their gender identity. The guidance discussed in this memorandum applies whether or not a particular individual self-identifies as transgender.

Transition: Some individuals will find it necessary to transition from living and working as one gender to another. These individuals often seek some form of medical treatment such as counseling, hormone therapy, electrolysis, and reassignment surgery. Some individuals, however, will not pursue some (or

any) forms of medical treatment because of their age, medical condition, lack of funds, or other personal circumstances. Managers and supervisors should be aware that not all transgender individuals will follow the same pattern, but they all are entitled to the same consideration as they undertake the transition steps deemed appropriate for them, and should all be treated with dignity and respect.

Transition While Employed

The World Professional Association of Transgender Health (WPATH), an international organization devoted to the study and treatment of gender-identity-related issues, has published the WPATH Standards of Care, which explains gender transition as a process that may include therapy, hormones, and possibly surgical procedures, or any combination of them. In particular, as explained by the WPATH Standards of Care, a transgender individual's gender transition will usually proceed in the following order. First, the individual will meet with a mental health provider to ascertain what transition steps are most appropriate to address the lack of congruity between his or her gender identity and the sex assigned to him or her at birth. Second, after appropriate evaluation and counseling, the individual may begin a course of hormone therapy, usually under the supervision of both her mental health provider and an endocrinologist. Third, after a period of time on hormone therapy, an individual will be ready to commence the "real life experience," which is when an individual transitions to living full-time in the gender role that is consistent with his or her gender identity. It is at this point that an employer is most often made aware that an employee is transgender and undertaking a gender transition.

Gender identity health care providers recognize commencement of the real life experience as often the most important stage of transition, and, for a significant number of people, the last step necessary for them to complete a healthy gender transition. As the name suggests, the real life experience is designed to allow the transgender individual to experience living full-time in the gender role to which he or she is transitioning. Completion of at least one year of the real life experience is required prior to an individual's being deemed eligible for gender reassignment surgery.

There are several issues that commonly generate questions from managers and employees who are working with a transitioning employee. In order to assist you in ensuring that transitioning employees are treated with dignity and respect, we offer the following guidance on those issues.

Confidentiality and Privacy: An employee's transition should be treated with as much sensitivity and confidentiality as any other employee's significant life experiences, such as hospitalization or marital difficulties. Employees in transition often want as little publicity about their transition as possible. They may be concerned about safety and employment issues if other people or employers become aware that he or she has transitioned. Moreover, medical information received about individual employees is protected under the Privacy Act (5 U.S.C. 552a).

Employing agencies, managers, and supervisors should be sensitive to these special concerns and advise employees not to spread information concerning the employee who is in transition: gossip and rumor-spreading in the workplace about gender identity are inappropriate. Other employees may be given only general information about the employee's transition; personal information about the

employee should be considered confidential and should not be released without the employee's prior agreement. Questions regarding the employee should be referred to the employee himself or herself. If it would be helpful and appropriate, employing agencies may have a trainer or presenter meet with employees to answer general questions regarding gender identity. Issues that may arise should be discussed as soon as possible confidentially between the employee and his or her managers and supervisors.

Dress and Appearance: Employees who begin the "real life experience" stage of their transition are required under the WPATH Standards of Care to live and work full-time in the target gender in all aspects of their life, which includes dressing at all times in the clothes of the target gender. Once an employee has informed management that he or she is transitioning, the employee will begin wearing the clothes associated with the gender to which the person is transitioning. Agency dress codes should be applied to employees transitioning to a different gender in the same way that they are applied to other employees of that gender. Dress codes should not be used to prevent a transgender employee from living full-time in the role consistent with his or her gender identity.

Names and Pronouns: Managers, supervisors, and coworkers should use the name and pronouns appropriate to the employee's new gender. Further, managers, supervisors, and coworkers should take care to use the correct name and pronouns in employee records and in communications with others regarding the employee. Continued intentional misuse of the employee's new name and pronouns, and reference to the employee's former gender by managers, supervisors, or coworkers may undermine the employee's therapeutic treatment, and is contrary to the goal of treating transitioning employees with dignity and respect. Such misuse may also breach the employee's privacy, and may create a risk of harm to the employee.

Sanitary and Related Facilities: The Department of Labor's Occupational Safety and Health Administration (DOL/OSHA) guidelines require agencies to make access to adequate sanitary facilities as free as possible for all employees in order to avoid serious health consequences. For a transitioning employee, this means that, once he or she has begun living and working full-time in the gender that reflects his or her gender identity, agencies should allow access to restrooms and (if provided to other employees) locker room facilities consistent with his or her gender identity. While a reasonable temporary compromise may be appropriate in some circumstances, transitioning employees should not be required to have undergone or to provide proof of any particular medical procedure (including gender reassignment surgery) in order to have access to facilities designated for use by a particular gender. Under no circumstances may an agency require an employee to use facilities that are unsanitary, potentially unsafe for the employee, or located at an unreasonable distance from the employee's work station. Because every workplace is configured differently, agencies with questions regarding employee access to any facilities within an agency should contact OPM for further guidance.

Recordkeeping: Consistent with the Privacy Act, the records in the employee's Official Personnel Folder (OPF) and other employee records (pay accounts, training records, benefits documents, and so on) should be changed to show the employee's new name and gender, once the employee has begun working full-time in the gender role consistent with the employee's gender identity. See 5 U.S.C. 552a (d). Instructions for how to reconstruct an employee's OPF to account for a gender change are set forth in Chapter 4, How to Reconstruct a Personnel Folder [196 KB].

Insurance Benefits: Employees in transition who already have Federal insurance benefits must be allowed to continue their participation, and new employees must be allowed to elect participation, in their new names and genders. If the employees in transition are validly married at the time of the transition, the transition does not affect the validity of that marriage, and spousal coverage should be extended or continued even though the employee in transition has a new name and gender. Further information about insurance coverage issues can be found on the web at OPM's Insure website, or by contacting the relevant OPM insurance program office.

Specific Questions: For further guidance on these issues, contact the Diversity Program Manager, Office of Diversity and Inclusion, Office of Personnel Management, 1900 E Street, NW, Washington, DC 20415, at (202) 606-0020.

Back to Employment of Transgender Individuals

This page can be found on the web at the following url:
http://www.opm.gov/diversity/Transgender/Guidance.asp

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Withheld pursuant to exemption

(b)(5);(b)(7)(E)

of the Freedom of Information and Privacy Act

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
MIDLAND-ODESSA DIVISION

ALEX PACHECO	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 7:10-CV-116-RAJ
	)	
FREEDOM BUICK GMC TRUCK, INC.,	)	
	)	
Defendant.	)	
	)	

BRIEF OF UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICUS CURIAE IN OPPOSITION TO SUMMARY JUDGMENT

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STATEMENT OF INTEREST

The United States Equal Employment Opportunity Commission ("EEOC") is charged by Congress with the administration, interpretation, and enforcement of Title VII of the Civil Rights Act of 1964, as amended ("Title VII"), 42 U.S.C. §§ 2000e et seq. This case presents the question whether, under Title VII, disparate treatment of an employee because she is transgender is discrimination "because of ... sex." Given the Commission's enforcement interest in the resolution of this question, we offer our views to the Court.

It is the position of the EEOC that disparate treatment of an employee because he or she is transgender is discrimination "because of ... sex" under Title VII. This is so for at least two reasons: (1) under the reasoning of the Supreme Court's decision in Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), discrimination against a transgender individual because he or she does not conform to gender norms or stereotypes is discrimination "because of ... sex" under Title VII; and (2) following the reasoning in Schroer v. Billington, 577 F.Supp.2d 293 (D.D.C. 2008), discrimination because an individual intends to change, is changing, or has changed his or her sex – including by changing aspects of his or her biological sex or gender expression – is likewise prohibited by Title VII. Further, in this case, the record evidence presents a genuine dispute of fact as to whether Defendant Freedom Buick GMC, Inc. ("Freedom") violated Title VII by firing Plaintiff Alex Pacheco ("Pacheco") "because of ... sex."[1]

Accordingly, the EEOC, as amicus curiae, respectfully submits that Freedom's motion for summary judgment should be denied.

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[1] The EEOC refers to and relies on evidence contained in the unsealed portions of the record. Citations herein to "Dominguez Dep.," "Hooker Dep.," and "Pacheco Dep." refer to the depositions attached to the Defendant's Appendix (Doc. No. 17), and "P.App." refers to the Plaintiff's Appendix (Doc. No. 22).

STATEMENT OF FACTS

When first hired by Freedom in January 2009 as a receptionist, Pacheco identified as and presented as male. Pacheco Dep. at 104, 237. Subsequently, Pacheco began taking hormones in order to undergo a physical transition from male to female. Id. at 94. These hormones caused changes in her physical appearance, including the development of breasts. Id. The plaintiff also grew her hair and nails out and began identifying, dressing, and otherwise "liv[ing] my life as a female" whenever she was not at work at Freedom. Id. at 98-99, 157.

In May 2010, Pacheco asked Sarah Dominguez ("Dominguez"), a cashier at Freedom, to ask Freedom's president, Josefina Hooker ("Hooker"), if Pacheco could begin presenting as female at work. Dominguez Dep. at 89. According to Dominguez, Hooker responded that this would be "inappropriate" and would not be permitted. Id. at 91.

Also at about that time, Hooker saw Pacheco presenting as a female one day when Pacheco was off-duty but had stopped by the workplace to give Dominguez a ride home. Pacheco Dep. at 210-11. According to Dominguez, Hooker later related that she was "shocked" to see Pacheco dressed as a woman. Dominguez Dep. at 83. Hooker's facial expression and manner of speaking while relating this made it clear to Dominguez that Hooker was shocked "in a bad way and found [Pacheco's] dressing as a woman to be very offensive." Id. at 95; see also id. at 83. Dominguez also testified that Hooker asked her repeatedly whether Pacheco planned to "get a sex change," id. at 103, in a manner that made it clear that Hooker found the idea objectionable, id. at 106. On another occasion at about this time, Dominguez heard Hooker and other employees express disapproval of Pacheco's appearance in pictures they saw on Pacheco's Myspace page in which Pacheco presented as a female. Id. at 98-101.

On June 15, 2010, Pacheco and Dominguez were summoned individually to Hooker's office and discharged. Dominguez Dep. at 77; Pacheco Dep. at 176, 189-90; Hooker Dep. at 38.

According to Pacheco and Dominguez, Hooker told each of them that she was discharging them because she was "simply reorganizing the office duties." Dominguez Dep. at 63; Pacheco Dep. at 176. Hooker recorded this in company records as the reason for Pacheco's discharge, and does not dispute that it is the reason she provided to Pacheco and Dominguez. Hooker Dep. at 34; see also Employee Disciplinary Report, P.App. Exh. D. Pacheco maintains that during this conversation Hooker also told her that "you just don't fit in the picture with the rest of the employees." Pacheco Dep. at 177. Hooker denies this. Hooker Dep. at 154. However, Hooker did not make any similar comment to Dominguez. Dominguez Dep. at 77.

Pacheco was replaced by a new receptionist the next day, on June 16, 2010, and Dominguez was replaced by a new cashier on June 15, 2010. Hooker Dep. at 38, 164. According to the defendant, the new receptionist's job description was the same as Pacheco's. Compare Answer to Interrogatory No. 3 with Answer to Interrogatory No. 13, P. App. Exh. F.

Later, during litigation, Hooker offered other, performance-related reasons for discharging Pacheco and Dominguez. Hooker Dep. 135-37. As set forth more fully in Pacheco's response to Freedom's motion, these explanations are contradicted by Hooker's deposition testimony, company records, or both. See Response to Motion for Summary Judgment at 4-10. Additionally, although Freedom maintains that Hooker decided to fire Dominguez and Pacheco because of an incident of misconduct on June 11, 2010, see Motion for Summary Judgment at 7-8, citing Hooker Dep. at 137, Hooker also testified that she had actually decided to discharge Dominguez at least two days earlier, on June 9, 2010, see id. at 39-40.

ARGUMENT

I. DISCRIMINATION AGAINST AN EMPLOYEE BECAUSE HE OR SHE IS TRANSGENDER IS DISCRIMINATION "BECAUSE OF . . . SEX" UNDER TITLE VII.

A. Discharging a Transgender Employee Because He or She Fails to Identify, Look, or Live in Conformance with A Preferred or Expected Gender Norm Is Discrimination Because of Sex Under Title VII.

In Price Waterhouse, the Supreme Court recognized that Title VII's prohibition of discrimination "because of ... sex" means "that gender must be irrelevant to employment decisions." See 490 U.S. at 240. The Court explained that "we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for '[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.'" Id. at 251 (internal citations omitted). Thus "Title VII's reference to 'sex' encompasses both the biological differences between men and women, and gender discrimination, that is, discrimination based on a failure to conform to stereotypical gender norms." Smith v. City of Salem, 378 F.3d 566, 575 (6th Cir. 2004). As one court of appeals has explained, in Price Waterhouse:

> the Supreme Court held that Title VII barred not just discrimination based on the fact that Hopkins was a woman, but also discrimination based on the fact that she failed "to act like a woman" – that is, to conform to socially-constructed gender expectations. What matters, for purposes of this part of the Price Waterhouse analysis, is that in the mind of the perpetrator the discrimination is related to the sex of the victim: here, for example, the perpetrator's actions stem from the fact that he believed that the victim was a man who "failed to act like" one.

Schwenk v. Hartford, 204 F.3d 1187, 1201-02 (9th Cir. 2000).

After Price Waterhouse, every federal circuit court of appeals that has addressed the question has recognized that disparate treatment of a transgender plaintiff can be discrimination

"because of ... sex" if the defendant's action was motivated by the plaintiff's nonconformance with a sex stereotype or norm. See Smith, 378 F.3d at 572-73 (holding that adverse action taken because of transgender plaintiff's failure to conform to sex stereotypes concerning how a man or woman should look and behave constitutes unlawful gender discrimination); Schwenk, 204 F.3d at 1201-02 (concluding that the transsexual prisoner had stated a viable sex-discrimination claim under the Gender Motivated Violence Act because "[t]he evidence offered ... show[s] that [the prison guard's assault was] motivated, at least in part, by Schwenk's gender – in this case, by her assumption of a feminine rather than a typically masculine appearance or demeanor" and noting that its analysis was equally applicable to claims brought under Title VII); see also Kastl v. Maricopa County Cmty. Coll. Dist., 325 Fed.Appx. 492 at 494, 2009 WL 990760, at **1 (9th Cir. 2009) (concluding that after Price Waterhouse, "it is unlawful to discriminate against a transgender (or any other) person because he or she does not behave in accordance with an employer's expectations for men or women"); Etsitty v. Utah Transit Auth., 502 F.3d 1215, 1222-24 (10th Cir. 2007) (assuming without deciding that a "transsexual" could bring a gender-stereotyping claim under Price Waterhouse, but also concluding that "transsexuals" are not a protected class under Title VII); Barnes v. City of Cincinnati, 401 F.3d 729, 736-39 (6th Cir. 2005) (holding that demotion of "preoperative male-to-female transsexual" police officer because he did not "conform to sex stereotypes concerning how a man should look and behave" stated a claim of sex discrimination under Title VII); cf. Rosa v. Park W. Bank & Trust Co., 214 F.3d 213, 213-15 (1st Cir. 2000) (applying Price Waterhouse to conclude, under the Equal Credit Opportunity Act, that plaintiff states a claim for sex discrimination if bank's refusal to provide a loan application was because plaintiff's "traditionally feminine attire.... did not accord with his male gender").[2]

[2] In addition, numerous federal district courts have come to the same conclusion. See, e.g., Glenn v.

Thus under Price Waterhouse, and in light of the clear weight of authority from lower courts applying its holding and rationale, it is unlawful sex discrimination under Title VII to discharge a transgender employee because he or she does not conform to the gender norms or stereotypes to which an employer expects or prefers the employee to conform.[3]

B. Discharging an Employee Because of a Change in Aspects of His or Her Sex, Including a Change in Gender Expression, Is Discrimination Because of Sex.

A plaintiff may also prove a claim of sex discrimination under Title VII by demonstrating that her employer discriminated against her because she planned to change, was in the process of changing, or had changed her sex. In Schroer, the court concluded that "no court would take seriously the notion" that religious converts are not protected by Title VII's prohibition against discrimination "because of ... religion." 577 F.Supp.2d at 306. Similarly, in Hobbie v. Unemployment Appeals Commission of Florida, the Supreme Court rejected the argument that unemployment benefits could be denied to a plaintiff who had been discharged for refusing to

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Brumby, 724 F.Supp.2d 1284, 1297-1301 (N.D. Ga. July 2, 2010) (on appeal); Michaels v. Akal Security, Inc., No. 09-cv-1300, 2010 WL 2573988, at *4 (D. Colo. June 24, 2010); Schroer, 577 F.Supp.2d 293; Lopez v. River Oaks Imaging & Diagnostic Grp., Inc., 542 F.Supp.2d 653, 660 (S.D. Tex. 2008); Mitchell v. Axcan Scandipharm, Inc., No. Civ.A. 05-243, 2006 WL 456173 (W.D. Pa. 2006); Tronetti v. TLC HealthNet Lakeshore Hosp., No. 03-cv-375E, 2003 WL 22757935, at *4 (W.D.N.Y. 2003); Doe v. United Consumer Fin. Servs., No. 1:01-cv-1112, 2001 WL 34350174, at *2-5 (N.D. Ohio 2001).

[3] In its motion for summary judgment, Freedom draws a sharp distinction between cases alleging "sex stereotyping" (which it acknowledges may be actionable) and those involving discrimination on the basis of "sexual identity" or "gender identity disorders" (which it alleges are not). This is an artificial dichotomy, and Freedom construes Price Waterhouse too narrowly. Preferring or insisting that an employee's gender identity "match" the employee's actual or perceived biological sex (e.g., anatomy) is itself an impermissible sex stereotype. Thus, if an employer were to take an adverse employment action because an employee's gender identity is not consistent with the employee's biological sex, the employer would be discriminating "because of ... sex." See Smith, 378 F.3d at 574-75 ("discrimination against a plaintiff who is a transsexual – and therefore fails to act and/or identify with his or her gender – is no different from the discrimination directed against [the plaintiff] in Price Waterhouse who, in sex-stereotypical terms, did not act like a woman"); Schwenk, 204 F.3d at 1202 (discrimination because of gender in part because the perpetrator had targeted the transgender victim "only after he discovered that she considered herself female") (emphasis added); Myers v. Cuyahoga County, 182 Fed.Appx. 510, 519 (6th Cir. 2006) ("Title VII protects transsexual persons from discrimination for failing to act in accordance and/or identify with their perceived sex or gender") (emphasis added).

work on her Sabbath if her need for a religious accommodation was the result of a religious conversion rather than preexisting religious beliefs. 480 U.S. 136, 144 (1987) ("In effect, the Appeals Commission asks us to single out the religious convert for different, less favorable treatment than that given an individual whose adherence to his or her faith precedes employment. We decline to do so.").

Likewise, the Schroer court reasoned, "refusal to hire Schroer after being advised that she planned to change her anatomical sex by undergoing sex reassignment surgery was literally discrimination 'because of ... sex.'" Id. at 308. The court's analogy to religious discrimination illustrates that discrimination on the basis of a protected characteristic encompasses discrimination because of a change in a protected characteristic. The fact that the protected characteristic at issue is "sex" rather than "religion" is immaterial. Accordingly, there is no basis for singling out transgender plaintiffs for less protection under Title VII's sex discrimination provision on the ground that aspects of their biological sex or gender-related expression changed at some point in time.

C. **Contrary Caselaw Decided Before Price Waterhouse Is Not Controlling.**

Several early appellate cases decided before Price Waterhouse rejected sex discrimination claims brought by transgender individuals. See, e.g., Ulane v. Eastern Airlines, 742 F.2d 1081, 1085 (7th Cir. 1984); Sommers v. Budget Mktg., Inc., 667 F.2d 748, 749 (8th Cir. 1982); Holloway v. Arthur Andersen & Co., 566 F.2d 659, 664 (9th Cir. 1977), overruling recognized by Schwenk, 204 F.3d at 1201-02. Freedom, relying on these cases, likewise contends that transgender status is not a protected classification under Title VII. Motion for Summary Judgment at 3-5. These cases, however, have been abrogated by the Supreme Court's subsequent decisions in Price Waterhouse and Oncale v. Sundowner Offshore Oil Services, Inc., 523 U.S. 75, 76 (1998).

The courts that held that Title VII did not protect transgender individuals did so primarily for two reasons. First, according to these courts, Congress intended the term "sex" to refer only to a person's biological status as male or female; therefore, only discrimination on the basis of that biological status is proscribed. See, e.g., Ulane, 742 F.2d at 1086 (construing "sex" in Title VII narrowly to mean only anatomical sex rather than gender); see also Sommers, 667 F.2d at 750 (concluding "the word 'sex' in Title VII is to be given its traditional definition, rather than an expansive interpretation"); Holloway, 566 F.2d at 662 ("Giving the statute its plain meaning, this court concludes that Congress had only the traditional notions of 'sex' in mind."). And second, according to these courts, Congress did not specifically intend to protect transgender individuals. See Ulane, 742 F.2d at 1085 ("Congress never considered nor intended that this 1964 legislation apply to anything other than the traditional concept of sex."); see also Sommers, 667 F.2d at 750 ("Because Congress has not shown an intention to protect transsexuals, we hold that discrimination based on one's transsexualism does not fall within the protective purview of the Act."); Holloway, 566 F.2d at 663 ("Congress has not shown any intent other than to restrict the term 'sex' to its traditional meaning.").

The rationales undergirding these decisions, however, have been eviscerated by the Supreme Court's decisions in Price Waterhouse and Oncale. As noted above, Price Waterhouse makes clear that Title VII does not simply prohibit discrimination based on biological aspects of sex, but also discrimination on the basis of gender-related stereotypes. See 290 U.S. at 251; see also Schwenk, 204 F.3d at 1201 ("sex" "encompasses both sex – that is, the biological differences between men and women – and gender"). And second, in Oncale, in ruling that same-sex harassment is actionable, the Supreme Court explicitly rejected the notion that Title VII only proscribes types of discrimination specifically contemplated by Congress. 523 U.S. at 79-80 (explaining that "statutory prohibitions often go beyond the principal evil [they were

passed to combat] to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed").

In short, as the Ninth Circuit noted when it repudiated its earlier decision in Holloway, "[t]he initial approach taken in cases such as Holloway has been overruled by the logic and language of Price Waterhouse." Schwenk, 204 F.3d at 1201-02; see also Smith, 378 F.3d at 572-73 (reasoning that Price Waterhouse "eviscerated" Ulane, Sommers, and Holloway). It thus is now well-established that a plaintiff's transgender does not provide a basis for excluding him or her from Title VII's protections. See Smith, 378 F.3d at 574-75 (under Price Waterhouse, "a label, such as 'transsexual' is not fatal to a sex discrimination claim where the victim has suffered discrimination because of ... gender non-conformity"); see also Schroer, 577 F.Supp.2d at 308 (discrimination on the basis of a change in sex is discrimination "because of ... sex").[4]

Freedom's argument – that Pacheco cannot prevail because transgender status is not a protected classification specifically listed in Title VII – therefore disregards Supreme Court precedent and rests on discredited reasoning. Discrimination against a transgender individual because the individual fails to conform (or stops conforming) with certain gender norms or stereotypes is discrimination "because of ... sex." Likewise, discrimination against a transgender individual because the individual intends to change, is changing, or has changed aspects of his or her sex/gender also is discrimination "because of ... sex." Thus, discrimination against a plaintiff because she is transgender is unlawful not because transgender status is a freestanding protected classification, but because such discrimination is a subcategory of sex discrimination.

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[4] For the same reason, certain district court decisions declining to recognize that Title VII protects transgender individuals also are no longer persuasive. See, e.g., Sweet v. Mulberry Lutheran Home, 2003 WL 21525058, at *3 (S.D. Ind.) (relying on Ulane); Oiler v. Winn-Dixie Louisiana, Inc., No. Civ.A.00-3114, 2002 WL 31098541, at *5 (E.D. La) (relying on Ulane and other pre-Price Waterhouse appellate decisions); Dobre v. Natl. Railroad Passenger Corp., 850 F.Supp.2d 284, 286-87 (E.D. Penn. 1993) (relying on Holloway prior to its overruling).

II. THERE IS A GENUINE DISPUTE OF FACT AS TO WHETHER FREEDOM FIRED PACHECO BECAUSE OF HER SEX.

Given the record in this case, there is a genuine issue as to whether Freedom decided to discharge Pacheco because of her sex. A reasonable jury could find that shortly before Pacheco's discharge, Hooker was "shocked" by and reacted negatively to the plaintiff's appearance as a female, stated that it would be "inappropriate" for the plaintiff to present as a female at work, asked Dominguez repeatedly whether Pacheco planned to "get a sex change," and found the idea of such a sex reassignment surgery objectionable. Further, there is evidence that Hooker told Pacheco when discharging her that "you just don't fit in the picture with the other employees," but did not make such a comment to Dominguez, whom Hooker discharged on the same day, purportedly for the same incident of misconduct. It can also be inferred that Hooker knew that biological aspects of Pacheco's sex were changing and was concerned that Pacheco might have surgery that would result in further such changes. Finally, there is evidence that the reasons offered by Freedom for Pacheco's discharge are pretextual, since they have changed over time and are contradicted by Hooker's own testimony or the company's own records.

Given this evidence, a reasonable jury could conclude that Hooker expected or preferred that Pacheco look and act male, rather than dressing and otherwise presenting as female, and that the reason for Pacheco's discharge was Hooker's disapproval of Pacheco's transition from male to female and/or Pacheco's resulting failure to conform to male gender norms.[5] Accordingly, there is a genuine dispute of fact as to whether Pacheco was discharged because of sex, and Pacheco's claim cannot be resolved on summary judgment.

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[5] For this reason, it is hardly dispositive that, as Freedom argues, Pacheco was already "effeminate" when first hired. Motion for Summary Judgment at 6. Hooker may not have been bothered by the fact that Pacheco was an effeminate man as long as he stayed male. Here, a reasonable jury could find that Hooker actually was motivated by Pacheco's full-fledged presentation as female (e.g., Pacheco's non-conformance with the stereotypical norm that males should look and act like males) and/or Pacheco's actual transition from male to female. That would be discrimination "because of ... sex" and thus a violation of Title VII.

CONCLUSION

For the reasons set forth above, the EEOC respectfully requests that the motion for summary judgment be denied.

October 13, 2011

Respectfully submitted,

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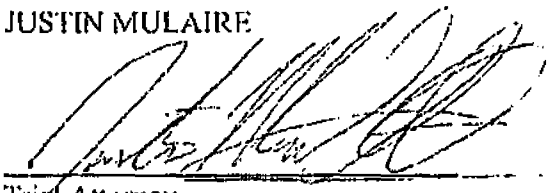
JUSTIN MULAIRE



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availability of the sex stereotyping theory as a valid method of establishing discrimination "on the basis of sex" in scenarios involving transgender individuals.

- The Commission found that although most courts have found protection for transgender people under Title VII applying a theory of gender stereotyping, "sex stereotyping" is not itself an independent cause of action. Rather, evidence of gender stereotyping is simply one means of demonstrating sex discrimination under Title VII. For example, Title VII prohibits sex discrimination based on sex whether motivated by hostility, by a desire to protect people of a certain gender, by assumptions that disadvantage men or women, by gender stereotypes, or by the desire to accommodate other people's prejudices or discomfort.

- Transgender individuals may establish sex discrimination in the same ways any individual may establish that discrimination on the basis of sex occurred. For example, a transgender individual may establish sex discrimination under a theory of gender stereotyping by showing she was denied a job because the employer believed that biological men should consistently present as men and wear male clothing. Alternatively, a transgender individual may establish sex discrimination without any evidence of gender stereotyping by showing that the employer was willing to hire her when it thought she was a man, but was not willing to hire her once it found out that she was now a woman.

- The Commission remanded the complaint back to the Agency for processing the entire complaint in accordance with 29 C.F.R. Part 1614. The Commission did not make any findings on the merits of the claim.

Implications of the Decision

- The decision clarifies that claims of discrimination based on transgender status or gender identity are covered under Title VII's sex discrimination prohibition.

- This decision makes clear that the Commission's holding is consistent with the current state of Title VII case law.

- The decision makes clear that Agencies must process an allegation of discrimination based on transgender status or gender identity as a claim of discrimination based on sex under 29 C.F.R. Part 1614.

- The decision offers clear guidance regarding the various ways Complainants may establish discrimination based on transgender status or gender identity.

- The Commission's decision applies to all its enforcement and litigation activities.

- Commission staff with internal questions about implementing this decision should contact Senior Attorney Advisor Jeanne Goldberg at 202.663.4693 or jeanne.goldberg@eeoc.gov

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, DC 20507

Mia Macy,
Complainant,

v.

Eric Holder,
Attorney General,
Department of Justice,
(Bureau of Alcohol, Tobacco, Firearms and Explosives),
Agency.

Appeal No. 0120120821

Agency No. ATF-2011-00751

DECISION

On December 9, 2011, Complainant filed an appeal concerning her equal employment opportunity (EEO) complaint alleging employment discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq. For the following reasons, the Commission finds that the Complainant's complaint of discrimination based on gender identity, change of sex, and/or transgender status is cognizable under Title VII and remands the complaint to the Agency for further processing.

BACKGROUND[1]

Complainant, a transgender woman, was a police detective in Phoenix, Arizona. In December 2010 she decided to relocate to San Francisco for family reasons. According to her formal complaint, Complainant was still known as a male at that time, having not yet made the transition to being a female.

Complainant's supervisor in Phoenix told her that the Bureau of Alcohol, Tobacco, Firearms and Explosives (Agency) had a position open at its Walnut Creek crime laboratory for which the Complainant was qualified. Complainant is trained and certified as a National Integrated Ballistic Information Network (NIBIN) operator and a BrassTrax ballistics investigator.

Complainant discussed the position with the Director of the Walnut Creek lab by telephone, in either December 2010 or January 2011, while still presenting as a man. According to Complainant, the telephone conversation covered her experience, credentials, salary and

[1] The facts in this section are taken from the EEO Counselor's Report and the formal complaint of discrimination. Because this decision addresses a jurisdictional issue, we offer no position on the facts themselves and thus no position on whether unlawful discrimination occurred in this case.

benefits. Complainant further asserts that, following the conversation, the Director told her she would be able to have the position assuming no problems arose during her background check. The Director also told her that the position would be filled as a civilian contractor through an outside company.

Complainant states that she talked again with the Director in January 2011 and asked that he check on the status of the position. According to Complainant in her formal complaint, the Director did so and reasserted that the job was hers pending completion of the background check. Complainant asserts, as evidence of her impending hire, that Aspen of DC ("Aspen"),[2] the contractor responsible for filling the position, contacted her to begin the necessary paperwork and that an investigator from the Agency was assigned to do her background check.[3]

On March 29, 2011, Complainant informed Aspen via email that she was in the process of transitioning from male to female and she requested that Aspen inform the Director of the Walnut Creek lab of this change. According to Complainant, on April 3, 2011, Aspen informed Complainant that the Agency had been informed of her change in name and gender. Five days later, on April 8, 2011, Complainant received an email from the contractor's Director of Operations stating that, due to federal budget reductions, the position at Walnut Creek was no longer available.

According to Complainant, she was concerned about this quick change in events and on May 10, 2011,[4] she contacted an agency EEO counselor to discuss her concerns. She states that the counselor told her that the position at Walnut Creek had not been cut but, rather, that someone

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[2] It appears from the record that Aspen of DC may be considered a staffing firm. Under the Commission's Enforcement Guidance: Application of EEO Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms, EEOC Notice No. 915.002 (December 3, 1997), we have recognized that a "joint employment" relationship may exist where both the Agency and the "staffing firm" may be deemed employers. The Commission makes no determination at this time as to whether or not a "joint employment" relationship exists in this case as this issue is not presently before us.

[3] On March 28, 2011, Complainant received an e-mail from the contractor asking her to fill out an application packet for the position. It is unclear how far the background investigation had proceeded prior to Complainant notifying the contractor of her gender change, but e-mails included in the record indicate that the Agency's Personnel Security Branch had received Complainant's completed security package, that Complainant had been interviewed by a security investigator, and that the investigator had contacted Complainant on March 31, 2011 and had indicated that he "hope[d] to finish your investigation the first of next week."

[4] In the narrative accompanying her formal complaint, Complainant asserts she contacted the Agency's EEO Counselor on May 5, 2011. However, the EEO Counselor's report indicates that the initial contact occurred on May 10, 2011.

else had been hired for the position. Complainant further states that the counselor told her that the Agency had decided to take the other individual because that person was farthest along in the background investigation.[5] Complainant claims that this was a pretextual explanation because the background investigation had been proceeding on her as well. Complainant believes she was incorrectly informed that the position had been cut because the Agency did not want to hire her because she is transgender.

The EEO counselor's report indicates that Complainant alleged that she had been discriminated against based on sex, and had specifically described her claim of discrimination as "change in gender (from male to female)."

On June 13, 2011, Complainant filed her formal EEO complaint with the Agency. On her formal complaint form, Complainant checked off "sex" and the box "female," and then typed in "gender identity" and "sex stereotyping" as the basis of her complaint. In the narrative accompanying her complaint, Complainant stated that she was discriminated against on the basis of "my sex, gender identity (transgender woman) and on the basis of sex stereotyping."

On October 26, 2011, the Agency issued Complainant a Letter of Acceptance, stating that the "claim alleged and being accepted and referred for investigation is the following: Whether you were discriminated against based on your gender identity sex (female) stereotyping when on May 5, 2011, you learned that you were not hired as a Contractor for the position of [NIBIN] Ballistics Forensic Technician in the Walnut Creek Lab, San Francisco Field Office." The letter went on to state, however, that "since claims of discrimination on the basis of gender identity stereotyping cannot be adjudicated before the [EEOC], your claims will be processed according to Department of Justice policy." The letter provided that if Complainant did not agree with how the Agency had identified her claim, she should contact the EEO office within 15 days.

The Department of Justice has one system for adjudicating claims of sex discrimination under Title VII and a separate system for adjudicating complaints of sexual orientation and gender identity discrimination by its employees. This separate process does not include the same rights offered under Title VII and the EEOC regulations set forth under 29 C.F.R. Part 1614. See Department of Justice Order 1200.1, Chapter 4-1, B.7.j, found at http://www.justice.gov/jmd/ps/chpt4-1.html (last accessed on March 30, 2012). While such complaints are processed utilizing the same EEO complaint process and time frames – including an ADR program, an EEO investigation and issuance of a final Agency decision – the Department of Justice process allows for fewer remedies and does not include the right to request a hearing before an EEOC Administrative Judge or the right to appeal the final Agency decision to the Commission.

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[5] The Counselor's Report includes several email exchanges with various Agency officials who informed the counselor of the circumstances by which it was decided not to hire Complainant.

On November 8, 2011, Complainant's attorney contacted the Agency by letter to explain that the claims that Complainant had set forth in the formal complaint had not been correctly identified by the Agency. The letter explained that the claim as identified by the Agency was both incomplete and confusing. The letter noted that "[Complainant] is a transgender woman who was discriminated against during the hiring process for a job with [the Agency]," and that the discrimination against Complainant was based on "separate and related" factors, including on the basis of sex, sex stereotyping, sex due to gender transition/change of sex, and sex due to gender identity. Thus, Complainant disagreed with the Agency's contention that her claim in its entirety could not be adjudicated through the Title VII and EEOC process simply because of how she had stated the alleged bases of discrimination.

On November 18, 2011, the Agency issued a correction to its Letter of Acceptance in response to Complainant's November 8, 2011 letter. In this letter, the Agency stated that it was accepting the complaint "on the basis of sex (female) and gender identity stereotyping." However, the Agency again stated that it would process only her claim "based on sex (female)" under Title VII and the EEOC's Part 1614 regulations. Her claim based on "gender identity stereotyping" would be processed instead under the Agency's "policy and practice," including the issuance of a final Agency decision from the Agency's Complaint Adjudication Office.

CONTENTIONS ON APPEAL

On December 6, 2011, Complainant, through counsel, submitted a Notice of Appeal to the Commission asking that it adjudicate the claim that she was discriminated against on the basis of "sex stereotyping, sex discrimination based gender transition/change of sex, and sex discrimination based gender identity" when she was denied the position as an NIBIN ballistics technician.

Complainant argues that EEOC has jurisdiction over her entire claim. She further asserts that the Agency's "reclassification" of her claim of discrimination into two separate claims of discrimination – one "based on sex (female) under Title VII" which the Agency will investigate under Title VII and the EEOC's Part 1614 regulations, and a separate claim of discrimination based on "gender identity stereotyping" which the Agency will investigate under a separate process designated for such claims – is a "de facto dismissal" of her Title VII claim of discrimination based on gender identity and transgender status.

In response to Complainant's appeal, the Agency sent a letter to the Commission on January 11, 2012, arguing that Complainant's appeal was "premature" because the Agency had accepted a claim designated as discrimination "based on sex (female)."

In response to the Agency's January 11, 2012 letter, Complainant wrote to the Agency on February 8, 2012, stating that, in light of how the Agency was characterizing her claim, she wished to withdraw her claim of "discrimination based on sex (female)," as characterized by the Agency, and to pursue solely the Agency's dismissal of her complaint of discrimination

based on her gender identity, change of sex and/or transgender status. In a letter to the Commission dated February 9, 2012, Complainant explained that she had withdrawn the claim "based on sex (female)" as the Agency had characterized it, in order to remove any possible procedural claim that her appeal to the Commission was premature.

Complainant reiterates her contention that the Agency mischaracterized her claim and asks the Commission to rule on her appeal that the Agency should investigate, under Title VII and the EEOC's Part 1614 regulations, her claim of discriminatory failure to hire based on her gender identity, change of sex, and/or transgender status.

ANALYSIS AND FINDINGS

The narrative accompanying Complainant's complaint makes clear that she believes she was not hired for the position as a result of making her transgender status known. As already noted, Complainant stated that she was discriminated against on the basis of "my sex, gender identity (transgender woman) and on the basis of sex stereotyping." In response to her complaint, the Agency stated that claims of gender identity discrimination "cannot be adjudicated before the [EEOC]." See Agency Letters of October 26, 2011 and November 18, 2011. Although it is possible that the Agency would have fully addressed her claims under that portion of her complaint accepted under the 1614 process, the Agency's communications prompted in Complainant a reasonable belief that the Agency viewed the gender identity discrimination she alleged as outside the scope of Title VII's sex discrimination prohibitions. Based on these communications, Complainant believed that her complaint would not be investigated effectively by the Agency, and she filed the instant appeal.

EEOC Regulation 29 C.F.R. §1614.107(b) provides that where an agency decides that some, but not all, of the claims in a complaint should be dismissed, it must notify the complainant of its determination. However, this determination is not appealable until final action is taken on the remainder of the complaint. In apparent recognition of the operation of §1614.107(b), Complainant withdrew the accepted portion of her complaint from the 1614 process so that the constructive dismissal of her gender identity discrimination claim would be a final decision and the matter ripe for appeal.

In the interest of resolving the confusion regarding a recurring legal issue that is demonstrated by this complaint's procedural history, as well as to ensure efficient use of resources, we accept this appeal for adjudication. Moreover, EEOC's responsibilities under Executive Order 12067 for enforcing all Federal EEO laws and leading the Federal government's efforts to eradicate workplace discrimination, require, among other things, that EEOC ensure that uniform standards be implemented defining the nature of employment discrimination under the statutes we enforce. Executive Order 12067, 43 F.R. 28967, § 1-301(a) (June 30, 1978). To that end, the Commission hereby clarifies that claims of discrimination based on transgender

status, also referred to as claims of discrimination based on gender identity, are cognizable under Title VII's sex discrimination prohibition, and may therefore be processed under Part 1614 of EEOC's federal sector EEO complaints process.

We find that the Agency mistakenly separated Complainant's complaint into separate claims: one described as discrimination based on "sex" (which the Agency accepted for processing under Title VII) and others that were alternatively described by Complainant as "sex stereotyping," "gender transition/change of sex," and "gender identity" (Complainant Letter of Nov. 8, 2011); by the Agency as "gender identity stereotyping" (Agency Letter Nov. 18, 2011); and finally by Complainant as "gender identity, change of sex and/or transgender status" (Complainant Letter Feb. 8, 2012). While Complainant could have chosen to avail herself of the Agency's administrative procedures for discrimination based on gender identity, she clearly expressed her desire to have her claims investigated through the 1614 process, and this desire should have been honored. Each of the formulations of Complainant's claims are simply different ways of stating the same claim of discrimination "based on . . . sex," a claim cognizable under Title VII.

Title VII states that, except as otherwise specifically provided, "[a]ll personnel actions affecting [federal] employees or applicants for employment ... shall be made free from any discrimination *based on ...sex ....*" 42 U.S.C. § 2000e-16(a) (emphasis added). *Cf.* 42 U.S.C. §§ 2000e-2(a)(1), (2) (it is unlawful for a covered employer to "fail or refuse to hire or to discharge any individual, or otherwise to discriminate with respect to his compensation, terms, conditions, or privileges of employment," or to "limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, *because of such individual's . . . sex*") (emphasis added).

As used in Title VII, the term "sex" "encompasses both sex—that is, the biological differences between men and women—and gender." See Schwenk v. Hartford, 204 F.3d 1187, 1202 (9th Cir. 2000); see also Smith v. City of Salem, 378 F.3d 566, 572 (6th Cir. 2004) ("The Supreme Court made clear that in the context of Title VII, discrimination because of 'sex' includes gender discrimination."). As the Eleventh Circuit noted in Glenn v. Brumby, 663 F.3d 1312, 1316 (11th Cir. 2011), six members of the Supreme Court in Price Waterhouse agreed that Title VII barred "not just discrimination because of biological sex, but also gender stereotyping—failing to act and appear according to expectations defined by gender." As such, the terms "gender" and "sex" are often used interchangeably to describe the discrimination prohibited by Title VII. See, e.g., Price Waterhouse v. Hopkins, 490 U.S. 228, 239 (1989) (emphasis added) ("Congress' intent to forbid employers to take *gender* into account in making employment decisions appears on the face of the statute.").

That Title VII's prohibition on sex discrimination proscribes gender discrimination, and not just discrimination on the basis of biological sex, is important. If Title VII proscribed only discrimination on the basis of biological sex, the only prohibited gender-based disparate treatment would be when an employer prefers a man over a woman, or vice versa. But the

statute's protections sweep far broader than that, in part because the term "gender" encompasses not only a person's biological sex but also the cultural and social aspects associated with masculinity and femininity.

In Price Waterhouse, the employer refused to make a female senior manager, Hopkins, a partner at least in part because she did not act as some of the partners thought a woman should act. Id. at 230-31, 235. She was informed, for example, that to improve her chances for partnership she should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." Id. at 235. The Court concluded that discrimination for failing to conform with gender-based expectations violates Title VII, holding that "[i]n the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender." Id. at 250.

Although the partners at Price Waterhouse discriminated against Ms. Hopkins for failing to conform to stereotypical gender norms, gender discrimination occurs any time an employer treats an employee differently for failing to conform to any gender-based expectations or norms. "What matters, for purposes of . . . the Price Waterhouse analysis, is that in the mind of the perpetrator the discrimination is related to the sex of the victim." Schwenk, 204 F.3d at 1201-02; see also Price Waterhouse, 490 U.S. at 254-55 (noting the illegitimacy of allowing "sex-linked evaluations to play a part in the [employer's] decision-making process").

"Title VII does identify one circumstance in which an employer may take gender into account in making an employment decision, namely, when gender is a 'bona fide occupational qualification [(BFOQ)] reasonably necessary to the normal operation of th[e] particular business or enterprise.'" Price Waterhouse, 490 U.S. at 242 (quoting 42 U.S.C. § 2000e-2(e)). Even then, "the [BFOQ] exception was in fact meant to be an extremely narrow exception to the general prohibition of discrimination on the basis of sex.'" See Phillips v. Martin Marietta Corp., 400 U.S. 542, 544 (1971) (Marshall, J., concurring). "The only plausible inference to draw from this provision is that, in all other circumstances, a person's gender may not be considered in making decisions that affect her." Price Waterhouse, 490 U.S. at 242.[6]

When an employer discriminates against someone because the person is transgender, the employer has engaged in disparate treatment "related to the sex of the victim." See Schwenk, 204 F.3d at 1202. This is true regardless of whether an employer discriminates against an employee because the individual has expressed his or her gender in a non-stereotypical fashion, because the employer is uncomfortable with the fact that the person has transitioned or is in the process of transitioning from one gender to another, or because the employer simply does not

[6] There are other, limited instances in which gender may be taken into account, such as is in the context of a valid affirmative action plan, see Johnson v. Santa Clara County Transportation Agency, 480 U.S. 616 (1987), or relatedly, as part of a settlement of a pattern or practice claim.

like that the person is identifying as a transgender person. In each of these circumstances, the employer is making a gender-based evaluation, thus violating the Supreme Court's admonition that "an employer may not take gender into account in making an employment decision." Price Waterhouse, 490 U.S. at 244.

Since Price Waterhouse, courts have widely recognized the availability of the sex stereotyping theory as a valid method of establishing discrimination "on the basis of sex" in many scenarios involving individuals who act or appear in gender-nonconforming ways.[7] And since Price Waterhouse, courts also have widely recognized the availability of the sex stereotyping theory as a valid method of establishing discrimination "on the basis of sex" in scenarios involving transgender individuals.

For example, in Schwenk v. Hartford, a prison guard had sexually assaulted a pre-operative male-to-female transgender prisoner, and the prisoner sued, alleging that the guard had

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[7] See, e.g., Lewis v. Heartland Inns of Am., L.L.C., 591 F.3d 1033, 1041 (8th Cir. 2010) (concluding that evidence that a female "tomboyish" plaintiff had been fired for not having the "Midwestern girl look" suggested "her employer found her unsuited for her job . . . because her appearance did not comport with its preferred feminine stereotype"); Prowel v. Wise Business Forms, Inc., 579 F.3d 285 (3rd Cir. 2009) (an effeminate gay man who did not conform to his employer's vision of how a man should look, speak, and act provided sufficient evidence of gender stereotyping harassment under Title VII); Medina v. Income Support Div., 413 F.3d 1131, 1135 (10th Cir. 2005) (involving a heterosexual female who alleged that her lesbian supervisor discriminated against her on the basis of sex, and finding that "a plaintiff may satisfy her evidentiary burden [under Title VII] by showing that the harasser was acting to punish the plaintiff's noncompliance with gender stereotypes"); Nichols v. Azteca Rest. Enters., 256 F.3d 864, 874–75 (9th Cir. 2001) (concluding that a male plaintiff stated a Title VII claim when he was discriminated against "for walking and carrying his tray 'like a woman' – i.e., for having feminine mannerisms"); Simonton v. Runyon, 232 F.3d 33, 37 (2d Cir. 2000) (indicating that a gay man would have a viable Title VII claim if "the abuse he suffered was discrimination based on sexual stereotypes, which may be cognizable as discrimination based on sex"); Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 261 n.4 (1st Cir. 1999) (analyzing a gay plaintiff's claim that his co-workers harassed him by "mocking his supposedly effeminate characteristics" and acknowledging that "just as a woman can ground an action on a claim that men discriminated against her because she did not meet stereotyped expectations of femininity . . . a man can ground a claim on evidence that other men discriminated against him because he did not meet stereotypical expectations of masculinity"); Doe by Doe v. City of Belleville, 119 F.3d 563, 580–81 (7th Cir. 1997) (involving a heterosexual male who was harassed by other heterosexual males, and concluding that "a man who is harassed because his voice is soft, his physique is slight, his hair is long, or because in some other respect he . . . does not meet his coworkers' idea of how men are to appear and behave, is harassed 'because of' his sex"), vacated and remanded on other grounds, 523 U.S. 1001 (1998).

violated the Gender Motivated Violence Act (GMVA), 42 U.S.C. § 13981. 204 F.3d at 1201-02. The U.S. Court of Appeals for the Ninth Circuit found that the guard had known that the prisoner "considered herself a transsexual and that she planned to seek sex reassignment surgery in the future." Id. at 1202. According to the court, the guard had targeted the transgender prisoner "only after he discovered that she considered herself female[,]" and the guard was "motivated, at least in part, by [her] gender"--that is, "by her assumption of a feminine rather than a typically masculine appearance or demeanor." Id. On these facts, the Ninth Circuit readily concluded that the guard's attack constituted discrimination because of gender within the meaning of both the GMVA and Title VII.

The court relied on Price Waterhouse, reasoning that it stood for the proposition that discrimination based on sex includes discrimination based on a failure "to conform to socially-constructed gender expectations." Id. at 1201-02. Accordingly, the Ninth Circuit concluded, discrimination against transgender females - i.e., "as anatomical males whose *outward behavior and inward identity* [do] not meet social definitions of masculinity" - is actionable discrimination "because of sex." Id. (emphasis added); cf. Rosa v. Park W. Bank & Trust Co., 214 F.3d 213, 215-16 (1st Cir. 2000) (finding that under Price Waterhouse, a bank's refusal to give a loan application to a biologically-male plaintiff dressed in "traditionally feminine attire" because his "attire did not accord with his male gender" stated a claim of illegal sex discrimination in violation of the Equal Credit Opportunity Act, 15 U.S.C. §§ 1691-1691f).

Similarly, in Smith v. City of Salem, the plaintiff was "biologically and by birth male." 378 F.3d at 568. However, Smith was diagnosed with Gender Identity Disorder (GID), and began to present at work as a female (in accordance with medical protocols for treatment of GID). Id. Smith's co-workers began commenting that her appearance and mannerisms were "not masculine enough." Id. Smith's employer later subjected her to numerous psychological evaluations, and ultimately suspended her. Id. at 569-70. Smith filed suit under Title VII alleging that her employer had discriminated against her because of sex, "both because of [her] *gender non-conforming conduct* and, more generally, because of [her] *identification* as a transsexual." Id. at 571 (emphasis added).

The district court rejected Smith's efforts to prove her case using a sex-stereotyping theory, concluding that it was really an attempt to challenge discrimination based on "transsexuality." Id. The U.S. Court of Appeals for the Sixth Circuit reversed, stating that the district court's conclusion:

> cannot be reconciled with Price Waterhouse, which does not make Title VII protection against sex stereotyping conditional or provide any reason to exclude Title VII coverage for non sex-stereotypical behavior simply because the person is a transsexual. As such, discrimination against a plaintiff who is a transsexual--and therefore fails to act and/or identify with his or her gender--is no different from the discrimination directed against [the plaintiff] in Price Waterhouse who, in sex-stereotypical terms, did not act like a woman. Sex

> stereotyping based on a person's gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior; a label, such as "transsexual" is not fatal to a sex discrimination claim where the victim has suffered discrimination because of his or her gender non-conformity. Accordingly, we hold that Smith has stated a claim for relief pursuant to Title VII's prohibition of sex discrimination.

Id. at 574-75.[8]

Finally, as the Eleventh Circuit suggested in Glenn v. Brumby, 663 F.3d 1312 (11th Cir. 2011), consideration of gender stereotypes will inherently be part of what drives discrimination against a transgendered individual. In that case, the employer testified at his deposition that it had fired Vandiver Elizabeth Glenn, a transgender woman, because he considered it "inappropriate" for her to appear at work dressed as a woman and that he found it "unsettling" and "unnatural" that she would appear wearing women's clothing. Id. at 1320. The firing supervisor further testified that his decision to dismiss Glenn was based on his perception of Glenn as "a man dressed as a woman and made up as a woman," and admitted that his decision to fire her was based on "the sheer fact of the transition." Id. at 1320-21. According to the Eleventh Circuit, this testimony "provides ample direct evidence" to support the conclusion that the employer acted on the basis of the plaintiff's gender non-conformity and therefore granted summary judgment to her. Id. at 1321.

In setting forth its legal reasoning, the Eleventh Circuit explained:

> A person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes. "[T]he very acts that define transgender people as transgender are those that contradict stereotypes of gender-appropriate appearance and behavior." Ilona M. Turner, *Sex Stereotyping Per Se: Transgender Employees and Title VII*, 95 Cal. L. Rev. 561, 563 (2007); *see also* Taylor Flynn, *Transforming the Debate: Why We Need to Include Transgender Rights in the Struggles for Sex and Sexual Orientation Equality*, 101 Colum. L.Rev. 392, 392 (2001) (defining transgender persons as those whose "appearance, behavior, or other personal characteristics differ from traditional gender norms"). There is thus a congruence between discriminating against transgender and transsexual individuals and discrimination on the basis of gender-based behavioral norms.

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[8] See also Barnes v. City of Cincinnati, 401 F.3d 729, 741 (6th Cir. 2005) (affirming a jury award in favor of a pre-operative transgender female, ruling that "a claim for sex discrimination under Title VII . . . can properly lie where the claim is based on 'sexual stereotypes'" and that the "district court therefore did not err when it instructed the jury that it could find discrimination based on 'sexual stereotypes'").

> Accordingly, discrimination against a transgender individual because of her gender-nonconformity is sex discrimination, whether it's described as being on the basis of sex or gender.

Glenn v. Brumby, 663 F.3d 1312, 1316-17 (11th Cir. 2011).[9]

There has likewise been a steady stream of district court decisions recognizing that discrimination against transgender individuals on the basis of sex stereotyping constitutes discrimination because of sex. Most notably, in Schroer v. Billington, the Library of Congress rescinded an offer of employment it had extended to a transgender job applicant after the applicant informed the Library's hiring officials that she intended to undergo a gender transition. See 577 F. Supp. 2d 293 (D.D.C. 2008). The U.S. District Court for the District of Columbia entered judgment in favor of the plaintiff on her Title VII sex discrimination claim. According to the district court, it did not matter "for purposes of Title VII liability whether the Library withdrew its offer of employment because it perceived Schroer to be an insufficiently masculine man, an insufficiently feminine woman, or an inherently gender-nonconforming transsexual." Id. at 305. In any case, Schroer was "entitled to judgment based on a Price-Waterhouse-type claim for sex stereotyping . . . ." Id.[10]

To be sure, the members of Congress that enacted Title VII in 1964 and amended it in 1972 were likely not considering the problems of discrimination that were faced by transgender individuals. But as the Supreme Court recognized in Oncale v. Sundowner Offshore Services, Inc.:

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[9] But see Etsitty v. Utah Trans. Auth., No. 2:04-CV-616, 2005 WL 1505610, at *4-5 (D. Utah June 24, 2005) (concluding that Price Waterhouse is inapplicable to transsexuals), aff'd on other grounds, 502 F.3d 1215 (10th Cir.2007).

[10] The district court in Schroer also concluded that discrimination against a transgender individual on the basis of an intended, ongoing, or completed gender transition is "*literally* discrimination 'because of . . . sex.'" Schroer, 577 F. Supp. 2d at 308; see also id. at 306-07 (analogizing to cases involving discrimination based on an employee's religious conversion, which undeniably constitutes discrimination "because of . . . religion" under Title VII). For other district court cases using sex stereotyping as grounds for establishing coverage of transgender individuals under Title VII, see Michaels v. Akal Security, Inc., No. 09-cv-1300, 2010 WL 2573988, at * 4 (D. Colo. June 24, 2010); Lopez v. River Oaks Imaging & Diag. Group, Inc., 542 F. Supp. 2d 653, 660 (S.D. Tex. 2008); Mitchell v. Axcan Scandipharm, Inc., No. Vic. A. 05-243, 2006 WL 456173 (W.D. Pa. Feb. 17, 2006); Tronetti v. TLC HealthNet Lakeshore Hosp., No. 03-CV-0375E(SC), 2003 WL 22757935 (W.D.N.Y. Sept. 26, 2003); Doe v. United Consumer Fin. Servs., No. 1:01 CV 111, 2001 WL 34350174 (N.D. Ohio Nov. 9, 2001).

> [S]tatutory prohibitions often go beyond the principal evil [they were passed to combat] to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed. Title VII prohibits "discriminat[ion] . . . because of . . . sex" in . . . employment. [This] . . . must extend to [sex-based discrimination] of any kind that meets the statutory requirements.

523 U.S. at 79-80; see also Newport News, 462 U.S. at 679-81 (rejecting the argument that discrimination against men does not violate Title VII despite the fact that discrimination against women was plainly the principal problem that Title VII's prohibition of sex discrimination was enacted to combat).

Although most courts have found protection for transgender people under Title VII under a theory of gender stereotyping, evidence of gender stereotyping is simply one means of proving sex discrimination. Title VII prohibits discrimination based on sex whether motivated by hostility,[11] by a desire to protect people of a certain gender,[12] by assumptions that disadvantage men,[13] by gender stereotypes,[14] or by the desire to accommodate other people's prejudices or discomfort.[15] While evidence that an employer has acted based on stereotypes about how men or women should act is certainly one means of demonstrating disparate treatment based on sex, "sex stereotyping" is not itself an independent cause of action. As the Price Waterhouse Court

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[11] See Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 64 (1986) (recognizing that sexual harassment is actionable discrimination "because of sex"); Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80 (1998) ("A trier of fact might reasonably find such discrimination, for example, if a female victim is harassed in such sex-specific and derogatory terms by another woman as to make it clear that the harasser is motivated by general hostility to the presence of women in the workplace.").

[12] See Int'l Union v. Johnson Controls, 499 U.S. 187, 191 (1991) (policy barring all female employees except those who were infertile from working in jobs that exposed them to lead was facially discriminatory on the basis of sex).

[13] See, e.g., Newport News, 462 U.S. at 679-81 (providing different insurance coverage to male and female employees violates Title VII even though women are treated better).

[14] See, e.g., Price Waterhouse, 490 U.S. at 250-52.

[15] See, e.g., Chaney v. Plainfield Healthcare Ctr., 612 F.3d 908, 912 (7th Cir. 2010) (concluding that "assignment sheet that unambiguously, and daily, reminded [the plaintiff, a black nurse,] and her co-workers that certain residents preferred no black" nurses created a hostile work environment); Fernandez v. Wynn Oil Co., 653 F.2d 1273, 1276-77 (9th Cir. 1981) (a female employee could not lawfully be fired because her employer's foreign clients would only work with males); Diaz v. Pan American World Airways, Inc., 442 F.2d 385, 389 (5th Cir. 1971) (rejecting customer preference for female flight attendants as justification for discrimination against male applicants).

noted, while "stereotyped remarks can certainly be *evidence* that gender played a part" in an adverse employment action, the central question is always whether the "employer actually relied on [the employee's] gender in making its decision." Id. at 251 (emphasis in original).

Thus, a transgender person who has experienced discrimination based on his or her gender identity may establish a prima facie case of sex discrimination through any number of different formulations. These different formulations are not, however, different claims of discrimination that can be separated out and investigated within different systems. Rather, they are simply different ways of describing sex discrimination.

For example, Complainant could establish a case of sex discrimination under a theory of gender stereotyping by showing that she did not get the job as an NIBIN ballistics technician at Walnut Creek because the employer believed that biological men should consistently present as men and wear male clothing.

Alternatively, if Complainant can prove that the reason that she did not get the job at Walnut Creek is that the Director was willing to hire her when he thought she was a man, but was not willing to hire her once he found out that she was now a woman—she will have proven that the Director discriminated on the basis of sex. Under this theory, there would actually be no need, for purposes of establishing coverage under Title VII, for Complainant to compile any evidence that the Director was engaging in gender stereotyping.

In this respect, gender is no different from religion. Assume that an employee considers herself Christian and identifies as such. But assume that an employer finds out that the employee's parents are Muslim, believes that the employee should therefore be Muslim, and terminates the employee on that basis. No one would doubt that such an employer discriminated on the basis of religion. There would be no need for the employee who experienced the adverse employment action to demonstrate that the employer acted on the basis of some religious stereotype—although, clearly, discomfort with the choice made by the employee with regard to religion would presumably be at the root of the employer's actions. But for purposes of establishing a prima facie case that Title VII has been violated, the employee simply must demonstrate that the employer impermissibly used religion in making its employment decision.

The District Court in Schroer provided reasoning along similar lines:

> Imagine that an employee is fired because she converts from Christianity to Judaism. Imagine too that her employer testifies that he harbors no bias toward either Christians or Jews but only 'converts.' That would be a clear case of discrimination 'because of religion.' No court would take seriously the notion that 'converts' are not covered by the statute. Discrimination "because of' religion" easily encompasses discrimination because of a change of religion.

577 F. Supp. 2d at 306.

Applying Title VII in this manner does not create a new "class" of people covered under Title VII—for example, the "class" of people who have converted from Islam to Christianity or from Christianity to Judaism. Rather, it would simply be the result of applying the plain language of a statute prohibiting discrimination on the basis of religion to practical situations in which such characteristics are unlawfully taken into account. See Brumby, 663 F.3d at 1318-19 (noting that "all persons, whether transgender or not" are protected from discrimination and "[a]n individual cannot be punished because of his or her perceived gender non-conformity").

Thus, we conclude 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. [16]

CONCLUSION

Accordingly, the Agency's final decision declining to process Complainant's entire complaint within the Part 1614 EEO complaints process is **REVERSED**. The complaint is hereby **REMANDED** to the Agency for further processing in accordance with this decision and the Order below.

ORDER (E0610)

The Agency is ordered to process the remanded complaint in accordance with 29 C.F.R. § 1614.108 et seq. The Agency shall acknowledge to the Complainant that it has received the remanded claims within thirty (30) calendar days of the date this decision becomes final. The Agency shall issue to Complainant a copy of the investigative file and also shall notify Complainant of the appropriate rights within one hundred fifty (150) calendar days of the date this decision becomes final, unless the matter is otherwise resolved prior to that time. If the Complainant requests a final decision without a hearing, the Agency shall issue a final decision within sixty (60) days of receipt of Complainant's request. A copy of the Agency's letter of acknowledgment to Complainant and a copy of the notice that transmits the investigative file and notice of rights must be sent to the Compliance Officer as referenced below.

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[16] The Commission previously took this position in an amicus brief docketed with the district court in the Western District of Texas on Oct. 17, 2011, where it explained that "[i]t is the position of the EEOC that disparate treatment of an employee because he or she is transgender is discrimination "because of . . . sex" under Title VII." EEOC Amicus Brief in *Pacheco v. Freedom Buick GMC Truck*, No. 07-116 (W.D. Tex. Oct. 17, 2011), Dkt. No. 30, at page 1, 2011 WL 5410751. With this decision, we expressly overturn, in light of the recent developments in the caselaw described above, any contrary earlier decisions from the Commission. See, e.g., Jennifer Casoni v. United States Postal Service, EEOC DOC 01840104 (Sept. 28, 1984); Campbell v. Dep't of Agriculture, EEOC Appeal No. 01931703 (July 21, 1994); Kowalczyk v. Dep't of Veterans Affairs, EEOC Appeal No. 01942053 (March 14, 1996).

IMPLEMENTATION OF THE COMMISSION'S DECISION (K0610)

Compliance with the Commission's corrective action is mandatory. The Agency shall submit its compliance report **within thirty (30) calendar days** of the completion of all ordered corrective action. The report shall be submitted to the Compliance Officer, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 77960, Washington, DC 20013. The Agency's report must contain supporting documentation, and the Agency must send a copy of all submissions to the Complainant. If the Agency does not comply with the Commission's order, the Complainant may petition the Commission for enforcement of the order. 29 C.F.R. § 1614.503(a). The Complainant also has the right to file a civil action to enforce compliance with the Commission's order prior to or following an administrative petition for enforcement. See 29 C.F.R. §§ 1614.407, 1614.408, and 29 C.F.R. § 1614.503(g). Alternatively, the Complainant has the right to file a civil action on the underlying complaint in accordance with the paragraph below entitled "Right to File a Civil Action." 29 C.F.R. §§ 1614.407 and 1614.408. A civil action for enforcement or a civil action on the underlying complaint is subject to the deadline stated in 42 U.S.C. 2000e-16(c) (1994 & Supp. IV 1999). If the Complainant files a civil action, the administrative processing of the complaint, including any petition for enforcement, will be terminated. See 29 C.F.R. § 1614.409.

STATEMENT OF RIGHTS - ON APPEAL

RECONSIDERATION (M0610)

The Commission may, in its discretion, reconsider the decision in this case if the Complainant or the Agency submits a written request containing arguments or evidence which tends to establish that:

1. The appellate decision involved a clearly erroneous interpretation of material fact or law; or

2. The appellate decision will have a substantial impact on the policies, practices, or operations of the Agency.

Requests to reconsider, with supporting statement or brief, must be filed with the Office of Federal Operations (OFO) **within thirty (30) calendar days** of receipt of this decision or **within twenty (20) calendar days** of receipt of another party's timely request for reconsideration. See 29 C.F.R. § 1614.405; Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at 9-18 (Nov. 9, 1999). All requests and arguments must be submitted to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 77960, Washington, DC 20013. In the absence of a legible postmark, the request to reconsider shall be deemed timely filed if it is received by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604. The request or opposition must also include proof of service on the other party.

Failure to file within the time period will result in dismissal of your request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. Any supporting documentation must be submitted with your request for reconsideration. The Commission will consider requests for reconsideration filed after the deadline only in very limited circumstances. See 29 C.F.R. § 1614.604(c).

COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (R0610)

This is a decision requiring the Agency to continue its administrative processing of your complaint. However, if you wish to file a civil action, you have the right to file such action in an appropriate United States District Court within ninety (90) calendar days from the date that you receive this decision. In the alternative, you may file a civil action after one hundred and eighty (180) calendar days of the date you filed your complaint with the Agency, or filed your appeal with the Commission. If you file a civil action, you must name as the defendant in the complaint the person who is the official Agency head or department head, identifying that person by his or her full name and official title. Failure to do so may result in the dismissal of your case in court. "Agency" or "department" means the national organization, and not the local office, facility or department in which you work. Filing a civil action will terminate the administrative processing of your complaint.

RIGHT TO REQUEST COUNSEL (Z0610)

If you decide to file a civil action, and if you do not have or cannot afford the services of an attorney, you may request from the Court that the Court appoint an attorney to represent you and that the Court also permit you to file the action without payment of fees, costs, or other security. See Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq.; the Rehabilitation Act of 1973, as amended, 29 U.S.C. §§ 791, 794(c). The grant or denial of the request is within the sole discretion of the Court. Filing a request for an attorney with the Court does not extend your time in which to file a civil action. Both the request and the civil action must be filed within the time limits as stated in the paragraph above ("Right to File a Civil Action").

FOR THE COMMISSION:

Bernadette B. Wilson
Acting Executive Officer
Executive Secretariat

April 20 2012
Date

Accurint

Using Accurint to Find People

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Research Resources
Library Services
Whom Do I Ask?
Field Offices
Search

Last Updated July 2011

What is Accurint?

Accurint is the primary research tool directly available to legal staff to track down the current contact information for individuals.

Can I Get Access?

The use of this database is restricted to attorneys, paralegals, and others by special request. If you are a paralegal or attorney, contact Library staff member Douglas Huemmer (douglas.huemmer@eeoc.gov) who will assign a user name and ID. If you are in another job series, please contact Research Librarian Holly Wilson (holly.wilson@eeoc.gov).

Due to recent incidents of theft of personal information from companies such as Choicepoint and yes, Accurint, Lexis (owner of Accurint) has very strong security controls in place due to the nature of the information in its files. Note the following policies:

- **Accurint can only be used to search on individuals involved in a charge or case. Do not search on famous names, your relatives, former school mates, etc. for practice. These searches do not meet Accurint's requirement for a 'permissible use.' Bear in mind that Accurint tracks each and every search we execute and from time to time, our searches are scrutinized. This means we have to supply Accurint with a notarized statement detailing the charge or case number proving the searches on an individual meet permissible use.**
- Passwords must be changed every 90 days. Users will be prompted to change their password when the 90 days is up. Once the system starts prompting users to change their passwords, the Library will not have a record of this information. Save this information! If, however, you forget and cannot log on contact Accurint staff member Christy Jordan (see below) to request that a new password be created.
- A user will be suspended if Accurint is not used within 90 days. Users will be suspended after five unsuccessful attempts to log on. **If you are locked out, contact Library staff member Douglas Huemmer via email to have your access restored. Be sure to include your user ID and a signature block showing your address and phone number.**

Accurint Sign On Procedure

1. Open your browser
2. Enter the address: http://www.accurint.com
3. Follow the link to "Account Login"
4. Enter your User Name and Password
5. Enter the Verification Characters Accurint provides
6. Click on "Login"
7. **The account is for official business only and may not be shared.**

Training, Help and Customer Service

Training - Telephone training is available from Accurint. Contact Accurint training representative Marian Oster to sign up for training. Their contact information is as follows:

Marian Oster, 202-857-9118, marian.oster@lexisnexis.com

If Marian Oster is not available and you have an urgent need for training, please contact Research Librarian Holly Wilson, holly.wilson@eeoc.gov.

Please note, the account number which you may be asked for, is 1013968.

Training may be done individually although it is preferable to arrange a session for a small group using a speaker phone and a PC. A training session lasts a maximum of an hour. **Note: Training is required and must be taken within 15 business days of being issued a user name and password. If training is not taken, access will be suspended. Users are responsible for arranging their own training.**

Help - There is a "help" tab on every menu page which will return instructions on how to use the various search features.

Customer Service Hotlines

General search assistance - Available 24 hours a day via 1-866-277-8407, listen for the option for Accurint. State you need assistance with Accurint as this is also the Lexis help line. And you must provide your user name.

Permissible Use Statements

Users must select the appropriate permissible use statement before searching. The Office of Legal Counsel selected the following:

Gramm-Leach-Bliley Act Privacy Provisions:

- "Click to Continue Law Enforcement Purposes"

Drivers Privacy Protection Act of 1994 (DPPA):

- "Click to Continue Court, Law Enforcement, or Government Agencies"

Databases Available for Searching

All resources available under our plan are 'turned on.' If you can get in, you can search!

People

Person Search - Search for an individual by SSN, name, address, city, date of birth, age range. Also available is a search using a radius around a particular geographic location. For example all individuals named Minnie Mouse living in a 10 mile radius around Orlando, Florida. Tip: if no SSN and the name is common, use birthdate information (if available) to search for individuals born on a particular date or between certain years.

Note: When search results are returned, Accurint offers a number of reports. A click on the "Run a Report" icon on the far left will provide the following choices:

- **Summary Report** - for a printable address summary
- **Finder Report** - for a compilation of neighbors and possible relatives to aid in the search for a hard-to-find individual.
- **Comprehensive** - provides an address history plus any public records associated with the individual such as bankruptcy filings, judgments, liens, criminal records, voter registration, motor vehicle and real property records. Not comprehensive in the true sense of the word as not all states and counties allow their data to be made available through Accurint.

Advanced Person Search - As above but with more options to enter information about a person.

People at Work - Searches for people associated by public records with a company such as company officials, directors and workers. **Not** a reliable service for discovering the current employer of an individual.

People Batching - Use to search for large numbers of individuals by batch process. The requests must be submitted via Research Librarian Holly Wilson. Please note, the Library (funds permitting) will absorb the cost for modest batch searches of a few hundred maximum. Larger searches must be paid for by the requesting office. Contact Holly Wilson via Groupwise email for more information.

The basics are as follows:

- Build a spreadsheet using Excel. See the attached Excel spreadsheet with examples showing the format required by Accurint. Also attached is a blank spreadsheet for your use in compiling the list of individuals to be searched.
- Use every column heading as shown in the example file. Do not put in any extra information - no notes and only one sheet! If there is anything extraneous, Accurint will abort the search.
- When the SSN is known for every individual, the only fields needed are: SSN, Last Name, First Name. When the SSN is not known, the last known address must be provided and each portion of the address must be a separate field: Last Name, First Name, Number and Street, City, State, Zip Code.
- Note: the very first column is labeled dob_switch. This column is used to request date of birth information. If you want date of birth, enter a Y in the column. If you do not need it, enter a N. As the DOB field roughly doubles the cost of a search, do not request DOB unless it is an age case and therefore, is a critical piece of data you need.
- The results will be returned to the sender in Excel format.

Be sure to supply information on the charge or case for the Library's records and submit the spreadsheet to Holly Wilson via email to: holly.wilson@eeoc.gov

Directory Assistance

Basic Lookup - National coverage of land-lines but no mobile phone numbers as yet. Tip: Search by street, city and state to get a listing of current neighbors for contact purposes. If you only want close by neighbors, enter a search as follows: 5540:5550 Princess Anne, Virginia Beach, VA. This will return all neighbors with land-line listings for the addresses between 5540 and 5550 on Princess Anne Road.

Reverse Lookup - Search by phone number to see who the listing is registered to. Does not include mobile phone numbers at this time.

Phones Plus - Ability to search in Accurint's files for any phone number or numbers, cell or land-line, associated with a name or location as well as a reverse lookup on a number. The cell information is not from a directory but from any records (consumer, public records) which contain phone number(s). At a minimum, if you are trying to identify the holder of a cell phone number, the service provider will be identified. Legal means when appropriate, can then be used to identify the holder of a cell phone numer.

Licenses

Driver Licenses - At present only 11 states offer current driver license information and 13 states offer historical data. Click on the link "coverage" to see a listing of states.

Hunting & Fishing - current information from 17 states, historical information from 4 states. Consult the coverage link for a listing of the states.

Voter Registrations - a long shot but contains address information. Not all states report this data, see the coverage link.

Motor Vehicle Driving Records - At present 18 states offer this information. Click on the coverage link to see a listing of states.

Courts

The following files often contain an address:

Bankruptcy

Sexual Offenders

Liens & Judgments

Foreclosures - While it won't provide a current address, this file may explain why the address you have is no longer valid.

Other offerings which do not usually contain street addresses:

Criminal

Civil

Be sure to check the area of coverage. Not all states, counties and local areas report their data. This service in no way assures a nation wide search for criminal records. There is no one source the EEOC Library can offer which will provide thorough coverage. See the tutorial on criminal records on the Virtual Library.

Assets

These files can also be helpful for finding people:

Motor Vehicles - Current information from 23 states and the District of Columbia and 9 states offering historical information. Check this file to see if a 'missing' individual has registered a vehicle recently.

Property Assessments and Property Deeds - These two separate files can help identify property ownership of the last known address or by the individual. If the property was rented, perhaps the landlord knows where the party has moved. Note that these records are usually about a year behind. For the latest information, see if the county where the property is located offers a searchable database on the web of property records.

Questions or concerns? Contact Research Librarian Holly Wilson via email.

This file was last updated on 2012-06-08
Edit

PARTICIPANT MANUAL

HANDBOOK E

Scavenger Hunt

1. What date did the BNA's Employment Discrimination Report publish an article titled, "Title VII Protects Transgender Persons from Sex Discrimination, EEOC Decides"?

   (May 2, 2012)

   1st-100 points

   2nd- 50 points

2. What date was the article in #1 published in BNA's Daily Labor Report?

   (April 25, 2012)

   1st-100 points

   2nd- 50 points

3. How many Informal Discussion Letters were published in 2005?

   (21)

   1st-100 points

   2nd- 50 points

4. In a document titled, "Liability of Corporate Affiliates", there are four kinds of evidence that should be examined when considering "Centralized Control of Labor Relations." List the four kinds of evidence that should be examined.

   (Whether there is a centralized source of authority for development of personnel policy;

Whether one entity maintains personnel records and screens and test applicants for employment;

Whether the entities share a personnel (human resources) department and whether inter-company transfers and promotions of personnel are common;

Whether the same persons make the employment decisions for both entities.)

1st-200 points

2nd-100 points

5. The Commission has acknowledged that leave might be provided as an accommodation for treatment related to a disability. In EEOC's Technical Assistance Manual, published shortly after the ADA regulations and interpretive guidance and its Reasonable Accommodation Guidance, first published in 1999 and revised in 2002, the Commission recognized five other reasons why leave might be needed under the ADA. List these five other reasons from the written testimony that was submitted by Christopher Kuczynski, EEOC Assistant Legal Counsel, at the Commission meeting on June 8, 2011.

(To obtain medical treatment, recover from an illness or recover from an episodic manifestation of a disability, receive disability-related training, make repairs to equipment or devices, avoid temporary adverse conditions in the workplace)

1st-300 points

2nd- 200 points

6. List the six considerations that are listed on Slide # 16 of the PowerPoint slide show titled "Tools to Help Discover Respondents' Corporate Relationships".

(-Centralized control of labor relations generally most important

-Do no need to establish all factors or any one in particular

-Common management/ownership less important

-Look at the totality of circumstances

-Interrelation of operations often most factually detailed

-Some courts have emphasized which entity makes ultimate employment decisions regarding harmed party

1st-400 points

2nd-200 points

7. The PowerPoint slide show titled "Tools to Help Discover Respondents' Corporate Relationships" lists the two persons who conducted training on September 2, 2009? Who are they?

(Robert D. Rose and Jerome Scanlan)

1st-100 points

2nd- 50 points

8. The Case Management Best Practices Desk Reference for Investigators 2011 lists how many free websites for locating missing individuals? What are they?

- **Zaba Search**

- **Reverse Telephone Directories**
- **SSN Validator**
- **Social Security Death Index**
- **National Sex Offender Public Registry**
- **FBI Listing of Sex Offender Registry Websites by State**
- **Federal Bureau of Prisons Inmate Locator**

1st-500 points

2nd- 400 points

9. What is Strategic Objective III of the Strategic Plan for FY 2012-2016?

-Deliver excellent and consistent service through a skilled & diverse workforce & effective systems.

1st-300 points

2nd- 200 points

10. What section of EEOC's Compliance Manual should be followed when Unions are Co-Respondents or Parties to Conciliation?

(§15.14 see section § 62.5)

1st-1000 points

2nd-700 points

Harrington vs. AC Medical Lab

Charge Number 000-2012-99999

CP's allegations	R's defenses	Disputed (Y/N)	Evidence
Statute: Title VII & ADA Basis: gender-female & disability Issue: Promotion Initial Assessment: A PF Case-Sex: 1. CP member of protected group (Sex-F) 2. CP Applied for ICM position 3. CP was denied ICM position 4. R selected someone of another protected group (male-selected) Disability: 1. CP member of protected group (disability) 2. Applied for job/qualified – (applied for ICM position) 3. CP was rejected (denied position) 4) ER selected someone of another protected group (non-disabled selected)	(b)(5);(b)(7)(E)		(b)(5);(b)(7)(E)

3-Step Basic Investigative Plan

(b)(5);(b)(7)(E)

While an IP may vary in complexity based on the case, 3 simple steps can assist in keeping an investigation on track:

1. Did CP present a prima facie case?
2. Did R articulate a legitimate, non-discriminatory reason for the action?
3. Does the EVIDENCE support the allegation or the defense?

Harrington vs. AC Medical Lab

Charge Number 000-2012-99999

CP's allegations	R's defenses	Disputed	Evidence
Statute: Title VII & ADA Basis: gender-female & disability Issue: Promotion Initial Assessment: A PF Case-Sex: 1. CP member of protected group (Sex-F) 2. CP Applied for ICM position 3. CP was denied ICM position 4. R selected someone of another protected group (male-selected) Disability: 1. CP member of protected group (disability) 2. Applied for job/qualified – (applied for ICM position) 3. CP was rejected (denied position) 4) ER selected someone of another protected group (non-disabled selected)	(b)(5);(b)(7)(E)	Y Y Y Y	(b)(5);(b)(7)(E) **Updated Assessment:**

PRETEXT? Defense #2 – Title VII – Sex - Promotion

1. **Is R's reason believable?**
   We have: R's PS

   (b)(5);(b)(7)(E)

2. **Comps: how are folks outside the protected group treated?**
   We have: Ryan McKendrick, male, was selected. He was qualified but CP alleges he was not as experienced as her. CP worked for R longer than McKendrick and according to CP, she trained McKendrick.

   (b)(5);(b)(7)(E)

3. **Is there evidence of bias by decision-makers towards the protected group?**
   We have: CP's allegation that Torres told her to attend interview dressed as a man

   (b)(5);(b)(7)(E)

4. **What do the stats say?**
   We have: N/A for Defense #2

   (b)(5);(b)(7)(E)

PRETEXT? Defense #3 – Title VII – Sex – Promotion – R contends that CP and McKendrick are the same gender.

1. **Is R's reason believable?**
   We have: R's PS; RFI response

(b)(5);(b)(7)(E)

2. **Comps: how are folks outside the protected group treated?**

   We have: Ryan McKendrick, male, was selected. He was qualified but appears to not be as experienced as CP. According to CP, she CP trained him and worked for R longer. CP presents as a female and considers herself a female.

(b)(5);(b)(7)(E)

3. **Is there evidence of bias by decision-makers towards the protected group?**
   We have: CP's allegations and R's contention that CP is the same gender as McKendrick is a biased statement.

(b)(5);(b)(7)(E)

4. **What do the stats say?**
   We have: N/A for Defense #3

(b)(5);(b)(7)(E)

PRETEXT? Defense #4 – ADA- Disability - Promotion

1. **Is R's reason believable?**
   We have: CP's allegations and R's position statement

   (b)(5);(b)(7)(E)

2. **Comps: how are folks outside the protected group treated?**
   We have: Ryan McKendrick, non-disabled, was selected. He was qualified but not as experienced as CP. CP worked for R longer than McKendrick and according to her, she trained him.

   (b)(5);(b)(7)(E)

3. **Is there evidence of bias by decision-makers towards the protected group?**
   We have: CP believes that R harbored animosity because she previously needed time off due to her disability and that Clark made an inappropriate remark about her coming back to work after a summer vacation

   (b)(5);(b)(7)(E)

4. **What do the stats say?**
   We have: N/A for Defense #4

   (b)(5);(b)(7)(E)

Harrington vs. AC Medical Lab

Charge Number 000-2012-99999

CP's allegations	R's defenses	Disputed	Evidence
Statute: Title VII & ADA Basis: gender-female & disability Issue: Promotion Initial Assessment: A PF Case-Sex: 1. CP member of protected group (Sex-F) 2. CP Applied for ICM position 3. CP was denied ICM position 4. R selected someone of another protected group (male-selected) Disability: 1. CP member of protected group (disability) 2. Applied for job/qualified – (applied for ICM position) 3. CP was rejected (denied position) 4) ER selected someone of another protected group (non-disabled selected)	(b)(5);(b)(7)(E)	Y Y Y Y	(b)(5);(b)(7)(E)

PRETEXT? Defense #2 – Title VII – Sex - Promotion

1. **Is R's reason believable?**
   We have: R's PS and CP's Rebuttal

   (b)(5);(b)(7)(E)

2. **Comps: how are folks outside the protected group treated?**
   We have: Ryan McKendrick, male, was selected. He was qualified but does not appear to be as experienced as CP. CP worked for R longer than McKendrick and according to CP, she trained McKendrick.

   (b)(5);(b)(7)(E)

3. **Is there evidence of bias by decision-makers towards the protected group?**
   We have: CP's allegation that Torres told her to attend interview dressed as a man

   (b)(5);(b)(7)(E)

4. **What do the stats say?**
   We have: N/A for Defense #2

   (b)(5);(b)(7)(E)

PRETEXT? Defense #3 – Title VII – Sex – Promotion – R contends that CP and McKendrick are the same gender.

1. **Is R's reason believable? No**
   We have: R's PS and CP's Rebuttal

   (b)(5);(b)(7)(E)

2. **Comps: how are folks outside the protected group treated?**

   We have: Ryan McKendrick, male, was selected. He was qualified but appears to not be as experienced as CP. According to CP, she CP trained him and worked for R longer. CP presents as a female and considers herself a female.

   (b)(5);(b)(7)(E)

3. **Is there evidence of bias by decision-makers towards the protected group?**
   We have: CP's allegations and R's contention that CP is the same gender as McKendrick is a biased statement.

   (b)(5);(b)(7)(E)

4. **What do the stats say?**
   We have: N/A for Defense #3

   (b)(5);(b)(7)(E)

PRETEXT? Defense #4 – ADA- Disability - Promotion

1. **Is R's reason believable? Yes**
   We have: R's position statement and CP's Rebuttal

(b)(5);(b)(7)(E)

2. **Comps: how are folks outside the protected group treated?**
   We have: Ryan McKendrick, non-disabled, was selected. He was qualified but not as experienced as CP. CP worked for R longer than McKendrick and according to her, she trained him.

(b)(5);(b)(7)(E)

3. **Is there evidence of bias by decision-makers towards the protected group?**
   We have: CP believes that R harbored animosity because she previously needed time off due to her disability and that Clark made an inappropriate remark about her coming back to work after a summer vacation

(b)(5);(b)(7)(E)

4. **What do the stats say?**
   We have: N/A for Defense #4

(b)(5);(b)(7)(E)

Harrington vs. AC Medical Lab

Charge Number 000-2012-99999

CP's allegations	R's defenses	Disputed (Y/N)	Evidence
Statute: Title VII & ADA Basis: gender-female & disability Issue: Promotion Initial Assessment: A PF Case-Sex: 1. CP member of protected group (Sex-F) 2. CP Applied for ICM position 3. CP was denied ICM position 4. R selected someone of another protected group (male-selected) Disability: 1. CP member of protected group (disability) 2. Applied for job/qualified – (applied for ICM position) 3. CP was rejected (denied position) 4) ER selected someone of another protected group (non-disabled selected	Rebuttal: (b)(5);(b)(7)(E)	Yes Yes Yes No	(b)(5);(b)(7)(E)

			Updated Assessment:

PRETEXT? Defense #2 – Title VII – Sex - Promotion

1. **Is R's reason believable? NO**
   We have: R's PS; RFI response; Clark testimony; CP's rebuttal; Olgetree testimony; Resumes for McKendrick and CP; Job Description; Job posting; Rating and ranking sheets; Employee Handbook.

   (b)(5);(b)(7)(E)

2. **Comps: how are folks outside the protected group treated?**
   We have: Ryan McKendrick, male, was selected. He was qualified but not as experienced as CP. CP trained him. CP worked for R longer. CP scored close to McKendrick in the objective criteria. CP scored much lower that McKendrick on the subjective interview criteria.

   (b)(5);(b)(7)(E)

3. **Is there evidence of bias by decision-makers towards the protected group?**
   We have: Clark statement; Olgetree statement; CP's allegations and rebuttal – Appears that Torres harbored animosity against CP because she is transgender. Testimony indicates that Torres is very religious, rigid in her thinking and has made some bias comments regarding CP. Olgetree admits that Torres did not want CP involved with pharmaceutical reps or customers/clients outside of the lab.

   (b)(5);(b)(7)(E)

4. **What do the stats say?**
   We have: N/A for Defense #2

   (b)(5);(b)(7)(E)

PRETEXT? Defense #3 – Title VII – Sex – Promotion – R contends that CP and McKendrick are the same gender.

1. **Is R's reason believable? NO**
   We have: R's PS; RFI response; Clark testimony; CP's rebuttal; Olgetree testimony; Resumes for McKendrick and CP; Job Description; Job posting; Rating and ranking sheets; Employee Handbook.

   (b)(5);(b)(7)(E)

2. **Comps: how are folks outside the protected group treated?**
   We have: Ryan McKendrick, male, was selected. He was qualified but not as experienced as CP. CP trained him. CP worked for R longer. CP scored close to McKendrick in the objective criteria. CP scored much lower that McKendrick on the subjective interview criteria. CP presents as a female and considers herself a female.

   (b)(5);(b)(7)(E)

3. **Is there evidence of bias by decision-makers towards the protected group?**
   We have: Clark statement; Olgetree statement; CP's allegations and rebuttal – R's contention that CP is the same gender as McKendrick is a biased statement.

   (b)(5);(b)(7)(E)

4. **What do the stats say?**
   We have: N/A for Defense #3

   (b)(5);(b)(7)(E)

PRETEXT? Defense #4 – ADA- Disability - Promotion

1. **Is R's reason believable?** Yes
   We have: R's PS; RFI response; Clark testimony; CP's rebuttal; Olgetree testimony; Resumes for McKendrick and CP; Job Description; Job posting; Rating and ranking sheets; Employee Handbook.

(b)(5);(b)(7)(E)

2. **Comps: how are folks outside the protected group treated?**
   We have: Ryan McKendrick, non-disabled, was selected. He was qualified but not as experienced as CP. CP trained him. CP worked for R longer. CP scored close to McKendrick in the objective criteria. CP scored much lower that McKendrick on the subjective interview criteria. There is nothing in the rating and ranking that indicates that disability was the reason for non-selection. There is a remark about attendance, but Clark did grant CP an extension on her Disability based leave in 2011. It will be had to establish and intent to discriminate based on disability.

   However – there is an ADA Policy Violation
   Respondent admitted that they have a 12 week only Medical Leave Policy. R's policy violates the ADA in that R does not consider extended leave as a reasonable accommodation. CP was not affected by this policy because R made an exception to the rule and extended CP's leave for her disability.

(b)(5);(b)(7)(E)

3. **Is there evidence of bias by decision-makers towards the protected group?**
   We have: Clark statement; Olgetree statement; CP's allegations and rebuttal

(b)(5);(b)(7)(E)

4. **What do the stats say?**
   We have: N/A for Defense #4

(b)(5);(b)(7)(E)

(b)(6);(b)(7)(C) Witherspoon vs. BankOnMe, Inc.

Charge Number: 000-0000-00009

CP's allegations	R's defenses	Disputed (Y/N)	Evidence
Statute: Title VII, EPA Basis: Sex, female Issue: Wages Initial Assessment: A PF Case: CP is paid less than male counterpart at another branch.	Rebuttal: (b)(5);(b)(7)(E)		(b)(5);(b)(7)(E)

			Updated Assessment:

3-Step Basic Investigative Plan

(b)(5);(b)(7)(E)

While an IP may vary in complexity based on the case, 3 simple steps can assist in keeping an investigation on track:

1. Did CP present a prima facie case?
2. Did R articulate a legitimate, non-discriminatory reason for the action?
3. Does the EVIDENCE support the allegation or the defense?

(b)(6);(b)(7)(C) Witherspoon vs. BankOnMe, Inc.

Charge Number: 000-0000-00009

CP's allegations	R's defenses	Disputed (Y/N)	Evidence
Statute: Title VII, EPA Basis: Sex, female Issue: Wages Initial Assessment: A PF Case: CP is paid less than male counterpart at another branch.	(b)(5);(b)(7)(E)		(b)(5);(b)(7)(E)

			Updated Assessment: (b)(5)

3-Step Basic Investigative Plan

(b)(5);(b)(7)(E)

While an IP may vary in complexity based on the case, 3 simple steps can assist in keeping an investigation on track:

1. Did CP present a prima facie case?
2. Did R articulate a legitimate, non-discriminatory reason for the action?
3. Does the EVIDENCE support the allegation or the defense?

(b)(6);(b)(7)(C) Witherspoon vs. BankOnMe, Inc.

Charge Number: 000-0000-00009

CP's allegations	R's defenses	Disputed (Y/N)	Evidence
Statute: Title VII, EPA Basis: Sex, female Issue: Wages Initial Assessment: A	(b)(5)	N	(b)(5);(b)(7)(E)
PF Case: CP is paid less than male counterpart at another branch.		Y	
CP's rebuttal: CP claims her performance improved after she got the hang of the job. She is performing as well as her peers.			
Comp gets informal training opportunities that are not available to females.			

			Updated Assessment: (b)(5)

3-Step Basic Investigative Plan

(b)(5);(b)(7)(E)

While an IP may vary in complexity based on the case, 3 simple steps can assist in keeping an investigation on track:

1. Did CP present a prima facie case?
2. Did R articulate a legitimate, non-discriminatory reason for the action?
3. Does the EVIDENCE support the allegation or the defense?

(b)(6);(b)(7)(C) Witherspoon vs. BankOnMe, Inc.

Charge Number: 000-0000-00009

CP's allegations	R's defenses	Disputed (Y/N)	Evidence
Statute: Title VII, EPA Basis: Sex, female Issue: Wages Initial Assessment: A	(b)(5);(b)(7)(E)	N	(b)(5);(b)(7)(E)
PF Case: CP is paid less than male counterpart at another branch.		Y	
CP's rebuttal: CP claims her performance improved after she got the hang of the job. She is performing as well as her peers. Comp gets informal training opportunities that are not available to females.			

			hiring and promotion process. **Updated Assessment:** (b)(5)

3-Step Basic Investigative Plan

(b)(5);(b)(7)(E)

While an IP may vary in complexity based on the case, 3 simple steps can assist in keeping an investigation on track:

1. Did CP present a prima facie case?
2. Did R articulate a legitimate, non-discriminatory reason for the action?
3. Does the EVIDENCE support the allegation or the defense?

Intermediate Skills Training for Investigators
_____(location)

COURSE DATE:

Your feedback is important as we seek to meet your training needs. Please indicate the response which best expresses your assessment of these items.

1. **OVERALL COURSE**	Outstanding	Very Effective	Acceptable	Below Average	Ineffective
Course Overall	☐	☐	☐	☐	☐
Participant Materials	☐	☐	☐	☐	☐
Instructors	☐	☐	☐	☐	☐

Comments on Overall Course:

2. **CONTENT**	Outstanding	Very Effective	Acceptable	Below Average	Ineffective
Effectiveness of Exercises	☐	☐	☐	☐	☐
Amount of Group Interaction	☐	☐	☐	☐	☐
Sufficient Time for Feedback	☐	☐	☐	☐	☐

Comments on Content:

3. **FACILITIES**	Excellent	Good	Average	Below Average	Unacceptable
Meeting Rooms	☐	☐	☐	☐	☐
Food and Beverages	☐	☐	☐	☐	☐
Hotel	☐	☐	☐	☐	☐

Comments on Facilities:

4. **EFFECTIVENESS**

Rate your job-related knowledge	Excellent	Good	Average	Some	None
Prior to this course	☐	☐	☐	☐	☐
After completing this course	☐	☐	☐	☐	☐

5. **OPTIONAL**

Your Name _____ EEOC Office _____

E-mail _____

Additional Comments:

The Americans with Disabilities Act

Table of Contents
The Americans With Disabilities Act

APPENDIX

INTRODUCTION – OVERVIEW OF ADA

Disability discrimination occurs when an employer or other entity covered by the Americans with Disabilities Act, as amended (ADA), treats a qualified individual with a disability who is an employee or applicant unfavorably because she has a disability. Disability discrimination also occurs when a covered employer or other entity treats an applicant or employee less favorably because she has a history of a disability (such as cancer that is controlled or in remission) or because she is believed to have a physical or mental impairment that is not transitory (lasting or expected to last six months or less) and minor (even if she does not have such an impairment).

The law requires an employer to provide **reasonable accommodation** to an employee or job applicant with a disability, unless doing so would cause significant difficulty or expense for the employer ("undue hardship").

The law also protects people from discrimination based on their **relationship** with a person with a disability (even if they do not themselves have a disability). For example, it is illegal to discriminate against an employee because her husband has a disability.

The law places strict limits on employers when it comes to asking job applicants to **answer medical questions, take a medical exam, or identify a disability**. For example, an employer may not ask a job applicant to answer medical questions or take a medical exam before extending a job offer. An employer also may not ask job applicants if they have a disability (or about the nature of an obvious disability). An employer may ask job applicants whether they can perform the job and how they would perform the job, with or without a reasonable accommodation. After a job is offered to an applicant, the law allows an employer to condition the job offer on the applicant answering certain medical questions or successfully passing a medical exam, but only if all new employees in the same type of job have to answer the questions or take the exam.

Once a person is hired and has started work, an employer generally can only ask medical questions or require a medical exam if the employer needs medical documentation to support an employee's request for an accommodation or if the employer believes that an employee is not able to perform a job successfully or safely because of a medical condition.

The law also requires that employers keep **all medical records and information confidential** and in separate medical files.

HOW TO DETERMINE IF A CHARGING PARTY MEETS THE ADA DEFINITION OF "DISABILITY"

Introduction

The ADA Amendments Act of 2008 amended the ADA to provide that the definition of disability *"shall be construed in favor of broad coverage"* and *"should not demand extensive analysis."*

However, if the CP alleges disparate treatment based on disability, harassment based on disability, or denial of accommodation for a disability, we still have to determine whether the CP is an "individual with a disability" (i.e., is "covered") under the ADA.

NOTE: ADA claims of an improper disability-related inquiry or medical exam, improper disclosure of confidential medical information, or retaliation/interference can be brought by any applicant or employee, and do not require that CP be an "individual with a disability."

What is the definition of disability?

Under the ADA, an individual with a disability is someone who:

- has a physical or mental **impairment** that **substantially limits** one or more of that person's **major life activities (sometimes referred to as an actual disability)**;
- has a **record** of such impairment; or
- is **regarded as** having such an impairment. (This means that the individual has been subjected to an adverse action because of an actual or perceived impairment that is not both "transitory and minor.")

As we will discuss further, the standard for prong 3 ("regarded as") coverage is an impairment-based standard that is easier to meet than prongs 1 and 2, but individuals covered only under prong 3 are not entitled to

accommodation. For purposes of these overview materials, however, we will proceed to explain the three prongs in the order in which they appear in the statute.

NOTE TO ALL INVESTIGATORS: USE THE FOLLOWING GUIDES available In appendix to this training participant manual, and on inSite at this link: http://insite.eeoc.gov/.

- **Interview Questions for Assessing Disability Under the ADAAA**

- **Annotated Interview Questions for Assessing Disability Under the ADAAA -- detailed explanations of the kind of information you will want to obtain when using the interview questions, and discussion of why gathering this information is important to determining coverage.**

- **Checklist for Disability Coverage under the ADAAA -- can be used at the end of an intake to confirm that you have obtained all the information you need to make an assessment of coverage.**

- **Models of Proof of Coverage -- walks you through the proper analysis for determining whether a CP is an individual with a disability. Use after an intake interview has been conducted, and after additional evidence has been collected, if necessary.**

THESE DOCUMENTS ARE GUIDES FOR YOU ONLY – do not give it to CP or the health care provider to fill out.

What is an impairment?

- a physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems, such as neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, immune, circulatory, hemic, lymphatic, skin, and endocrine; or

- a mental or psychological disorder, such as an intellectual disability (formerly termed "mental retardation"), organic brain syndrome, emotional or mental illness, and specific learning disabilities.

Identification of physical impairments generally is straightforward. However, there may be more confusion concerning what constitutes a mental impairment. Conditions categorized as mental disorders in the American Psychiatric Association's latest edition of the Diagnostic and Statistical Manual of Mental Disorders (now the DSM-5) may be mental impairments for purposes of the ADA. However, not everything in the DSM-5 qualifies as an impairment (or a disability) for ADA purposes. (See, e.g., "Exemptions and Limitations of Coverage," below.)

Exemptions and Limitations of Coverage

The ADA exempts from coverage **"persons engaged in current illegal use of drugs."**

The term "current" has not been defined, but it refers to drug use of sufficiently recent occurrence as to indicate that the individual "is actively engaged in such conduct."

The ADA **may protect**, however, **an individual with drug addiction who has completed a drug rehabilitation program or otherwise has stopped using drugs;** an individual who is enrolled in a rehabilitation program and no longer uses drugs; or someone erroneously considered to be an addict who is not currently using illegal drugs.

The possible protection extended to those who have completed a drug rehabilitation program will not necessarily extend to an employee who suddenly enters a rehabilitation program to avoid his employer's intent to terminate him for reasons connected with drug use and/or addiction. Such a situation would indicate drug use recent enough to suggest the person is still actively using drugs, and therefore no ADA protection would be available to the person.

By statute, disability does not include: Transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders; compulsive gambling, kleptomania, or pyromania; or psychoactive substance use disordres resulting from current illegal use of drugs.

Homosexuality and bisexuality are also, by statute, excluded from the definition of disability.

The term "impairment" does not cover psychological traits, emotions, and reactions that are not caused by an impairment. For example, feelings of stress and traits like irritability, chronic lateness, or poor judgment are not

impairments, though personality traits may sometimes be symptoms or manifestations of underlying impairments.

Physical characteristics (such as being left handed or red-headed) are not impairments and therefore cannot be disabilities.

Pregnancy and old age are not impairments. **Note: Pregnancy-related impairments, however, are disabilities if they substantially limit a major life activity, or if they meet one of the other two definitions of disability. See EEOC Enforcement Guidance on Pregnancy Discrimination and Related Issues (June 25, 2015), and accompanying question-and-answer guide.**

Does the Charging Party have a Physical or Mental Impairment?

If a CP has an obvious disability (e.g., paraplegia, blindness, deafness) then Investigators will not need to spend much time verifying that she has an impairment, let alone one that substantially limits a major life activity.

However, if a CP alleges that she has a hidden disability (i.e., a condition that is not apparent by observing the person), then Investigators will need to gather information relating to whether the CP has been diagnosed with an impairment.

Begin with the Charging Party's Statements – Some of the basic questions include:

What physical or mental impairment does the CP claim to have?

Some CPs may use precise medical terminology while others may use "plain English" to describe their condition. Others may focus on their functional limitations, for example, difficulty handling stress or lifting objects.

If the CP uses "plain English" or is vague on a diagnosis, what questions would you ask him/her to obtain information to help you determine if the individual has an impairment?

Did the CP get any type of medical treatment or consult with a health care professional for the condition or symptoms s/he is describing?

If yes, did the health care professional provide a diagnosis of the condition or symptoms? If yes, what is the diagnosis?

Is the CP currently under the care of a physician or other health care professional for the condition or symptoms she is describing? What type of treatment did the CP receive (or is still receiving)?

Does the CP have any documents (e.g., doctor's bill, insurance statement, prescription) that list a diagnosis?

Medical Documentation

If the CP has an obvious medical condition, then medical documentation that he has the impairment is not required. If, however, a CP alleges that she has a **hidden medical condition**, an Investigator must ask the CP to provide documentation from an appropriate health care professional that verifies the existence of the medical condition. The documentation is required even if the CP precisely identified an alleged impairment. The CP's word, standing alone, is insufficient to establish that she has an impairment. ***Although the documentation need not be extensive, there must be some kind of medical verification to substantiate the CP's alleged impairment.***

What type of medical documentation could you seek to verify a medical condition, in order to establish that an impairment exists?

A note from the CP's treating physician or other health care professional (e.g., psychiatrist, psychologist, licensed clinical social worker (LCSW) that clearly states a diagnosis. The Investigator should also attempt to determine:

The professional's familiarity with the CP (how long and how frequently s/he has treated the CP);

Whether the professional is a general practitioner or a specialist;

The health care provider's knowledge about the specific condition.

A diagnosis or similar statement found on a medical bill or in health insurance documents.

A prescription that might list the medical condition.

Interview with appropriate doctor or other health care professional

If the CP cannot provide any of the types of written documentation mentioned above, or if the documentation does not confirm a diagnosed impairment, an Investigator should ask the CP if she will permit the health care professional to confirm the information about the impairment. (Since the CP's medical files are confidential, she will have to provide the doctor with written authorization to share medical information with an Investigator.)

For example, this situation may arise for alleged mental impairments, where the documentation may show some treatment, but it is not clear whether the CP has a psychiatric impairment or, by contrast, simply is dealing with a normal emotional reaction.

Example: A CP may present a note from his/her health care professional stating that the CP was "depressed" and needed time off, but without referring to a formal diagnosis.

In some cases, such a "plain English" doctor's note, coupled with the CP's credible testimony that she has the same impairment referenced in the note, may support the conclusion that a CP has the alleged psychiatric impairment. In other cases, however, the Investigator may need to contact the health care professional with follow-up questions to identify a specific mental disorder. The Investigator will need to obtain written consent from the CP before contacting the health care professional.

MAJOR LIFE ACTIVITIES

What is a major life activity?

"Major life activities" under the ADA include "major bodily functions," for example: functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, hemic, lymphatic, musculoskeletal and reproductive functions. Major bodily functions also include operations of an individual organ within a body system, such as the operation of kidney, liver, or pancreas.

Major life activities also include activities such as caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, interacting with others, and working.

This is not an exhaustive list. However, not all human activities are considered "major life activities." For example, courts have rejected

gardening, golfing, and shopping as being major life activities. Hobbies and social activities are not major life activities.

Many of the questions that an Investigator asks to establish whether a CP has an impairment will also help to establish whether the impairment substantially limits one or more major life activities.

In describing limitations, the CP will not necessarily name a "major life activity" as listed above. For example, a CP may say that s/he rarely can complete a task; or that s/he is easily distracted by noise, movement, and smells. The CP is describing problems in the major life activity of "concentration" even though she never uses that term.

Similarly, a CP may describe difficulty in doing the shopping, household chores, and gardening, which are not major life activities. Upon further questioning, however, a CP might reveal that s/he has difficulty performing all of these activities because they involve standing, walking, or lifting more than a few pounds – all of which are major life activities.

A CP may describe feelings of anxiety, sadness, or hopelessness that do not seem to suggest a limitation in performing a major life activity. Careful questioning, however, may reveal that when the CP is consumed by such feelings, s/he is substantially limited in major life activities such as caring for oneself, concentrating, or interacting with other people. A person who cannot get out of bed because of severe feelings of hopelessness and sadness will be substantially limited in caring for him/herself during such episodes.

Evidence regarding the effect of an impairment on the operation of a major bodily function will likely come from a health care professional. For example, a CP might be able to describe how his asthma affects his breathing, etc., but is unlikely to be able to describe how it limits the functioning of his respiratory system. Similarly, a CP might be able to describe the limitations in lifting, walking, sleeping, working, etc., she experienced due to her cancer and its treatment, but she likely would not be able to provide a description of the cancer's limitation on normal cell growth or other bodily functions.

Therefore, the Investigator should specifically elicit this information by questioning CP and to the extent necessary in a particular case asking CP to provide relevant medical records from his physician. In some cases, the investigator in consultation with the Legal Unit may need to speak directly with the health care provider where further information is needed to clarify

how CP's impairment may affect any major bodily functions as compared to most people in the general population, including:

immune system (relates to HIV, AIDS, etc.)

normal cell growth (relates to cancer, etc.)

neurological (relates to epilepsy, multiple sclerosis, etc.)

brain (relates to cerebral palsy, learning disabilities, psychiatric or cognitive impairments, etc.)

respiratory (relates to asthma, etc.)

circulatory (relates to heart conditions, etc.)

endocrine (relates to diabetes, etc.)

hemic (relates to sickle cell disease, lupus, etc.)

lymphatic (relates to lymphedema, etc.).

musculoskeletal (relates to rheumatoid arthritis, etc.)

(The CP will need to authorize his/her doctor to disclose such information.)

SUBSTANTIALLY LIMITS

To have a current disability" (or a "record of" a disability), a CP must show that s/he is (or was) **substantially limited** in a major life activity compared to most people in the general population.

Note: For charges that arose prior to January 1, 2009, the effective date of the ADA Amendments Act, a "substantial limitation" was interpreted to mean a "severe" or "significant" restriction. (You will not encounter one of these charges, but it is useful to know how the ADAAA changed the law.) **Under the ADA Amendments Act*, the limitation need not be a severe or significant restriction. Other important changes were made to the definition of disability, and are reflected in these training materials and the Models of Proof for ADA Coverage.***

The most important point to know about the amended ADA is that the definition of "disability" in the ADA "shall be construed broadly" and "should not demand extensive analysis." In amending the law, Congress made clear

that the "primary object of attention" in ADA cases should not be on the definition of disability but rather on whether an individual can be accommodated absent undue hardship, or whether discrimination occurred.

Limitations Must be Caused by Impairment

Of course, the limitations must be caused by the impairment. This might include being caused by the impairment itself, by a condition resulting from the impairment, or even by a side effect of medication or other treatment for the impairment. To help establish this connection, the Investigator should:

Have the CP explain, as best he can, exactly how the impairment affects the ability to perform a major life activity.

If the CP's information is insufficient, then the Investigator may, where relevant, need to interview individuals who interact with the CP and have observed him/her engaging in major life activities, such as the CP's family, coworkers, or friends.

In some instances, and in particular those involving major bodily functions, the Investigator may need to contact a health care professional to confirm that there is a **nexus** between an impairment and limitations in performing a major life activity.

The next step is to determine whether the CP is substantially limited in performing one or more major life activities. In making this determination, the Investigator may find that the individual is substantially limited compared to most people in any number of ways, for example due to the medical restrictions on performing the activity, the pain experienced when performing the activity, the length of time CP can perform it, or the extra effort or time CP must expend to perform it.

In considering whether an impairment substantially limits a major bodily function, note that the limitation may be something that neither the CP nor the Investigator can detect. Rather, the evidence may be obtained from CP's health care provider *because it involves a bodily process, or because it requires considering how limited CP would be without the benefit of mitigating measures*.

Example:

CP alleges failure to accommodate his asthma, for which he requested but was denied a schedule change in order to obtain treatment. In

some cases, CP's treating physician, rather than CP, may be the Investigator's primary source of evidence about the limitations the asthma causes on the functioning of CP's respiratory system, as well as the limitations CP would experience in breathing and/or functions of the respiratory system absent his mitigating measures, including medications and medically-recommended behavioral regimens.

Example:

An individual with a learning disability who is substantially limited in reading, learning, concentrating, or thinking as compared to most people because of the speed or ease with which he can read, the time required for him to learn, or the difficulty he experiences in concentrating or thinking, is an individual with a disability, even if he has achieved a high level of academic success, such as graduating from college. The determination of whether an individual has a disability does not depend on what an individual is able to do in spite of an impairment.

Note: A CP's credibility may depend on the extent to which CP provides specific information as opposed to vague generalities, and whether CP's statements are largely consistent. Also, consider whether the CP's difficulties performing a major life activity seem similar to problems experienced by everyone from time to time, or whether they seem more serious, either qualitatively or quantitatively.

Do the limitations have to last or be expected to last a minimum amount of time to be considered "substantially limiting"?

NO. *Even if the limitations from an impairment last, or are expected to last, fewer than six months, the impairment can nevertheless be "substantially limiting."* An impairment that lasts for fewer than six months may be a disability under ANY prong of the definition of disability.

MITIGATING MEASURES

Under the ADA, the *ameliorative* effects of mitigating measures are not considered, with the exception of ordinary eyeglasses and contact lenses.

Limitations caused or exacerbated by mitigating measures, (e.g. adverse side effects of medication, irritation from a prosthetic limb, etc.) can also support a finding of disability. However, in many instances it will be

unnecessary to consider the negative effects of mitigating measures to find that someone is substantially limited in a major life activity, because the limitations that would exist without the benefit of mitigating measures will be sufficient to establish coverage.

Example: **It will probably be unnecessary to consider whether a CP with insulin-dependent diabetes is substantially limited in eating or caring for self as the result of the strict regimen he needs to follow to "control" the condition, because without insulin, the CP would be substantially limited in endocrine function (i.e. the production of insulin) and other major life activities that would be affected by a lack of insulin.**

Example: **It will probably be unnecessary to consider the difficulties that receiving kidney dialysis imposes on someone with polycystic kidney disease, if, when considered without the dialysis treatments, the CP would be substantially limited in waste elimination, bladder functions, and other major life activities.**

What are mitigating measures?

A mitigating measure is something such as **medication, a device, or certain behaviors** that may lessen or control, i.e., mitigate, the symptoms or effects of an impairment.

Examples:

medication, medical supplies, equipment, or appliances, low-vision devices, prosthetics (including limbs and devices), hearing aids and cochlear implants or other implantable hearing devices, mobility devices, oxygen therapy equipment and supplies

use of assistive technology

reasonable accommodations

learned behavioral or adaptive neurological modifications (e.g., such as compensatory strategies or unconscious adjustments of the brain that enable someone with vision in only one eye to function without depth perception or with a limited field of vision)

psychotherapy, behavioral therapy, physical therapy

Remember that there is one exception to the mitigating measures rule: ameliorative effects of ordinary eyeglasses or contact lenses "shall be considered" in determining whether a vision impairment is substantially limiting.

"Ordinary eyeglasses and contact lenses" are defined as "lenses that are intended to fully correct visual acuity or eliminate refractive error." For example, if a CP's vision can only be corrected to 20/30 with glasses or contact lenses, the lenses are not "ordinary eyeglasses," and therefore their ameliorative effects will *not* be considered in determining if CP is substantially limited in seeing.

Note: It is important to distinguish "ordinary eyeglasses and contact lenses" from "low vision devices," defined as "devices that magnify, enhance, or otherwise augment a visual image" – ameliorative effects of these are not considered in determining disability.

Rule for Impairments that are Episodic or in Remission

Impairments that are episodic or in remission are considered substantially limiting if they would be substantially limiting when active. For example, major depression, bipolar disorder, or post-traumatic stress disorder (PTSD) may be episodic for some people. Certain anxiety disorders may be triggered by certain conditions, resulting in episodic limitations. Similarly, certain seizure disorders may be quiescent for a period and then reoccur. Multiple sclerosis and other impairments can be characterized by periodic "flare ups" of symptoms. Cancer may be in remission after treatment. If the medical and other evidence shows that such an impairment would be substantially limiting when active, without the benefit of medication or other mitigating measures, it is a disability.

EEOC's Amended ADA Regulations (issued in 2011)

"Substantially Limits": Nine Rules of Construction -- § 1630.2(j)(1)

Substantial limitation shall be construed broadly in favor of expansive coverage

Impairment need not prevent or severely or significantly restrict performance of a major life activity to be considered substantially limiting. Nonetheless, not every impairment will be a disability.

Extensive analysis not required: Primary focus should be on a person's qualifications for a job, need for reasonable accommodation, or whether discrimination occurred

Individualized assessment still required, but "substantially limits" is a lower standard than pre-ADAAA

Assessing ability to perform major life activity as compared to most people usually will not require scientific, medical, or statistical evidence, although presentation of such evidence is not prohibited

Ameliorative effects of mitigating measures (other than ordinary eyeglasses or contact lenses) shall not be considered

Impairments that are episodic or in remission can be substantially limiting if would be when active

Individual need only be substantially limited in one major bodily function or other major life activity to have a disability

No minimum duration -- Impairment lasting fewer than six months may be substantially limiting

Regulations emphasize that individualized assessment still required

But, for certain impairments, this individualized assessment will virtually always result in a finding of substantial limitation due to the inherent nature of these conditions AND the extensive changes Congress made to the definition of disability

Examples of Types of Impairments That Should Easily Be Concluded To Be Substantially Limiting –
§ 1630.2(j)(3)(iii)

Deafness, blindness, mobility impairments requiring use of a wheelchair, intellectual disability (mental retardation), partially or completely missing limbs

Autism, cancer, cerebral palsy, diabetes, epilepsy, HIV infection, multiple sclerosis, muscular dystrophy

Mental impairments such as major depressive disorder, bipolar disorder, post-traumatic stress disorder, obsessive-compulsive disorder, schizophrenia

Condition, Manner, or Duration –
§ 1630.2(j)(4)

In determining whether a substantial limitation exists, it may be relevant to consider the condition, manner, or duration of the person's ability to perform a major life activity.

Relevant facts might include: difficulty, effort, or length of time required to perform major life activity; pain; amount of time major life activity may be performed; the way an impairment affects the operation of a major bodily function

RECORD OF A DISABILITY

The ADA also protects a person with a record of a substantially limiting impairment. This provision protects from discrimination an individual who has a history of a physical or mental impairment that substantially limited a major life activity in the past. In other words, this provision protects individuals who have a history of a disability, even though at present the disability does not exist. It also protects individuals who were once misclassified as having a substantially limiting impairment (e.g., someone erroneously deemed to have had a learning disability but who did not).

Example:

An employer may discriminate against persons with a record of a disability, regardless of his/her present condition, because of fears and assumptions about the past disability. For example, an employer may refuse to hire a person with a history of a mental disability, regardless of the individual's current status, because of fears and assumptions concerning rising health insurance costs, use of sick leave, or the individual's ability to cope with stress.

Note that an individual with a "record of" a disability could be entitled to an accommodation if one is needed due to limitations related to an impairment that in the past was substantially limiting.

REGARDED AS AN INDIVIDUAL WITH A DISABILITY

Unlike the first two definitions of "disability" – which focus on the CP's impairment and its impact, CP is "regarded as" an individual with a disability if he is subject to an employment action prohibited by the ADA (e.g. non-hire, non-selection for promotion, demotion, termination, harassment, refusal to allow return to work, etc.) because of an impairment that is not ***both*** transitory ***and*** minor. The "transitory" part of this exception is defined in the statute as lasting or expected to last 6 months or less. In the Commission's view, actions based on an impairment's symptoms or based on an individual's use of a mitigating measure (e.g., medication), amount to actions based on an impairment.

"Regarded as" Examples:

- **refusal to hire because of skin graft scars – regarded as**

- **termination because of cancer – regarded as**

- **termination of employee with angina due to belief he will pose a safety risk – regarded as**

- **termination of employee with bipolar – regarded as; employer can't assert it believed impairment was transitory and minor**

  termination of employee with hand wound that employer mistook as HIV – regarded as because the perceived impairment (HIV) on which the employer acted is not transitory and minor

Note: *Although "regarded as" is a very broad definition, investigators have a critical role to play in cases where the employer has not conceded that it took the challenged employment action on the basis of CP's impairment. In those cases, indirect evidence about the employer's motive will be relevant to coverage under the "regarded as" prong as well as to the merits.*

The ADAAA expressly provides that accommodation is not available to an individual who is only covered under the "regarded as" prong. If a CP claims that he or she needed a reasonable accommodation, or if the investigation reveals this fact, you must determine whether the CP is covered under the first or second prong.

What sources of evidence are relevant to a claim that a respondent regarded the CP as having a disability?

Sources of evidence include:

interviewing witnesses identified by CP or the Investigator who may have knowledge of the true reason for the respondent's employment decision, if the reason is disputed

obtaining written documents (e.g., memos or letters discussing the respondent's true reasons for its employment decision)

interviewing respondent officials (e.g., CP's supervisor, respondent's company physician) regarding the reasons for the challenged employment decision

What steps should the Investigator take to determine whether the respondent regarded the CP as having a substantially limiting impairment?

Identify the impairment that respondent knew ***or believed*** the CP to have. If the impairment that was the basis of R's decision, R "regarded" CP as an individual with a disability *unless* that impairment is both transitory and minor.

Identify the reason that the respondent disqualified the CP from an employment opportunity (e.g., hiring, promotion).

Did the Respondent admit that CP's actual or perceived impairment, symptoms of the impairment, or mitigating measures used for the impairment motivated its decision? Alternatively, is there direct evidence the impairment was the motivation? In either of these cases, R has regarded CP as an individual with a disability and must justify its decision (e.g., by showing it was job-related and consistent with business necessity) to avoid a cause finding on the merits of the charge. A determination that R regarded CP as having a disability only establishes coverage and does not establish a violation of the ADA. Evidence to establish regarded as coverage is often relevant to determining if R discriminated against CP, but not every finding of regarded as coverage means that discrimination occurred.

If not, did R offer a legitimate, non-discriminatory reason (e.g., poor performance, attendance, etc.) for its action? If so, is there evidence that the asserted reason was not R's true reason for the challenged employment decision, and that the real reason was CP's impairment?

ASSOCIATED WITH SOMEONE WITH A DISABILITY

The ADA also prohibits discrimination against an individual because of that person's **relationship or association** with someone with a disability.

For example, an employer could not discriminate against the spouse of an individual who has a disability, such as AIDS, because of the individual's disability. An employer may not discriminate against an employee whose child has a disability, because of the child's disability

This type of discrimination generally results from an employer's concern that an employee may not be reliable or may require excessive amounts of leave in order to care for a relative with a disability. Employers also may be concerned about increases in its health insurance costs because of an employee's dependent with a disability. While the ADA prohibits discrimination based on a person's relationship with someone with a disability, that person is not entitled to reasonable accommodation. For example, the ADA does not require an employer to provide a modified schedule to an employee who needs this alteration to take his child with a disability to medical appointments.

Summary of Key Points:

Most investigations will not focus on disability – the focus will be on whether accommodation was needed and could be provided absent undue hardship, or whether discrimination occurred.

But it is important to obtain basic information to establish that a CP meets one of the definitions of disability (unless coverage is based on a CP's association with a person with a disability).

Best practice: confer with your Legal Unit before concluding a CP is not an "individual with a disability" under the ADAAA standards.

Investigating the Merits of the Charge

The Investigation is not over simply because an Investigator determines that a CP has a substantially limiting impairment, a record of a substantially limiting impairment, or that a respondent subjected a CP to an action prohibited by the ADA because of an actual or perceived impairment (i.e., regarded the CP as having a disability). Remember, all that an Investigator

has established at this point is that a CP meets one of the definitions of "disability."

Next, the Investigator must determine whether the respondent discriminated against the CP. This includes gathering evidence that the CP is qualified (i.e., can perform the essential functions of the position). If an Investigator has determined that the respondent regarded the CP as having a disability, some of that evidence should be relevant to determining whether discrimination occurred.

NOTE RE: MATERIALS: This section does not review legal theories that are common to the other laws enforced by the Commission. Rather, the remainder of the ADA training manual focuses on legal issues and principles unique to the ADA. But, investigators should remember that ADA charges may allege facts requiring analysis of claims of **disparate treatment, harassment, or retaliation.** Investigators should follow the same analytical steps for such claims as they do for similar claims arising under Title VII, the ADEA, or GINA, as set out in the Theories of Discrimination training manual.
Note on ADA Interference: In addition, be aware of an additional unique claim that exists under the ADA for "interference." The ADA prohibits not only retaliation but also "interference" with statutory rights. Interference is broader than retaliation. Under the ADA's interference provision, it is unlawful to coerce, intimidate, threaten, or otherwise interfere with an individual's exercise of ADA rights, or with an individual who is assisting another to exercise ADA rights. Some employer acts may be both retaliation and interference, or may overlap with unlawful denial of accommodation. Examples of interference include:

- coercing an individual to relinquish or forgo an accommodation to which he or she is otherwise entitled;
- intimidating an applicant from requesting accommodation for the application process by indicating that such a request will result in the applicant not being hired;
- threatening an employee with loss of employment or other adverse treatment if he does not "voluntarily" submit to a medical examination or inquiry that is otherwise prohibited under the statute;
- issuing a policy or requirement that purports to limit an employee's rights to invoke ADA protections (e.g., a fixed leave policy that states "no exceptions will be made for any reason");
- interfering with a former employee's right to file an ADA lawsuit against the former employer by stating that a negative job reference will be given to prospective employers if the suit is filed; and
- subjecting an employee to unwarranted discipline, demotion, or other adverse treatment because he assisted a coworker in requesting reasonable accommodation.

A threat does not have to be carried out in order to violate the interference provision, and an individual does not actually have to be deterred from exercising or enjoying ADA rights in order for the interference to be actionable.

HOW TO DETERMINE IF A CHARGING PARTY IS "QUALIFIED"

Having established that a CP meets one of the three definitions of "disability," the next step in analyzing a disability claim is determining whether the individual is "qualified" for the position at issue.

What does "qualified" mean?

Generally, this means determining whether the person can perform the job. Under the ADA, a qualified individual is someone who:

satisfies the **requisite skill, experience, education, and other job-related requirements** of the position (e.g., training, licenses, certificates), and

can perform the essential functions of the position in question, **with or without reasonable accommodation**.

Disputes over "qualified" arises most often when:

CP requested to be excused from job duty due to medical condition (e.g., CP asks to be excused from lifting boxes on loading dock due to back problem);

Employer believed CP not able to perform job duty due to medical condition (e.g., employer excluded CP from job due to back impairment); or

Employer believed CP not fit for job because could not meet qualification standard (e.g., employer excluded CP from job because CP could not meet 70-pound lifting requirement due to medical condition).

Satisfies the Job-Related Requirements ("Qualification Standards")

These requirements are often found in job announcements and job descriptions. Of course, such requirements must be applied to all applicants for a position, or all employees who currently hold such positions. An employer cannot selectively apply a requirement to a person with a disability.

If, due to a disability, a person is screened out because s/he cannot meet one of the job requirements (also known as "qualification standards"), an employer must show that the requirement is **job-related and consistent with business necessity**.

Job-related means that the requirement is a legitimate measure or qualification for the specific job for which it is being used. For example, it would not be job-related to establish a qualification standard that applicants for a secretarial position be able to use certain computer programs that the incumbent is not required to use.

Even if a requirement is job-related, it must also be **consistent with business necessity**. This means that the requirement must relate to the ability to perform an essential function of the position.

Example: It may be job-related to require a driver's license for a clerical position because the occupants of this position are occasionally asked to run errands. However, it would not be consistent with business necessity to impose this requirement on a person, who because of a disability, lacks a driver's license, if running errands is an incidental part of the job (i.e., a marginal function). An employer cannot exclude this person because s/he fails to meet this requirement.

Remember that even if a requirement is job-related and consistent with business necessity, a CP is considered to meet the requirement if s/he could do so with a reasonable accommodation (except if the CP only meets the "regarded as" definition, in which case the CP must meet the requirement without reasonable accommodation as explained in the next section).

Example: It may be job-related and consistent with business necessity to require that a secretary produce documents on a word processor. But, if as a result of disability, a person cannot type on a keyboard, then it would be discriminatory to reject that individual if s/he could use a voice-activated word processing program to generate documents.

Where Dispute is About Whether CP Meets a Qualification Standard

If employer rejects applicant or removes employee from position because of not meeting a qualification standard, determine: (1) did CP not meet the standard because of a disability (i.e., was "screened out" because of the disability); and if so, (2) is the qualification standard job-related and consistent with business necessity (JRCBN).

If the standard is JRCBN, the employer was allowed to exclude CP for not meeting the standard (unless CP could meet the standard or perform the job with accommodation).

If the standard is not JRCBN, determine if CP could perform the essential functions of the job. If so, CP was qualified.

The ADA Amendments Act highlights one particular type of qualification standard – uncorrected vision standards – and requires that an employer be able to show that ALL such standards are job-related and consistent with business necessity.

Unlike other qualification standards, any CP screened out by such a standard can challenge an uncorrected vision standard, even if CP is not an individual with a disability. ***This means a challenge can be even be brought by a CP who wears no corrective lenses at all, or who wears ordinary eyeglasses or contact lenses, even if the use of such lenses would normally lead to a finding that the individual does not have a disability.*** However, many individuals who fail an uncorrected vision standard are likely to meet the "regarded as" definition.

Special Rule for Safety-Based Qualification Standards

Safety-related qualification standards (i.e., qualification standards that an employer seeks to justify for safety reasons) must meet the "direct threat" defense.

In other words, as part of proving that the standard is job-related and consistent with business necessity, the employer's evidence must show that the standard is needed due to a significant risk of substantial harm.

Can Perform the Essential Functions

The essential functions of a position are the **fundamental job duties** that the incumbent of a position must be able to perform. Failure to perform these functions would fundamentally alter the position. Marginal functions are functions that are much less important to the successful performance of a specific position.

Example: Conducting investigations is an essential function of an EEOC investigator position. However, giving speeches may only be a marginal function of a specific investigator position. It may be critical that someone

within the office be able to give speeches, but not necessarily the person in a specific investigator position.

In identifying the essential and marginal functions of a position, Investigators should focus on the **purpose of the function** and the **result to be accomplished**, and not on the usual manner in which the function is performed.

This concept is critical because many respondents are likely to consider physical skills -- such as lifting, carrying, bending, walking, standing, speaking, typing -- or mental skills -- such as thinking, concentrating, learning -- as being essential functions. In most instances, however, these skills are not the essential functions but rather descriptions of how the functions are performed. Although it may be essential that a function be performed, generally it is not necessary that it be performed in a particular way.

Example: An essential function of a job may be to move heavy boxes from one site to another. A respondent may state that it is "essential" that this function be performed by physically lifting and carrying the boxes from one site to another but, in fact, the function may also be performed with the use of reasonable accommodation (e.g., a hand truck). Thus, a person with a disability may be able to perform this essential function with a reasonable accommodation.

Employers are entitled to establish quantitative and qualitative standards in connection with the performance of essential and marginal functions. As long as these standards are applied to every employee who performs the functions, the employer may hold a person with a disability to the same standards. For example, an employer may require that every person in an assembly line position, including someone with a disability, be able to produce 100 widgets an hour.

What questions would you ask to determine if a function is essential?

Does the position exist to perform that function?

Example: Reading text may be an essential function for a proofreader position, but not for an attorney position. An attorney position, unlike the proofreading position, does not exist to have someone read materials.

Are there a limited number of other employees available to whom the performance of the job function can be distributed?

Sometimes, the limited number of people available to perform a certain function means it is imperative that each employee perform it, and thus it is an essential function.

Is the function highly specialized, and was the charging party hired for special expertise or ability to perform this function?

If a function requires highly specialized skills, educational qualifications, or other special expertise, then it most likely is an essential function.

Is the CP actually required to perform a particular function of the job?

If a CP never performs a function, then it is unlikely to be essential, even if it is contained in the job description. (But, remember to consider the consequences of not requiring a person to perform a function. This may offset the fact that it appears an individual is never required to perform a specific function. For example, most police officers will never need to use a gun, yet failure to require that an officer perform this function could have severe consequences for the officer, other police, and the public. So, ability to use a gun would be an essential function of a police officer even if a CP has never used a gun on the job.)

Would removing the function fundamentally alter the position?

Other relevant factors that may be appropriate to consider:

Structure of the organization: Positions bearing the same job title may still have different essential functions because of different organizational structures.

Example: There are two manufacturers of porcelain figurines. One manufacturer requires each person to work on a figurine from the beginning to the end of the process. This means that s/he shapes the clay in a mold, refines it, fires it, and then decorates it. A second manufacturer uses an assembly line approach that requires workers to do specific tasks in the creation of the figurines. Thus, one employee fires the figurines while another employee decorates them, and so on. Although workers at the two factories may have the same job title, the different structure of the two factories means that employees will perform different essential functions.

Unique aspects of specific functions: A limited number of functions can be essential because of a unique aspect of the function.

Example: The legislative history of the ADA states that any function that requires a national security clearance is an essential function of a position.

Evidence Helpful in Determining Which Functions are Essential and Which are Marginal

the employer's judgment (e.g., interviews with supervisor or other members of management).

This factor does not mean that an employer can simply state that a function is essential. Rather, the employer must be able to explain **why** it is claiming a function is essential.

a written job description prepared before advertising or interviewing applicants for the job.

the amount of time spent performing the function (evidence may come from interviews with CP, supervisor, co-workers; a written job analysis provided by the respondent; a collective bargaining agreement; on-site observation).

the consequences of not requiring a person in this position to perform a function.

the terms of the collective bargaining agreement (e.g., does it specify the duties or tasks of the position CP holds or desires).

work experience of others who have performed the job in the past and work experience of people who currently perform similar jobs (e.g., interview with co-workers, incumbents or former employee(s) who recently held the same position).

In some cases, one piece of evidence may be determinative as to whether a function is essential, while in other cases two or more pieces of evidence may be necessary.

Steps to Determine the Essential and Marginal Functions of a Position

First, Identify All the Functions of the Position

Interview the CP, the CP's supervisor, employees in the same job that CP wants/holds, human resources or personnel director

Look at the position description and/or job announcement

Review the collective bargaining agreement, if applicable.

Second, Determine Which Functions are Essential and Marginal (following the steps and factors outlined above)

Determining the essential functions of a job requires a **case-by-case** analysis.

If there is any question as to whether the CP's disability interferes with his/her ability to perform a function (thus potentially rendering the CP unqualified), then it is important to know whether that function is essential and how the function generally is performed. Knowing how the function is performed may also provide evidence about reasonable accommodations and whether the employer is engaging in disparate treatment.

Example: A buzzer goes off to indicate to workers that food is ready to be served. A deaf person cannot hear the buzzer. A reasonable accommodation may be to install a device that flashes to indicate when the food is ready.

Example: A buzzer goes off and a light flashes to indicate to workers that food is ready to be served. The employer refuses to hire a deaf applicant on the grounds that he cannot hear the buzzer. This is disparate treatment because the oven includes a flashing light that enables the deaf person to perform the essential function.

Scenario: Distinguishing Essential and Marginal Functions

Michael, a data entry clerk, has a permanent leg injury that substantially limits his ability to stand and walk. Most of his work is performed at a desk and on a computer. He opens and sorts bills (20% of his time), enters data on the accounts payable data base (60% of his time), prints reports and obtains approval for the reports (10% of his time). Occasionally, data entry clerks are required to deliver the mail throughout the 10-story building when the mail clerks are out. Delivering mail takes a full day.

REASONABLE ACCOMMODATION AND UNDUE HARDSHIP

INTRODUCTION

An employer is **required to make reasonable accommodation** to the known physical and mental limitations of an otherwise qualified individual with a disability **unless** the employer can show that accommodation **would cause an undue hardship**. Furthermore, denying an employment opportunity to an individual because s/he needs a reasonable accommodation violates the ADA.

What is Reasonable Accommodation?

An accommodation is any **change in the work environment or in the way things are customarily done** that would enable an individual with a disability to enjoy equal employment opportunities.

Reasonable accommodation must address **workplace or employment barriers** that stand in the way of providing the qualified individual with a disability with an equal employment opportunity, not barriers that may exist outside the workplace. A reasonable accommodation is one that is both feasible and effective in eliminating or neutralizing the workplace barrier.

Example: Unless provided to non-disabled employees, employers generally are not required to provide transportation, as a reasonable accommodation, to enable a person to commute to work. However, transportation problems related to a disability might require changes to an employee's work schedule as a reasonable accommodation.

Employment barriers may include:

architectural or structural barriers that prevent or inhibit access to work facilities or equipment (e.g., stairs, narrow doorways, boxes stacked in the hall); or

rigid work schedules, policies, or procedures; or

the way people communicate with one another.

An employer's **reasonable accommodation duty encompasses three aspects** of the employment relationship:

The application process: An employer has to make the application process accessible to a person with a disability;

Example: An applicant with a learning disability may need additional time to take a written test; a deaf applicant may need a sign language interpreter for an interview; or an applicant with an intellectual disability (mental retardation) may need assistance filling out an application form.

Job performance and access to workplace: An employer must provide an accommodation that enables the individual to perform the essential functions of the position and permits access to the workplace; and

Benefits and privileges: An employer must ensure that all benefits and privileges of employment available to employees generally also are available to persons with disabilities.

Example: An employer may have to provide materials in Braille so that an employee who is blind can attend a training class that other employees are attending; or provide a sign language interpreter at an office-wide party for an employee who is deaf.

Persons who meet only the "regarded as" definition of disability are NOT entitled to receive reasonable accommodation. A CP must meet one of the other two definitions in order to receive a reasonable accommodation. This means that a CP who meets only the "regarded as" definition must be able to perform the essential and marginal functions of the position at issue without a reasonable accommodation.

In addition, persons who have a relationship or association with a person with a disability are not entitled to receive reasonable accommodation. Only applicants or employees with a disability may be entitled to reasonable accommodation. Thus, a parent who requests a modified schedule to care for a child with a disability is not entitled to that schedule as a reasonable accommodation.

What are some types of reasonable accommodation?

making existing facilities used by employees accessible to employees with disabilities;

part-time or modified work schedules;

job restructuring (through the elimination of nonessential functions);

permitting use of accrued leave or unpaid leave for treatment, therapy, or training related to disability (e.g., how to use a new prosthetic limb or how to use a service animal);

modification of exams or training materials or policies (including providing alternative formats);

acquiring assistive devices or modifying existing equipment;

adjusting supervisory methods;

providing readers or interpreters; or

reassignment to a vacant position.

This is not an exhaustive list but only some of the more common types of reasonable accommodations. Below we will discuss what is not considered a form of reasonable accommodation, but almost anything else has the potential to be a reasonable accommodation in certain circumstances. Both the individual with a disability and the employer or other covered entity should keep an open mind about possible accommodations that would eliminate a workplace barrier and permit an individual to have an equal employment opportunity.

Sometimes a case may appear to involve denial of reasonable accommodation when, in fact, it really is a case of disparate treatment. Not every denial by an employer signifies a possible violation of the reasonable accommodation obligation. To the contrary, if there is evidence that the employer is denying something that it provides to other applicants or employees then the case should be analyzed as one of disparate treatment. Reasonable accommodation applies when an applicant or employee needs something that the employer is not otherwise providing, or required to provide, to applicants or employees.

This is especially true where an employee has been denied leave. Investigators should first ensure that the employer has complied with its policies/procedures on granting leave before analyzing the case as denial of reasonable accommodation. If the evidence shows that the employer failed to provide leave pursuant to its policies, or the investigator discovers other workers have received similar amounts of leave as the CP requested, then the case involves disparate treatment.

Example: A CP claims that he was fired rather than given the 8 months of leave he needed for treatment related to his disability. The employer has a

policy of granting up to 12 months of sick leave. Based on this evidence, the denial of leave constitutes disparate treatment, not denial of reasonable accommodation.

Example: Same CP as above. But, this respondent only grants 4 months of sick leave to employees, and there is no evidence that the employer has ever granted additional leave to anyone. Based on this evidence, the denial of leave constitutes a denial of reasonable accommodation, assuming there is no evidence of undue hardship.

Example: A CP claims that he was fired rather than given the intermittent leave he needed for treatment related to his disability. Both the employee and the employer are covered under the federal Family and Medical Leave Act (FMLA); under that statute the employer would be required to grant the CP's request. Since the employer has an obligation outside the ADA to provide the leave requested this is a case of disparate treatment, not denial of reasonable accommodation. (A later section of this training module will compare the major requirements of the FMLA with the ADA.)

EEOC has issued a resource document, "Employer-Provided Leave and the Americans with Disabilities Act" (May 2016), which provides general information to employers and employees regarding when and how leave must be granted for reasons related to an employee's disability. This resource document seeks to promote voluntary compliance with the ADA and addresses some recurring issues seen in charges, including equal access to leave, leave as a reasonable accommodation, maximum leave policies, and return to work issues. For example, some employers may not know that they may have to modify policies that limit the amount of leave employees can take when an employee needs additional leave as a reasonable accommodation. Employer policies that require employees on extended leave to be 100 percent healed or able to work without restrictions may deny some employees reasonable accommodations that would enable them to return to work. Employers also sometimes fail to consider reassignment as an option for employees with disabilities who cannot return to their jobs following leave.

You should review this resource document for a good overview of ADA leave issues.

Investigators cannot hope to become experts in all of the types of reasonable accommodations. Disability organizations also can provide helpful suggestions. So can the Job Accommodation Network (see the Appendix to this section). **Be careful to avoid making an assumption that reasonable accommodation is not possible. Many times we are**

unaware of equipment or alternative methods of performance because of lack of expertise.

Reassignment

Reassignment to a vacant position is the reasonable accommodation of last resort. It must be considered when an employee with a disability is no longer able to perform the essential functions of his/her current position, with or without reasonable accommodation.

Although reassignment should be used as a last resort, the ADA permits an employer and employee to agree on a transfer to a new position even though there is an available reasonable accommodation that would allow the employee to remain in his/her current position.

Reassignment is **available only for employees**, not applicants.

An employee with a disability must be **qualified** for the new position (i.e., s/he meets the job-related requirements and can perform the essential functions of the position, with or without reasonable accommodation). But s/he does not need to be the most qualified individual for the vacant position. As long as the employee is qualified for the vacant position, s/he is entitled to get the position **without competing** for it.

An employer must consider reassignment to any **vacant** positions that are available or will become available within a reasonable period of time. "Reasonable period of time" must be determined on a case-by-case basis, considering relevant facts, such as whether the employer, based on experience, can anticipate that an appropriate position will become vacant within a short period of time.

An employer does not have to create a job or bump an employee out of a job in order to create a vacancy.

Reassignment should be made to a position **equivalent** to the one presently held in terms of pay, benefits, and job status. However, an employer may reassign an individual to a lower graded position if there are no equivalent positions vacant (or positions that will become vacant within a reasonable period of time) for which the employee is qualified. If reassignment is made to a lower level position, an employer does not have to maintain the individual's salary from the higher level position, unless it does so for other employees who are transferred to lower graded positions. Finally, an employer never has to provide reassignment to a position that would constitute a promotion for the employee.

What is Not a Reasonable Accommodation?

There are several types of adjustments that are not considered forms of reasonable accommodation, and thus an employer has no obligation to provide them. These include:

personal use items (e.g., eyeglasses, medication, hearing aids, service animals, wheelchairs, health insurance). It should be noted that permitting an individual to bring a service animal into the workplace is a form of reasonable accommodation.

An employer does not have to eliminate an essential function of a position. A person with a disability who is unable to perform the essential functions, with or without reasonable accommodation, is not "qualified." However, eliminating or swapping marginal functions is a form of reasonable accommodation.

An employer does not have to lower performance standards, whether qualitative or quantitative, that are uniformly applied to employees with and without disabilities.

Example: If an employer requires all employees on an assembly line to produce 100 widgets an hour, an employer does not have to allow an employee with a disability to produce 90 widgets as a reasonable accommodation. However, an employee who has difficulty meeting the production standard because of a disability may be entitled to a reasonable accommodation to help him/her meet the production standard.

An employer never has to waive warranted discipline, even if an individual's disability played a role in causing the conduct that is worthy of discipline.

The Reasonable Accommodation Process

As a general rule, **the individual with the disability is responsible for informing the employer that an accommodation is needed**. The individual does not have to use "magic words" but must let the employer know that s/he has a medical condition requiring some sort of change in the workplace. S/he may use "plain English" and need not mention the ADA, disability, or use the phrase "reasonable accommodation." The request does not have to be made in writing, but can be an oral request by an employee or applicant. The employer may ask an applicant or employee to fill out a form to document the request, but the employer must begin to process the request once it is made.

The reasonable accommodation process ideally should be "an interactive process" between the individual needing the accommodation and the employer. After reviewing a request, the employer should ask questions to clarify what limitations or problems the individual is experiencing, how they relate to the disability and the job (or the application process or a benefit or privilege), and exactly what accommodations would address the problems. The employer is expected to move expeditiously in discussing the individual's request, obtaining additional information (if necessary), and providing an accommodation if appropriate.

When the individual's disability and/or need for reasonable accommodation is not obvious, the employer has the right to request reasonable documentation about his/her disability and functional limitations. The employer is entitled to know that the individual has a covered disability for which s/he needs a reasonable accommodation, and that the individual requires an accommodation because of limitations caused by the disability.

The accommodation selected need not be the most expensive or the "best" one out there. Rather, it need only be "effective" in the sense that it will enable the individual to perform the essential functions of the job, or gain equal access to the application process or a benefit/privilege of employment.

Evidence may show that a respondent failed to engage in any interactive process. While that is a bad practice, it is not a violation of the ADA. A violation occurs only if the Investigator finds evidence that a reasonable accommodation existed that would not have caused undue hardship.

Undue Hardship - An Affirmative Defense

The term "reasonable" in reasonable accommodation does not refer to whether the accommodation would be too costly or disruptive to the employer.

The employer's defense where it contends that the suggested accommodation would be **unduly costly, extensive, substantial, or disruptive**, or that it would **fundamentally alter the nature or operation** of the business is **"undue hardship."** The employer has the burden of proving that a suggested accommodation would impose an undue hardship.

What factors are considered in evaluating a claim of undue hardship?

nature of the accommodation;

net cost of the accommodation (taking into consideration any tax breaks or financial assistance that an employer may receive for providing an accommodation);

overall financial and other resources of the employer; effect on the employer's expenses and resources; and

impact of the accommodation on the operation of the employer, including impact on the ability of employees to perform their duties and impact on a facility's ability to conduct business.

Comparison of the cost of an accommodation to the employee's salary is **not** a factor in determining undue hardship.

An employer's proof that one specific accommodation would cause it undue hardship does not absolve it from considering other proposed or potential reasonable accommodations.

When a charge involves a **facility that is part of a larger entity** and the facility is claiming undue hardship, the Investigator needs to examine the financial and administrative links between the facility and the larger entity and whether there is evidence to show that the facility and/or the larger entity would have had significant difficulty or expense in providing the accommodation.

Employee morale cannot be the basis of an undue hardship defense; impact on the ability of employees to perform their duties can be the basis for an undue hardship defense.

Example: An employer cannot claim an undue hardship and refuse to reassign a marginal function to another employee, because the other employee does not want the new function. Undue hardship, however, could exist if the employer shows that the other employee would be unable to do his/her own job if s/he had to perform one more function and there is no other employee available to take over the function.

Special Analysis: Seniority Rules

As a result of the Supreme Court's decision in U.S. Airways, Inc. v. Barnett (2002), a reassignment that conflicts with seniority rules ordinarily will not be considered "reasonable" and thus the employer has no obligation to provide it. This is true whether the seniority rules are unilaterally imposed by the employer or found in a collective bargaining agreement.

When there is a direct conflict between a requested reassignment and seniority rules, the employer does not have to show undue hardship; it merely has to show a conflict exists. But, if there is a conflict, an employee has the opportunity to provide evidence of "special circumstances" that warrant an exception to the seniority rule in this particular case.

For example, an employee may be able to show that the employer retains the right to change the seniority system unilaterally and exercises that right fairly frequently, thereby reducing all employees' expectations in the seniority system. Alternatively, a seniority system that contains exceptions may mean that one more exception (i.e., providing the reassignment) would not upset employees' expectations.

It may be possible, however, to resolve certain charges without confronting a direct conflict between seniority rules and the duty to provide a reassignment as a reasonable accommodation. For example, if an Investigator determines that a particular reassignment raises a direct conflict with a respondent's seniority rules, s/he should first consider whether there are any other possible effective accommodations which would not conflict with the seniority rules. In addition, Investigators should be sure that a direct conflict truly exists.

EXERCISE:

Determining If a Respondent Failed to Provide Charging Party with a Reasonable Accommodation

Exercise Instructions:

For each of the scenarios below, determine if the respondent failed to provide CP with a reasonable accommodation.

Be sure to explain what evidence you relied on to reach your determination.

If more information is needed identify what information is missing and why it would be helpful in making a determination.

~~ Scenario #1 ~~

CP, who has multiple sclerosis, asked for and received several reasonable accommodations (leave, modified schedule) from her employer. The CP began to develop performance problems, which the respondent discussed with her. CP did not mention her multiple sclerosis or the need for any other accommodations beyond the ones she had already received. Eventually, the CP was fired for poor performance. CP claims that respondent failed to provide her with additional accommodations that would have addressed her performance problems.

~~ Scenario #2 ~~

CP, who has an obsessive-compulsive disorder, requested and received a flexible work schedule as a reasonable accommodation. However, it soon became clear to both the CP and the respondent that the accommodation was not working. CP requested to work at home as an alternative accommodation, but respondent rejected that request immediately, without engaging in an interactive process. CP claims that respondent failed to provide her with a reasonable accommodation (working at home).

~~ Scenario #3 ~~

CP could not drive due to epilepsy. She applied for a promotion to an assistant manager position, one duty of which is to drive to the bank to deposit store receipts. CP was one of two finalists for the position. CP explained to the hiring official that she did not drive due to epilepsy but that she could deposit the receipts if the store would provide her with a driver. Respondent said it could not spare other employees to act as her driver and that she must be able to drive herself. While acknowledging that CP met all other qualifications for the job, the respondent chose another employee for the promotion. CP claims the store failed to provide her with a reasonable accommodation and denied her a promotion.

~~ Scenario #4 ~~

CP, a registered nurse, requested reassignment when it became clear that her severe back problems precluded staying in her current job. The respondent offered the CP a scheduler position, but she turned it down since it involved a pay cut and she believed she was overqualified for that position. CP mentions there was a vacancy that would have given her a $1,000 raise, but the respondent refused to reassign her to that position. CP claims the respondent failed to provide her with a reasonable accommodation.

~~ Scenario #5 ~~

CP is a store clerk. She recently became unable to continue stocking shelves due to her fibromyalgia. She explained the situation to her employer and told him that she also cannot work a full shift due to her chronic fatigue syndrome. The employer asked CP's doctor to submit a statement about what she could and could not do. The doctor placed CP on the following restrictions: no lifting over 20 pounds; no pushing or pulling over 25 pounds; no standing for more than 1 hour without a 10-minute break; no reaching above her head; no twisting, turning, or bending above the waist; and no working more than 5 hours a day. The employer stated that there were no jobs available that met these requirements. But, CP remembers that someone was hired to be a cashier in the snack bar at about the same time she was discussing the possibility of a reassignment with her boss. She thinks that was a part-time position, but the CP mentions that she is not sure she could have performed the job because it requires standing for more than 1 hour.

DIRECT THREAT: AN EMPLOYER DEFENSE

INTRODUCTION

When an employer claims that it took an adverse employment action against an individual with a disability because the person posed a risk to health or safety, the employer is raising the ADA **defense of direct threat.**

Direct threat exists when a person, because of his/her disability, poses a **"significant risk of substantial harm** to the health or safety of the individual or others **that cannot be reduced or eliminated by reasonable accommodation."** The availability of a reasonable accommodation that would reduce or eliminate the harm is not considered where a CP meets only the "regarded as" prong of the definition of "disability," since a CP who meets only the "regarded as" definition is not entitled to reasonable accommodation

An employer does not have to hire or retain an individual with a disability if it can prove that the individual's employment would pose a direct threat to the individual or others (e.g., co-workers, business associates, clients, customers, and members of the public). If an Investigator determines that a CP poses a direct threat, and the level of risk cannot be reduced or eliminated with a reasonable accommodation, then the CP is not qualified for the position at issue.

Direct threat is a defense that must be **proved by the respondent.** The assumption is that a CP poses no direct threat unless the respondent provides sufficient evidence showing otherwise, except in certain circumstances as explained below.

Direct threat determinations must be based on an individualized assessment of the individual's **present** ability to safely perform the essential functions of the job, considering **reasonable medical judgment** relying on the **most current medical knowledge** and/or **best available objective evidence.** Speculation, conjecture, myths and stereotypes will not justify an employer's determination to disqualify an individual with a disability. If an employer has a **reasonable belief, based on objective evidence, that a person might pose a direct threat** it may seek disability-related information or require a medical examination in order to determine if a direct threat exists. (This topic will be covered in greater detail in the next section of the training.)

If an employer believes that an individual is an unsafe worker for reasons **unrelated** to disability, then it is not an ADA matter.

Example: A CP with insulin-dependent diabetes has had a number of minor accidents, all of them unrelated to the disability. The respondent fires the individual for carelessness. This termination is not a violation of the ADA because the firing had nothing to do with the disability, but rather was based on the CP's carelessness. Thus, direct threat is not an issue in this case.

Although an employer may apply any safety standard it chooses, it must apply the standard equally to individuals with and without disabilities. If a respondent applies a higher safety standard to a person with a disability, then it is engaging in disparate treatment on the basis of disability. Returning to the example above, if a non-disabled employee also had similar accidents but was not terminated, then a respondent's termination of the CP with insulin-dependent diabetes would be disparate treatment.

Factors to Consider in Assessing a Respondent's Direct Threat Defense

The four factors that must be considered when determining whether a CP poses a direct threat are:

1. The **duration of the risk** (e.g., contagious for two weeks versus always contagious)

2. The **nature and severity of the potential harm** (e.g., cut finger versus serious injury or death)

3. The **likelihood that the potential harm will occur** (e.g., chance of winning the lottery versus near certainty)

4. The **imminence of the potential harm** (e.g., will occur soon versus may occur "someday" or will occur "eventually").

These factors should be used as the basis for developing questions for a CP, respondent, and other witnesses to ascertain how a respondent reached its conclusion that a CP posed a "direct threat." These factors also should be used to assess whether the respondent has met its burden of proof.

Evidence Relevant to a Direct Threat Determination

What information would you seek concerning respondent's actions in making its direct threat determination?

Did the respondent have a ***reasonable belief, based on objective evidence***, that the CP ***might*** pose a direct threat, thus allowing the employer to seek disability-related information or order a medical examination?

Example: The respondent tells an Investigator that it refused to hire the CP, who has cerebral palsy, because it believed that someone with this disability is likely to fall and injure him/herself. The respondent's beliefs about the CP's disability are based on myths and stereotypes, not objective reasons.

If the respondent had a reasonable belief, based on objective evidence, that the CP might pose a direct threat, did the respondent make disability-related inquiries and/or conduct medical examinations necessary to determine whether the CP **actually** posed a direct threat? What disability-related inquiries and/or medical examinations were conducted? What did they show? Who performed them?

Example: A CP has a construction job and works on scaffolding. On a Monday morning, the CP told his supervisor he has epilepsy and that over the weekend he had a seizure for the first time in five years. The CP's supervisor had a legitimate reason to ask questions to ascertain whether the CP posed a direct threat. The disability (epilepsy), the CP's construction job (working on scaffolding), and the disclosure of a recent seizure for the first time in several years provide a reasonable belief, based on objective evidence, for making inquiries or requiring a medical examination.

Example: The CP is an administrative assistant. One day she tells her supervisor that she had childhood seizures but has not experienced any seizures for over 15 years. The supervisor orders the CP to undergo a neurological examination. However, the supervisor has no reasonable belief, based on objective evidence, to begin a direct threat inquiry because there is no indication of any recent seizures and nothing to indicate that the CP's position poses any significant risks of substantial harm. (The next section of the training will discuss the legality of ordering an employee to undergo a medical examination. When there is a health or safety concern, the general rule is that if an employer does not have a reasonable belief,

based on objective evidence, that a direct threat might exist, then ordering a medical examination is illegal.)

What sources of factual information were relied upon by the respondent? What expertise did that source have about the CP's disability (as opposed to the disability in general)?

Example: The respondent claims the CP, who has Parkinson's disease, poses a direct threat. Did the respondent obtain medical information from its company doctor, an internist, or from the CP's treating physician, a neurologist who specializes in Parkinson's disease?

If the respondent failed to make the necessary inquiries to determine if, in fact, a CP posed a direct threat, an Investigator cannot simply conclude that there is no direct threat. The Investigator must make the inquiries the respondent should have made.

What information would you seek about the charging party's disability?

Identify the CP's disability and what the respondent knew about the disability.

Did the respondent solicit information from the CP? Did the CP cooperate with the respondent's efforts to gather information? If not, did the CP's actions prevent the respondent from obtaining information necessary to make a determination?

If the respondent had a reasonable belief, based on objective evidence, that the CP might pose a direct threat, and the CP refused to cooperate with the respondent in providing information to enable the respondent to determine if a direct threat actually existed, the respondent has a legitimate right to take an adverse employment action against the CP, including possibly termination.

Identify CP's disability and the manifestation or symptoms of the disability that the respondent believes pose a danger.

Examples:

The CP's hands shake uncontrollably because of Parkinson's disease.
The CP's medication for cancer can cause drowsiness.
The CP might lose consciousness because of diabetes.

Investigators should obtain detailed information from the CP about how the disability affects him/her. The CP's doctor also may provide useful information. Remember, relevant evidence must relate specifically to **how the disability affects the CP** and not people with the disability in general.

If the CP shows none of the symptoms alleged by the respondent, then the direct threat defense will fail.

What information would you seek about the position at issue and the work environment?

Did the respondent consider the CP's specific position and work environment?

What are the **specific dangers**? Do those specific dangers exist when the CP is performing **essential and/or marginal functions** of his/her position? Do the specific dangers grow out of the CP's interaction with the **work environment**?

Examples of specific dangers include:

shaky hands will result in a CP dropping a test tube filled with a toxic substance that could harm the CP and anyone else standing nearby
drowsiness can cause mishandling of dangerous power tools that could result in the CP's hand or arm being mangled
loss of consciousness will cause the CP to fall on his/her head on a concrete floor.

What information would you seek about the CP's recent work history?

Is the CP's condition today substantially the same as when the respondent made its determination of direct threat? A CP's disability may have changed since the events that led to the filing of the charge. You must make sure that a direct threat determination is based on CP's medical condition at the time of the employment decision. If CP's condition has not changed, and CP's current job is similar to the one at issue, then CP's current work history could be relevant evidence as to whether s/he posed a direct threat while working for R. Similarly, if CP's medical condition was the same at a job held before the one at issue, then the previous job may offer evidence whether CP did or did not pose a direct threat.

Was a previous job and/or work environment similar to the job/work environment at issue? If yes, then the previous job/work environment may

shed light on whether CP posed a direct threat in the job/work environment at issue.

Was the CP able to perform the essential functions of the previous job without posing a direct threat to him/herself or others? Did the CP require reasonable accommodation in order to safely perform the job? If yes, what was the reasonable accommodation?

If the CP previously had safely performed a similar job, and there has been no change in the CP's disability, this is strong evidence that the CP would not pose a direct threat in performing the current job for the respondent.

Does the respondent claim that its actions are pursuant to a federal, state, or local health or safety law?

Sometimes a respondent will defend its actions by claiming that another law requires different treatment based on a person's disability. Many federal, state, and local laws address issues of employee health and safety, and thus may overlap with the ADA. An Investigator may need to evaluate a "conflict-of-laws" defense instead of, or in addition to, a direct threat defense.

The EEOC's ADA regulations state that it is a defense to show that the employer's action was required by another federal law or regulation. In other words, federal laws take precedence over the ADA **but only if they directly conflict with one of the ADA's requirements**.

A direct conflict would exist if, for example, a federal law said that all persons with insulin-dependent diabetes are ineligible to drive trucks in interstate commerce and the respondent's position is covered by that law. Such a statement would never support a direct threat defense for many individuals with insulin-dependent diabetes. But, since the employer would violate the federal transportation law if it hired a person with insulin-dependent diabetes, that law takes precedence over the ADA.

The ADA, however, takes precedence over state and local laws. Thus, if a city law prohibits hiring bus drivers with insulin-dependent diabetes, the ADA regulations do not permit the "conflict-of-laws" defense. Unless an employer can show that a direct threat exists for a specific CP (or that the CP is otherwise not qualified), it will be liable for an ADA violation.

If the Investigator determines that CP posed a direct threat and the respondent failed to consider reasonable accommodations, an Investigator must make inquiries about possible accommodations because if no

reasonable accommodations are possible, then the CP would be unqualified because s/he does pose a direct threat that cannot be eliminated.

If an Investigator identifies a possible reasonable accommodation, s/he must allow the respondent an opportunity to make an undue hardship defense. Of course, the Investigator should scrutinize the sufficiency of any such defense.

EXERCISE:

Determining If Charging Party Poses a Direct Threat

~~ Scenario #1 ~~

CP, who has Hepatitis C, was rejected for a promotion to an oil refinery position because of the employer's concern that the exposure to chemicals would pose a direct threat to his health. CP had worked in the oil refinery for five years; his disability was diagnosed three years ago. CP has never missed a day of work due to ill health. CP's doctor, a specialist in Hepatitis C, did not find any threat to his patient's health after reviewing a list of the chemicals CP would be exposed to in the refinery. However, the respondent's doctor, an internist, recommended against giving CP the promotion due to concerns that CP should not be exposed to toxic chemicals as a result of his Hepatitis C.

~~ Scenario #2 ~~

CP, who has insulin-dependent diabetes, was rejected for a position as a police officer. The police department justified its decision based on concerns that the CP's disability would pose a direct threat to himself and others if he were to lose consciousness because of a sudden fluctuation in his blood sugar levels.

DISABILITY-RELATED QUESTIONS AND MEDICAL EXAMINATIONS

INTRODUCTION

The ADA rules on disability-related questions and medical examinations apply to people both with and without disabilities. Therefore, even non-disabled people have standing to file ADA charges alleging that they were subjected to illegal disability-related questions or medical examinations.

Employers may seek information about an individual's medical condition. However, the ADA limits **when** an employer can make disability-related inquiries or require medical examinations, and **what types of information** an employer may seek. As an initial matter, Investigators should understand what is meant by a "disability-related" question and a "medical" examination.

Disability-Related Questions

A question is considered disability-related if it is likely to disclose whether or not an individual has a disability. This determination is made by analyzing the question, not by analyzing a particular answer to a question. After all, an employer could ask a question about the weather and a CP's answer might mention a disability. That the answer referenced a disability does not make a question about the weather one that focuses on learning whether a person has a disability.

Generally, if a question has a limited set of answers and they are likely to reveal whether a person has a disability, then the question is disability-related. If a question has potentially many answers, only some or none of which may involve revealing a disability, then the question is not disability-related.

Questions that are not likely to elicit information about a disability are not disability-related inquiries and therefore not subject to the ADA rules discussed in this section.

What questions would be disability-related?

Have you ever been hospitalized, and if so, why?

When was the last time you saw a doctor?

Why did you see the doctor?

What prescription medications are you taking?

How much sick leave did you use in your last job?

Do you have a health condition that would prevent you from performing any part of this job?

Have you ever sought mental health treatment?

Have you ever applied for or received Worker's Compensation?

Do you have, or have you had, any of the following illnesses or medical conditions? (This question is generally followed by a list that may include such medical conditions as heart disease, seizure disorders, diabetes, etc.)

What questions would not be considered disability-related?

Asking generally about an applicant's or employee's **well-being** (e.g., How are you?).

Asking an employee who looks tired or ill if s/he is feeling okay.

Asking an employee who is sneezing or coughing whether s/he has a cold or allergies.

Asking how an employee is doing following the death of a loved one or the end of a marriage/ relationship.

Asking an applicant about impairments that are not "disabilities" (e.g., How did you break your leg?).

Asking an applicant whether s/he can perform job functions.

Asking an employee whether s/he has been drinking.

Asking an employee about his/her current illegal use of drugs.

Asking a pregnant employee how she is feeling or when her baby is due.

Asking an employee to provide the name and telephone number of a person to contact in case of a medical emergency.

Medical Examinations

A "medical examination" is a **procedure or test that seeks information about an individual's physical or mental impairments or health**.

The following factors should be considered to determine whether a test (or procedure) is a medical examination:

whether the test is administered by a health care professional;

whether the test is interpreted by a health care professional;

whether the test is designed to reveal an impairment or physical or mental health;

whether the test is invasive;

whether the test measures an employee's performance of a task or measures his/her physiological responses to performing the task ;

whether the test normally is given in a medical setting; and,

whether medical equipment is used.

In many cases, a combination of factors will be relevant in determining whether a test or procedure is a medical examination. In other cases, one factor may be enough to determine that a test or procedure is medical.

Medical examinations include, but are not limited to, the following:

vision tests conducted and analyzed by an ophthalmologist or optometrist;

blood, urine, and breath analyses to check for alcohol use;

blood, urine, saliva, and hair analyses to detect disease or genetic markers (e.g., for conditions such as sickle cell trait, breast cancer, Huntington's disease);

blood pressure screening and cholesterol testing;

nerve conduction tests (i.e., tests that screen for possible nerve damage and susceptibility to injury, such as carpal tunnel syndrome);

range-of-motion tests that measure muscle strength and motor function;

pulmonary function tests (i.e., tests that measure the capacity of the lungs to hold air and to move air in and out);

psychological tests that are designed to identify a mental disorder or impairment; and,

diagnostic procedures such as x-rays, computerized axial tomography (CAT) scans, and magnetic resonance imaging (MRI).

There are a **number of procedures and tests employers may require that generally are not considered medical examinations**, including:

tests to determine the **current illegal use of drugs** (a blood or urine test to detect current illegal use of drugs is not a medical examination but a blood or urine test to detect the presence of alcohol or lawful drugs is a medical examination);

physical agility tests, which measure an employee's ability to perform actual or simulated job tasks, and **physical fitness tests**, which measure an employee's performance of physical tasks, such as running or lifting, as long as these tests do not include examinations that could be considered medical (e.g., measuring heart rate or blood pressure);

tests that evaluate an employee's ability to read labels or distinguish objects as part of a demonstration of the ability to perform actual job functions;

psychological tests that measure personality traits such as honesty, preferences, and habits; and,

polygraph examinations (but individual questions asked as part of a polygraph examination may be disability-related inquiries and therefore subject to the ADA rules on making such inquiries).

Having reviewed the meaning of "disability-related" questions and "medical" examinations, we now review the ADA rules on when employers can ask

such questions and require medical examinations, and what information they are entitled to seek. The rules divide employment into three stages.

Stage 1: Pre-Offer

Prior to making a job offer, an employer may describe the essential and marginal functions of the job and ask all applicants how they would perform them with or without a reasonable accommodation, or ask them to demonstrate how they would perform these functions. Employers also may give physical agility tests, seek information on an applicant's educational background and job experience, inquire about an applicant's skills or possession of necessary licenses or certifications, and require them to take various written or oral tests.

But, during the pre-offer stage the employer may not ask applicants disability-related questions – i.e., questions that are likely to elicit whether or not the applicant has a disability. Similarly, employers may not require applicants to submit to medical examinations.

Asking such questions or requiring such examinations during the pre-offer stage are automatic violations of the ADA, regardless of the employer's intent in asking the question (or requiring a medical examination), or whether it used the information to discriminate against an individual. (If an employer uses the information gained from the illegal question or medical examination to discriminate against a qualified individual with a disability, that would be a separate ADA violation.)

The reason for this rigid requirement is that, prior to enactment of the ADA, discrimination against individuals with disabilities often occurred as a result of employers asking such questions or requiring medical examinations and then refusing to hire individuals based on the information learned. Individuals with hidden disabilities were particularly vulnerable to such questions/examinations since an employer could not tell by looking at an applicant whether s/he has a disability. Employers could give the individual almost any reason for the failure to hire and it would be quite difficult to prove the real reason. Therefore, the ADA requires employers to focus on their primary consideration in hiring – determining whether an applicant is qualified – rather than on the possible existence of a disability.

Questions about Reasonable Accommodation

The employer is permitted to tell applicants what the hiring process involves (e.g., an interview, a timed written test), and then **may ask all applicants** if

they will need a reasonable accommodation **for the hiring process only.** Such questions often appear on job application forms and are permissible. A person with a disability will not know if s/he might need a reasonable accommodation without first knowing what the application process entails.

The rules differ, however, about asking questions concerning the need for reasonable accommodation **to perform the job.** There are subtle differences that may occur in questions involving reasonable accommodation. These differences, while appearing slight, can change a lawful question into an illegal one.

Asking all applicants whether they need reasonable accommodation to perform the job is a disability-related question and thus illegal at this stage. Only individuals with disabilities might need reasonable accommodation, so asking about this need is likely to elicit whether an applicant has a disability. However, asking whether an applicant can perform the functions of the job, with or without reasonable accommodation, is not disability-related and thus may be asked at this stage.

The difference is that the first question focuses on the need for reasonable accommodation and forces the applicant to reveal whether it is needed (and the disability that prompts the need), while the second question focuses on the ability to perform job functions and does not require the applicant to respond directly as to whether reasonable accommodation will be needed.

While employers may not ask all applicants about the need for reasonable accommodation to perform a job, they may ask a **specific** applicant whether s/he needs reasonable accommodation if the employer could reasonably believe that this applicant will need accommodation to perform a particular job function. An employer who knows that an applicant has a disability might reasonably wonder about the need for reasonable accommodation to perform specific tasks. How might an employer know that an applicant has a disability?

The applicant has an obvious disability (e.g., blindness, deafness, paraplegia)

The applicant has a hidden disability that s/he has voluntarily disclosed to the employer.

The applicant has voluntarily disclosed to the employer that s/he needs reasonable accommodation.

Knowing that a person has a disability, the employer might develop erroneous assumptions about the need for reasonable accommodation, resulting in failing to hire a qualified applicant. To try to prevent this result, the law permits an employer to ask two questions when s/he has a reasonable belief that an applicant with a disability might need a reasonable accommodation to perform a specific job function:

Does the applicant need a reasonable accommodation to perform the job function?

If yes, what type of reasonable accommodation does the applicant need?

The employer is not permitted, however, to ask anything about the disability itself (e.g., how the disability occurred, its prognosis). The employer is limited to learning whether there is a need for reasonable accommodation to perform a specific job function.

Asking for a Demonstration of Ability to Perform a Job Function

Just as an employer can seek information from an applicant with a known disability about the need for reasonable accommodation to perform a specific job function (if it meets the conditions discussed above), it also may ask an applicant with a known disability to demonstrate the ability to perform a job function if the employer reasonably believes that the disability will pose problems for the applicant in performing the job. This demonstration may be a simulation of the job function or actual performance.

Alternatively, the employer may ask the applicant to describe how s/he would perform the job function at issue. The employer's request for a demonstration or explanation is permissible even if it does not make such a request of other applicants, so long as the employer has a reasonable belief that a known disability may pose problems for the applicant in performing a specific job function. (If the employer asks all applicants to demonstrate or describe performance of a job function, then there is no issue that this request is made of an applicant who happens to have a disability.)

Questions about Drug and Alcohol Use, Drug Addiction, and Alcoholism

Again, subtle differences in phrasing can mean the difference between a lawful and unlawful question. It is illegal to ask applicants whether they are or have ever been **addicted to drugs** because such questions are likely to elicit information about a disability. For individuals who have recovered from

drug addiction, such questions are likely to reveal their "record" of a disability. However, if a question asks whether an applicant **currently** uses illegal drugs, the question is lawful because current illegal users are not considered "disabled" under the ADA.

Questions about whether an applicant has ever used drugs are lawful as long as they do not inquire about the extent of use. Thus, a question asking whether an applicant has ever used specific drugs would be lawful. However, questions about the extent of use (e.g., how many times did you use a drug, how often did you use a drug) would be illegal at this stage because the answer is likely to reveal whether a person was a casual user or an addict.

Similarly, questions about the use of alcohol are permissible while questions focusing on the extent of use would not be because the latter are likely to reveal whether or not an applicant is an alcoholic.
Drug tests may be given during the pre-offer stage because the statute deems that they are not medical examinations. However, employers cannot ask applicants prior to taking the drug test whether they are taking medications that could affect the results. Such questions would be disability-related because revealing medications could indicate whether or not a person has a disability. Of course, people taking medications that could affect the results of a drug test do not want to be screened out based on a misreading of the test results. To avoid that, employers can give the drug test first, and if it shows possible drug use, then an employer may ask whether the individual is taking medication that could have caused a positive result.

Affirmative Action Inquiries

The ADA permits employers to ask applicants to voluntarily self-identify if they have a disability for affirmative action purposes. In order to do this, however, the employer must meet certain requirements. First, the employer may ask for voluntary self-identification only if:

the employer is undertaking affirmative action because of a federal, state, or local law (including veterans' preference law) that **requires** affirmative action for individuals with disabilities; or

the employer is voluntarily using the information to benefit individuals with disabilities. This means that an employer is not simply gathering statistical information (e.g., how many people with disabilities are applying for a job), but rather will use the information to provide an employment benefit for an applicant with a disability.

If a state or local law **permits but does not require** affirmative action, then an employer can ask applicants to self-identify voluntarily **only** if it uses the information to benefit people with disabilities.

If an employer invites applicants to self-identify for affirmative action purposes, the employer must:

state clearly on any written questionnaire, or state clearly orally, that the information requested is used solely in connection with its affirmative action obligations; and

state clearly that the information is being requested on a voluntary basis, that it will be kept confidential in accordance with the ADA, that refusal to provide it will not subject the applicant to any adverse treatment, and that it will be used only in accordance with the ADA.

In order to ensure that the self-identification information is kept confidential, the information must be on a form that is kept separate from the application.

Stage 2: Post-Offer

As the name implies, this stage begins when an employer offers a position to an applicant and ends when the applicant reports for work.

An employer may condition a job offer on an individual answering disability-related questions and/or undergoing a medical examination. The questions and medical examinations **do not** have to be job-related and consistent with business necessity, i.e., they do not have to relate to the essential functions of the position. An employer may conduct **any** post-offer, pre-employment medical examination, or ask **any** disability-related question, as long as all entering employees in the same job category are subjected to the same examinations (and/or questions) regardless of disability. However, if the initial questions and/or examinations reveal a potential problem, an employer can subject a specific person to appropriate follow-up questions/examinations.

A critical inquiry here for an Investigator is whether the employer made a real job offer. A job offer is not real if, for example, at the post-offer stage, an employer has the president of the company interview the applicant. Such an interview should have been conducted during the pre-offer stage. With a few exceptions, the post-offer stage should almost exclusively be devoted to disability-related inquiries or medical examinations. Two possible exceptions would be conducting a reference check with the person's current

employer and conducting a background check that would be too difficult and costly until after the employer has identified applicants who meet medical qualifications for the job. All other efforts to determine an applicant's non-medical qualifications should be done at the pre-offer stage. (See the EEOC Pre-employment Guidance for a discussion of the limited situations in which employers may be able to pursue certain non-medical information post-offer.)

If an employer withdraws a job offer based on something it has learned from a disability-related question or medical examination, the employer must justify the withdrawal by showing that its reason is **job-related and consistent with business necessity**. This means that the employer must show why s/he believes the individual is unable to perform the essential functions of the position or poses a direct threat. The employer obviously believed the individual was qualified initially in order to have made a job offer and must explain why the medical information it has learned suddenly makes the individual unqualified. Remember that if the CP only meets the "regarded as" definition of disability, the CP must be qualified without reasonable accommodation. For all other CP's, an assessment of whether the individual can perform the essential functions or poses a direct threat must include consideration of whether a reasonable accommodation would enable the CP to show s/he is qualified despite the employer's concerns.

Stage 3: Individual Is an Employee

This stage begins when individuals start work and continues throughout their employment. Employers may ask disability-related questions and conduct medical examinations of employees only if they are job-related and consistent with business necessity. To meet this standard, generally an employer must have a **reasonable belief based on objective evidence** that, due to a medical condition, a particular employee:

may be unable to perform the essential functions of the position; or

may pose a direct threat.

This means that an employer has some objective information to suggest that an employee **may be unable** to perform the essential functions of the position, or **may pose** a direct threat, but without medical information the employer cannot make a definitive determination. Keep in mind that the employer is entitled only to the medical information necessary to determine whether an employee is unable to perform the essential functions of the position or poses a direct threat. The employer is not entitled to know the employee's complete medical history. Thus, questions and/or medical

examinations must be narrowly tailored to address the employer's reasonable belief.

Employers may also ask disability-related questions, seek medical documentation, and perhaps order a medical examination, if the employee requests reasonable accommodation and it is unclear to the employer: (1) whether the employee's medical condition constitutes a "disability"; and/or (2) whether the employee's requested accommodation is necessitated by the disability.

Under limited circumstances, an employer may require an employee to go to a health care professional of its choice (not the employee's). Such circumstances could be:

The employee has provided **insufficient documentation** from his/her treating physician (or other health care professional) to substantiate the existence of a disability and the need for a reasonable accommodation.

The employer has a reasonable belief based on objective information that the employee may pose a direct threat.

In these circumstances, an Investigator may wish to determine the health care professional's expertise in the employee's specific condition and whether s/he provided relevant information to make an informed decision concerning direct threat or the need for reasonable accommodation.

In cases where the medical documentation from the employer's health care provider conflicts with the medical documentation provided by the employee's own treating physician, the Investigator should include in the investigative file medical documentation from all sources. The Investigator should obtain evidence from all health care providers who have given information to the employer regarding:

the area of expertise of each medical professional (e.g., psychiatrist, neurologist, internist, oncologist);

the information on which the health care professional based his/her conclusions/advice (e.g., the doctor has been treating the individual for 9 years; the employer's doctor reviewed the individual's medical records but conducted no medical examination);

the kind of information each person has regarding the job's essential functions and the work environment in which they are performed;

whether a particular opinion is based on speculation or on current, objectively verifiable information about the risks associated with a particular condition; and

whether the medical opinion is contradicted by information known to or observed by the employer (e.g., information about the employee's actual experience in the job in question or in previous similar jobs).

Affirmative Action Inquiries

The ADA permits employers to ask employees to voluntarily self-identify if they have a disability for affirmative action purposes. The rules on seeking voluntary self-identification are the same as those discussed in the previous section as applied to applicants.

CONFIDENTIALITY OF MEDICAL INFORMATION

An employer must keep **all medical information** on applicants or employees **confidential**, regardless of how it was obtained, with the following limited exceptions:

supervisors and managers may be told about necessary restrictions on the work or duties of the employee and about necessary reasonable accommodations;

first aid and safety personnel may be told if the disability might require emergency treatment;

government officials investigating compliance with the ADA must be given relevant information on request;

employers may give information to state workers' compensation offices, state second injury funds, or workers' compensation insurance carriers in accordance with state laws; and

employers may use the information for insurance purposes.

The confidentiality requirement covers all medical information, regardless of when and where it was obtained. This protection extends to information voluntarily disclosed by an applicant or employee as well as information obtained from post-offer medical examinations. In addition, the ADA confidentiality rules apply to people both with and without disabilities.

Therefore, even non-disabled people have standing to file ADA charges alleging that a respondent violated the confidentiality provisions.

The ADA's confidentiality provisions require that employers maintain disability-related information separate from a person's general personnel file. Such information must be kept in a separate location with access permitted only in the situations listed above. However, if disability-related and medical information was maintained in one file prior to the effective date of the ADA, the law does not require that employers pull out the disability-related information. The law's requirements on confidentiality were prospective only.

There will be occasions when an Investigator discovers a confidentiality violation while investigating other allegations. For example, while investigating a Title VII charge or an ADA charge alleging failure to promote an Investigator may learn that the employer has commingled medical and non-medical information in violation of the ADA. The Investigator should consult with his/her supervisor about pursuing this violation.

The limits on sharing medical information sometimes cause confusion concerning appropriate uses of the information. For example, information obtained during a post-offer medical examination may be shared with appropriate decision makers involved in the hiring process that need to know the information so they can make employment decisions consistent with the ADA.

Example: An employer uses a 3-person hiring committee to evaluate all information concerning an applicant's suitability for hire. The results of a post-offer medical examination may be shared with all three members of the hiring committee.

Example: An employer uses a 3-person hiring committee, but each person has specific responsibilities to review certain information. One person is responsible for reviewing educational achievement and job references, another has responsibility for reviewing references, and a third person has responsibility for reviewing the information obtained in a post-offer medical examination. The person reviewing the medical information cannot share it with the other two committee members because they have different responsibilities that do not require access to the medical information.

ADA INSURANCE ISSUES

One of the most complex areas of the ADA is its application to employer-provided insurance. This section will address two forms of employer-provided insurance – **health and long term disability** – and how they are addressed under the ADA.

Access to Benefits

While the ADA does not require that employers provide insurance as a fringe benefit, if employers choose to do so, then employees with disabilities must be given an equal opportunity to receive whatever insurance benefits are offered (e.g., health insurance, life insurance, and long term disability insurance). Similarly, if these benefits are available to an employee's dependents, an employer cannot refuse to make them available to an employee whose dependent has a disability. However, an employer may provide different levels of benefits to employees and dependents. For example, an employer may offer prescription coverage for employees but not for dependents.

Distinctions in Benefits

Many insurance plans make distinctions based on medical conditions, health status, or disability in deciding when to reimburse and how much to reimburse for certain qualifying conditions. Some of these distinctions are lawful under the ADA and others are not. This section addresses how Investigators can determine whether a specific insurance provision violates the ADA.

Health Insurance

The ADA does not automatically outlaw all health-related distinctions found in employer-provided health insurance plans. Whenever an individual alleges that a provision within an employer-provided health plan violates the ADA, an Investigator must first determine whether the provision at issue contains a **disability-based distinction.**

A disability-based distinction is one that singles out:

a particular disability (e.g., deafness, HIV infection/AIDS, schizophrenia), or

a discrete group of disabilities (e.g., cancers, muscular dystrophies, kidney diseases), or

disabilities in general (i.e., all conditions that substantially limit a major life activity).

The Investigator must carefully examine the terms of an insurance provision to determine if s/he is dealing with a disability-based distinction.

Examples of health-related distinctions that are **not disability-based distinctions** include:

Broad distinctions which apply to the treatment of **a multitude of dissimilar conditions** and which affect individuals both **with and without disabilities**.

Example: One of the most common distinctions in health insurance plans is between physical conditions and "mental/nervous" conditions. Typically, health plans provide a **lower level of benefits for mental/nervous conditions**. This is **not considered a disability-based distinction** because it covers a multitude of dissimilar conditions (everything from grief counseling for the death of a spouse to schizophrenia) and affects both people with and without disabilities (a person needing grief counseling is not disabled while the person with schizophrenia is).

The fact that individuals with disabilities may suffer greater harm because of this type of distinction does not make it a violation of the ADA. Although a person with schizophrenia has a greater need for coverage of treatment related to his/her disability than the employee who needs grief counseling, the limitations placed on mental/nervous conditions will not violate the ADA.

Blanket pre-existing condition clauses that exclude from coverage any condition that pre-dates an individual's eligibility for benefits are not disability-based distinctions, and thus **do not violate the ADA.**

Universal limits or exclusions from coverage of all **experimental drugs and/or treatments**, or of all "elective surgery" are not disability-based distinctions, and thus **do not violate the ADA.**

Limitations on the coverage of certain medical procedures that are not exclusively, or nearly exclusively, utilized for the treatment of a particular disability are not disability-based distinctions, and thus **do not violate the ADA**.

Example: A health plan that limits the number of annual physical therapy sessions for which it will reimburse an individual is not violating the ADA, even though this limitation may have a greater impact on people with certain

disabilities. Physical therapy is used to treat many types of medical conditions, many of them having nothing to do with treatment of a disability.

Identification of a disability-based distinction does not mean discrimination has occurred. If the Investigator determines that there is a disability-based distinction, then s/he must determine whether the employer has a legitimate (i.e., a non-discriminatory) reason for using it. This involves two steps.

First, the employer must provide evidence that its health insurance plan is a **"bona fide" plan.**

If it is an **insured plan** (i.e., the employer purchased the plan from an insurance company or other organization), the employer must show that:

(1) the plan exists and pays benefits, and its terms have been accurately communicated to eligible employees, and

(2) the plan's terms are consistent with applicable state law.

If it is a **self-insured plan** (i.e., the employer directly assumes liability as an insurer), the employer must show that the plan exists and pays benefits, and its terms have been accurately communicated to eligible employees.

Second, the employer must show that the disability-based distinction is **not a subterfuge to discriminate,** i.e., the disability-based distinction is justified by the risks or costs associated with the disability. A determination as to whether the risks and costs associated with a disability justify a distinction must be made on a case-by-case basis, considering the totality of the circumstances.

An employer can offer several possible defenses to show that the disability-based distinction is justified, including (but not limited to):

There is no disability-based distinction. This defense means that there was a mistake in finding a disability-based distinction in the first place.

The disability-based distinction is justified by legitimate actuarial data, or by actual reasonably anticipated experience, and that conditions with comparable actuarial data and/or experience are treated in the same fashion. This means that the distinction is based on data that show there is an actual increase in the risks and costs associated with the disability.

The disability-based distinction is necessary to ensure that the plan satisfies the commonly accepted or legally required standards for the fiscal

soundness of such an insurance plan, i.e., without the disability-based distinction the plan would become financially insolvent and there was no other way to avoid insolvency.

The disability-based distinction is necessary to prevent a drastic increase in the premiums, co-payments, or deductibles, or a drastic alteration to the scope of coverage or level of benefits provided that would result in making the plan so unattractive as to result in healthy people opting out of the plan. The employer must show that these drastic consequences could not have been avoided by making changes other than adopting a disability-based distinction.

If the charging party is challenging denial of coverage for a **disability-specific treatment**, the respondent may prove that the treatment provides **no benefit**, (i.e., the treatment has no medical value) and the plan excludes coverage for all treatments that have no medical value. The respondent must provide reliable scientific evidence showing that the treatment does not cure the condition, slow the degeneration/ deterioration or harm attributable to the condition, alleviate the symptoms, or maintain the current health status of individuals who receive the treatment.

Long Term Disability Insurance (LTD)

This type of insurance provides, in effect, a substitute salary if an employee cannot work because of a disability. Generally, the payment represents a percentage of the employee's salary and payments usually begin after the employee has been off work for at least several months and with the expectation that the employee will be unable to work, at least, for several more months.

The EEOC has argued that **distinctions between physical and mental/nervous conditions in LTD plans are disability-based distinctions**. Generally, the difference in coverage concerns the length of time an employee is eligible to receive LTD payments -- for physical disabilities it generally is until age 65 while for mental/nervous disabilities it is only for two years.

In the health insurance context, the physical/mental distinction covered a **multitude of dissimilar conditions** which affected individuals both **with and without disabilities**. However, by definition, long term disability does not cover individuals who require short term treatment such as grief or marriage counseling, or several weeks of psychotherapy. Generally, only persons with a mental disability (as defined by the ADA) will qualify for LTD,

and these eligible disabilities do not represent a multitude of dissimilar conditions.

Thus, distinctions between physical and mental/nervous disabilities in LTD plans constitute disability-based distinctions and a Respondent must show that the plan is not a subterfuge. The same types of defenses discussed in the health insurance context would be applicable here.

EMPLOYER WELLNESS PROGRAMS & THE ADA

On May 17, 2016, the Commission issued a final rule to amend the ADA regulations as they relate to employer wellness programs.

The term "wellness program" generally refers to health promotion and disease prevention programs and activities offered to employees. Some wellness programs are part of an employer-sponsored group health plan, and other wellness programs are not tied to group health plans. Many of these programs ask employees to answer questions on a health risk assessment (HRA) and/or undergo biometric screenings for risk factors (such as high blood pressure or cholesterol). Other wellness programs provide educational health-related information or programs that may include nutrition classes, weight loss and smoking cessation programs, onsite exercise facilities, and/or coaching to help employees meet health goals. Some employers now extend wellness programs to employees' family members, particularly those who are enrolled in employer group health plans.

The final ADA rule provides that employers may offer limited financial incentives for employees to answer disability-related questions or take medical examinations as part of wellness programs. The rule provides guidance to both employers and employees about how workplace wellness programs can comply with the ADA consistent with provisions governing wellness programs in the Health Insurance Portability and Accountability Act, as amended by the Affordable Care Act (Affordable Care Act).

The rule permits wellness programs to operate consistent with their stated purpose of improving employee health, while including protections for employees against discrimination.

Effective date: The new provisions of the final rule concerning (1) the requirement to provide a notice that clearly explains to employees what medical information will be obtained and how it will be used and (2) the limits

on incentives apply only prospectively to wellness programs as of the first day of the first plan year that begins on or after January 1, 2017, for the health plan used to determine the level of incentives permitted under this rule. The rest of the provisions of the rule, which simply clarify existing obligations, apply both before and after publication of the final rule. If you are unclear whether a charge is raising an issue with an immediate effective date or not, please consult . . . . . .

Examples of Possible ADA Wellness Charges:

Example 1: My employer required me to fill out a HRA and take a biometric screen in order to get health insurance or to get into the plan I wanted.

Example 2: My employer used to pay part of the cost of my health insurance but I did not participate in the company wellness program and now I pay the full cost of my insurance.

Example 3: Ever since I filled out a HRA for my employer's wellness program I've been receiving marketing e-mails for products I can take to lower my cholesterol or that may help me manage my diabetes.

Example 4: A month after responding "yes" to a question on a HRA about whether I have ever been diagnosed with depression I started receiving warnings for poor performance. Until then, I've always received good evaluations.

Example 5: For months, my boss has been saying I should join the company wellness program. She says she doesn't understand why I'm being so stubborn when everybody else is joining.

Also on May 17, 2016, the Commission issued a final rule under GINA regarding wellness programs, which is discussed elsewhere in this manual. The final GINA rule says employers may provide limited financial and other inducements (also called incentives) in exchange for an employee's spouse providing information about his or her current or past health status as part of a wellness program, whether or not the program is part of a group health plan.

Examples of possible GINA wellness charges:

Example 1: My employer said if my spouse did not fill out the HRA, we could not participate in the group health plan or could only participate in a particular group health plan.

Example 2: My employer said if my spouse did not fill out the HRA I would be fired. (Variation: My employer said based on information provided by my spouse in filling out the HRA, I am fired.)

Example 3: My employer required my spouse to participate in a wellness program that asked her questions about her health but did not provide any individual feedback.

Example 4: My employer told me that it would pay for part of my family's health insurance if my spouse fills out a HRA that asks questions about his health. Otherwise, we have to pay the entire cost of the health insurance.

More information about the ADA, GINA, and wellness programs can be found in an internal webinar. If you have questions or charges raising wellness program issues, please follow the guidance on wellness charge coordination.

COMPARING THE ADA, THE FAMILY AND MEDICAL LEAVE ACT, WORKERS' COMPENSATION, AND SOCIAL SECURITY DISABILITY BENEFITS

CPs may mistakenly come to the EEOC to file charges about matters arising under other federal and state laws which provide benefits and protections to persons with disabilities and medical conditions. In addition, some CPs may have cases that implicate both the ADA and one of these other laws. It is important that Investigators have some familiarity with these other laws in order to recognize what is and is not an ADA issue, as well as to provide appropriate referrals.

The Family and Medical Leave Act (FMLA)

The Family and Medical Leave Act (FMLA), which is enforced by the U.S. Department of Labor, requires covered employers to grant a certain amount of leave to eligible employees who require time off for specified family and medical reasons. It is the medical leave granted under the FMLA that may overlap with the ADA's requirement that an employee with a disability be granted leave as a reasonable accommodation.

However, not everyone protected under the FMLA is protected under the ADA, and vice versa. Employees are eligible for FMLA leave only if they have worked for the employer for at least **12 months**, and for at least **1,250**

hours during the 12-month period preceding the requested leave. (A full-time employee usually works 2,080 hours per year). Furthermore, the FMLA covers only employers who have **50 or more employees.**

The ADA covers employees from the moment of hire; employers are covered under the ADA if they have 15 or more employees. The ADA provides reasonable accommodation, which includes leave, to employees with a disability as defined by the statute.

Under the FMLA, eligible employees are entitled to medical leave if they have a **"serious health condition,"** which is defined as "an illness, injury, impairment or physical or mental condition that involves . . .[i]npatient care . . . or [c]ontinuing treatment by a health care provider." This includes conditions that require at least an overnight stay in a health facility or conditions that last more than three consecutive days and require at least one treatment by a health care provider with some ongoing treatment at home under the provider's supervision. The definition of a "disability" under the ADA is narrower than the FMLA's definition of a "serious health condition." Thus, while everyone with an ADA disability (at least the first two prongs of the definition) will have an FMLA serious health condition, not everyone with an FMLA serious health condition will have an ADA disability.

The ADA requires an employer to grant leave, as a reasonable accommodation, except if it causes an undue hardship. The FMLA, however, requires an employer to grant a maximum of **12 weeks of leave during a 12-month period**. This means that under the FMLA an employer must grant up to 12 weeks of leave to an eligible employee who has a serious health condition regardless of the hardship it may impose on the employer. Under the ADA, however, an employer may not have to grant any leave to an eligible employee if it would cause an undue hardship. Alternatively, an employer may have to grant more than 12 weeks of leave if there is no undue hardship.

For more information on the relationship between the ADA and the FMLA, consult the *EEOC Fact Sheet on The Family and Medical Leave Act, the Americans with Disabilities Act, and Title VII of the Civil Rights Act of 1964,* which is available at **www.eeoc.gov/policy/docs/fmlaada.html.**

Workers' Compensation

Every state has a workers' compensation law that provides compensation for occupational injuries and illnesses that result in present and future medical care and potential loss of earning capacity. The injuries and

illnesses that may be covered under a workers' compensation statute do not necessarily meet the ADA's definition of disability. Therefore, although a CP may have a "disability" rating from a workers' compensation tribunal, that rating does not mean that the individual meets the ADA definition of "disability." The rating may be evidence to be used by an Investigator in making a determination as to whether the CP has an ADA "disability," but it cannot be the determining piece of evidence.

In addition to providing compensation for occupational injuries or illnesses, workers' compensation programs can provide various job modifications and alternative assignments which, under the ADA, could be considered reasonable accommodations. If an employee's occupational injury is covered under both Workers' Compensation and the ADA, then the employee may be entitled to such modifications or reassignment under both laws. The fact that an employee has a Workers' Compensation claim does not preclude the employee from protection under the ADA and the ability to file a charge with the EEOC if s/he believes that the employer is engaging in discrimination based on disability (including denial of a reasonable accommodation).

For more information on the relationship between the ADA and workers' compensation statutes, consult the EEOC Enforcement Guidance on Workers' Compensation and the ADA, available at **www.eeoc.gov/policy/docs/workcomp.html** This Guidance addresses issues involving coverage, reasonable accommodations, light duty positions, disability-related questions and fitness-for-duty medical examinations, and confidentiality.

Social Security Disability Benefits

CPs who file ADA charges may be receiving, or have received in the past, Social Security Disability benefits. The Social Security Act's definition of "disability" differs from that used in the ADA. Thus, once again, Investigators cannot rely solely on evidence of receipt of Social Security Disability benefits to determine whether a CP meets the ADA definition of "disability."

A second issue may arise for CPs who have received, or are receiving, Social Security Disability benefits. Receipt of Social Security benefits, or even the application for such benefits, **may** affect whether someone meets the ADA definition of "qualified," i.e., capable of performing the essential functions with or without reasonable accommodation. A person applying for or receiving these benefits is supposed to be unable to work, which would

seem to preclude him/her from simultaneously maintaining that s/he is "qualified."

Investigators must make an individualized assessment of whether a CP, despite application for or receipt of such benefits, can perform the essential functions of the position at issue, with or without reasonable accommodation. (For CP's who only meet the "regarded as" definition of disability, there is no assessment of the possible role of reasonable accommodation.) There is not necessarily an inconsistency in applying for and receiving Social Security Disability benefits while being able to perform the essential functions of a position.

For example, if an employer improperly denied a request for reasonable accommodation and terminated an employee, thereby forcing the individualto apply for disability benefits, the employee may still have a valid charge of discrimination. If the employer had provided the reasonable accommodation, thus enabling the person to perform the essential functions of the position, the person would be "qualified" under the ADA, despite the fact that the person was receiving disability benefits.

Additionally, certain medical conditions may be presumptively deemed disabling under the Social Security Act, thus rendering the person incapable of working as defined by that statute. Nonetheless, if the person could perform the essential functions of a position, with or without reasonable accommodation, the individual would be considered "qualified" under the Americans with Disabilities Act, regardless of the Social Security Administration's designation.

Apparent inconsistencies between a CP's claim that s/he is "qualified" and the application for or receipt of Social Security disability benefits may also be explained as the result of changes that have occurred in the CP's condition over time. For example, a CP may have been qualified for a job at the time of an employer's allegedly discriminatory failure to hire or termination, but the CP may have experienced a worsening of the disability in the interim that now makes CP unable to work and thus eligible for Social Security disability benefits.

For more information on this complex topic, consult the *EEOC Enforcement Guidance on the Effect of Representations Made in Applications for Benefits on the Determination of Whether a Person is a "Qualified Individual with a Disability" Under the ADA*, which is available at **www.eeoc.gov/policy/docs/qidreps.html.**

APPENDIX

Overview: New Investigator Training on the Americans with Disabilities Act

I. Definition of Disability

- *Does the CP have a "physical or mental impairment" that "substantially limits" a "major life activity"?*
    - *Evidence supporting existence of a physical or mental impairment if not obvious?*
    - *What is/are the major life activities (including major bodily functions) affected by the impairment?*
    - *Evidence supporting that impairment substantially limits one or more major life activities compared to most people? (May include CP's description of his/her limitations, medical documentation, and/or information from others who know CP.)*

        - *Does the CP use one or more "mitigating measures" (e.g., medication) that ameliorate the impact of an impairment? If yes, our inquiry is would the impairment be substantially limiting without the mitigating measures?*
        - *Is the impairment "episodic" or "in remission"? If yes, our inquiry is would the impairment substantially limit a major life activity "when active"?*
        - *Is the CP's impairment one of the impairments identified in the regulations as easily found to be substantially limiting?*
        - *Is the "condition, manner or duration" of performing one or more major life activities relevant to finding if a disability exists (e.g., half-hour limitation on standing, or takes CP much longer than others to walk particular distance)?*

- *Does the CP have a "record of" (past history of) a substantially limiting impairment? Use the same analysis as above in determining whether an impairment that no longer exists in substantially limiting form was substantially limiting in the past. Relevant evidence may include educational, medical, or employment documentation indicating the past history of disability.*

    NOTE: Because of the various rules of construction for determining whether an impairment is substantially limiting under the first prong of the definition of disability, including the rule that conditions that are episodic or in remission can be disabilities if they would be substantially limiting when active and the rule that the benefits of mitigating measures (such as medications) are to be disregarded when determining whether a CP has a disability, it will often be unnecessary to assess coverage under the "record of" prong.
- *Did R "regard" CP as having a disability, meaning did R take an adverse action against the CP based on a real or perceived impairment?*
    - *Does CP have an impairment?*
    - *If no, what is the perceived impairment that R believed CP to have?*

- *Is the impairment (real or perceived) objectively **both** transitory (lasting six months or less) **and** minor, thus precluding a finding that R regarded CP as having a disability?*
    - *If R did not raise this defense, confer with the Legal Unit re: how to proceed.*
- *If the impairment is not both transitory and minor, what is the adverse employment action that R took?*
- *What is the evidence to support that R took the adverse employment action based on CP's real or perceived impairment rather than on some other basis? NOTE: Much of the evidence relevant in answering this question may be relevant when assessing liability (i.e., whether discrimination actually occurred).*

II. Types of Disability Discrimination Claims

Claims requiring CP is individual with a disability

- *Disparate treatment*
- *Harassment*
- *Qualification standards (either disability-based or neutral) that screen out based on disability*
- *Failure to provide a reasonable accommodation*

Claims that do NOT require disability coverage:

- *Unlawful disability-related inquiries or medical examinations*
- *Violation of confidentiality provision*
- *Retaliation*
- *Interference*

III. Investigating the Merits

➢ ***Disparate Treatment***

Qualified

- *Is the CP "qualified" for the position at issue?*
- *Did CP meet the requisite skill, experience, education, and other job-related requirements of the position?*
- *Could the CP perform all the "essential functions" of the position, with or without reasonable accommodation (meaning, with accommodation if needed and not an undue hardship)? If there is a question about CP's ability to perform any job duty, then determine if the function is "essential" or "marginal."*
    - *EXCEPTION: A CP covered only under the "regarded as" definition of disability is not entitled to accommodation. Can CP perform all essential functions without reasonable accommodation?*

- *These additional "essential function" questions apply only if CP has an actual disability or a record of one and needs accommodation to be qualified:*

    - *If there is a dispute over CP's ability to perform a particular job duty, or CP sought as accommodation to be excused from performing the duty, what evidence supports a finding that the specific job duty is only a marginal function? (Employer need not excuse performance of essential functions as an accommodation.)*

    - *If the function(s) at issue is an essential function, identify the reasonable accommodation(s) that CP required, determine if they would have posed an undue hardship, and determine if with the accommodation(s) CP could have performed the function.*

Causation

- *Was the challenged adverse action taken because of CP's disability?*

Defenses

- *If R admits it took an action because of CP's disability, does R have a defense (e.g., CP posed a direct threat to health or safety of self or others, or the action taken was mandatory for R under another federal law or regulation)?*

➢ ***Harassment***

- *Analyzed the same as harassment on other bases.*

➢ ***Qualification Standards Not Met Because of Disability***

- *Disability-Based: Was CP subject to adverse action for not meeting a disability-based qualification standard (e.g., R does not hire anyone who takes hypertension medication for patrol officer positions)?*

- *Neutral (ADA-specific version of disparate impact): Was the CP screened out because of failure to meet a neutral "qualification standard"? (e.g., must be able to lift 70 pounds) (note: declaratory and injunctive relief but no damages available for this type of claim)*

- *If yes to either question, what is the qualification standard and is it "job-related and consistent with business necessity?"*
    - *Is the standard at issue safety-related? If yes, does the standard meet the "direct threat" test? (See below for more on "direct threat")*
    - *If the standard is job related and consistent with business necessity, could CP meet the standard or perform the job with reasonable accommodation? If yes, CP is qualified.*

- *If the standard is not job-related and consistent with business necessity, could CP perform the essential functions of the job with or without reasonable accommodation? If yes, CP is qualified.*

➢ ***Denial of Reasonable Accommodation***

- *Does CP have an actual disability or record of a disability? CP is not entitled to reasonable accommodation if only covered under the "regarded as" definition of disability.*

- *Did CP (or a third party on CP's behalf) request a reasonable accommodation from R?*

- *What happened after CP requested a reasonable accommodation? What evidence supports that CP and R engaged in an "interactive process" to determine if reasonable accommodation was required and, if so, what the appropriate accommodation would be? Did either CP or R fail to engage in the interactive process or cause a breakdown in the interactive process? (Note: This is not itself a violation, but may affect who prevails if there was a reasonable accommodation available that could have been provided without undue hardship.)*

- *If CP was entitled to reasonable accommodation, and such an accommodation existed, did R provide it? If not, why? Did R propose an alternative accommodation to one requested by the CP (or a third party on behalf of the CP)? If so, was the alternative accommodation effective?*
- *Did a possible reasonable accommodation violate a seniority rule or collective bargaining agreement? If so, are there exceptions to the seniority rule or, even in the absence of specific exceptions, has R made exceptions to the seniority rule, such that special circumstances would exist for granting a reasonable accommodation?*

- *If there was a possible reasonable accommodation, did R provide evidence that demonstrates it would have caused an undue hardship?*

➢ ***Unlawful disability-related inquiries or medical examinations***

- *Did R ask for or seek "disability-related" information, or require a medical examination, during the pre-offer period?*

    - *If R asked for disability-related information, does it fall under one of the very limited exceptions to the general prohibition (for example, asking whether there is a need for reasonable accommodation to perform a specific job duty where disability is known and it is reasonable to suspect accommodation might be needed; or R seeks information on disability specifically for affirmative action purposes)?*

- *Did R ask for or seek disability-related information, or require a medical examination, during the post-offer period?*

    - *If yes, did R revoke the job offer based on information learned from such inquiries/medical examination?*
    - *If yes, what evidence did R provide to show that its revocation of the job offer was "job-related and consistent with business necessity"?*

- *Did R ask for or seek disability-related information, or require a medical examination, once CP was working for R?*
    - *If yes, what evidence did R provide to show that its inquiry/medical examination was "job-related and consistent with business necessity"?*
    - *Did R have a reasonable belief, based on objective evidence that CP, due to a medical condition, might be unable to perform an essential function or might pose a direct threat?*
    - *Did another federal law or regulation require R to ask for medical information or conduct a medical examination (e.g., a DOT regulation applicable to drivers of commercial motor vehicles)?*
    - *Did R have some other lawful reason for requesting medical information or conducting a medical examination, such as where it conducts periodic medical examinations of employees who are actually in positions affecting public safety?*

➢ ***Violation of confidentiality provision***

- *Did R automatically violate the ADA by failing to maintain CP's medical information separate from the regular personnel file?*
- *Even if the information was stored properly, If the information was otherwise disclosed by R, what were the circumstances?*
- *Was R permitted to disclose the information under one of the exceptions to the confidentiality rule?*

➢ ***Retaliation***

- *Did CP engage in prior protected activity (or was there anticipatory retaliation, e.g., employer policy restraining protected activity)? Protected activity includes not only actions such as opposing employer conduct an employee reasonably believes are discriminatory and participating, or assisting others in participating, in the EEO process (e.g., by filing a charge with EEOC), but also making a request for a reasonable accommodation.*
- *Did the employer take a materially adverse action (action that would deter reasonable person from engaging in protected activity)?*
- *Is there a causal connection between the protected activity and the employer's action?*

- ***Interference***
  - *Did R coerce, intimidate, threaten, or otherwise interfere with CP's exercise of ADA rights, or with CP assisting another to exercise ADA rights? May overlap with claims for retaliation or unlawful denial of accommodation. Examples of interference:*
    - *coercing an individual to relinquish or forgo an accommodation to which he or she is otherwise entitled;*
    - *intimidating an applicant from requesting accommodation for the application process by indicating that such a request will result in the applicant not being hired;*
    - *threatening an employee with loss of employment or other adverse treatment if he does not "voluntarily" submit to a medical examination or inquiry that is otherwise prohibited under the statute;*
    - *issuing a policy or requirement that purports to limit an employee's rights to invoke ADA protections (e.g., a fixed leave policy that states "no exceptions will be made for any reason");*
    - *interfering with a former employee's right to file an ADA lawsuit against the former employer by stating that a negative job reference will be given to prospective employers if the suit is filed; and*
    - *subjecting an employee to unwarranted discipline, demotion, or other adverse treatment because he assisted a coworker in requesting reasonable accommodation.*

IV. Additional Defenses

Direct Threat

- *Does R justify its actions based on the "direct threat" defense; i.e., does R defend its adverse action against CP based on health or safety concerns? If yes, is there evidence that CP's disability posed a "significant risk of substantial harm" to the health or safety of CP or others?*

- *Is there evidence relating to the existence of all four factors that must be considered to find direct threat:*
  - *Duration of the risk*
  - *Nature and severity of the potential harm*
  - *Likelihood that potential harm will occur*
  - *Imminence of the potential harm?*

- *If evidence supports a finding of direct threat, is there a reasonable accommodation (available only to individuals with a currently substantially limiting impairment or record of a substantially limiting impairment) that would eliminate or reduce the direct threat?*

Other Federal Law

- *Did a federal statute or regulation require the employer to take the challenged action?*
  - *State or local laws would not support this defense.*

- *Federal laws or regulations that permit, but do not require, the employer action at issue would not support this defense.*

Appendix A: RESOURCES FOR LOCATING REASONABLE ACCOMMODATIONS

U.S. Equal Employment Opportunity Commission website
www.eeoc.gov

U. S. Department of Labor (For information on the Family and Medical Leave Act). To request written materials or to ask questions:
1-866-487-9243 (Voice/TTY); or www.dol.gov/esa/whd/fmla.

Internal Revenue Service (For information on tax credits or deductions for providing certain reasonable accommodations)
(202) 622-6060 (Voice)

Job Accommodation Network (JAN)
1-800-232-9675 (Voice/TTY)
www.askjan.org

A service of the President's Committee on Employment of People with Disabilities. JAN can provide information, free-of-charge, about many types of reasonable accommodations.

ADA Disability and Business Technical Assistance Centers (DBTACs)
1-800-949-4232 (Voice/TTY)

The DBTACs consist of 10 federally funded regional centers that provide information, training, and technical assistance on the ADA. Each center works with local business, disability, governmental, rehabilitation, and other professional networks to provide current ADA information and assistance, and places special emphasis on meeting the needs of small businesses. The DBTACs can make referrals to local sources of expertise in reasonable accommodations.

Registry of Interpreters for the Deaf
(301) 608-0050 (Voice/TTY)

The Registry offers information on locating and using interpreters and transliteration services.

DisabilityInfo.gov

The federal government's one-stop Web site for people with disabilities, their families, employers, veterans and service members, workforce professionals

and many others. A collaborative effort among twenty-two federal agencies, **DisabilityInfo.gov** connects people with disabilities to the information and resources they need to actively participate in the workforce and in their communities.

RESNA Technical Assistance Project
(703) 524-6686 (Voice)(703) 524-6639 (TTY)
http://www.resna.org/hometa1.htm

RESNA, the Rehabilitation Engineering and Assistive Technology Society of North America, can refer individuals to projects in all 50 states and the six territories offering technical assistance on technology-related services for individuals with disabilities. Services may include:

*information and referral centers to help determine what devices may assist a person with a disability (including access to large data bases containing information on thousands of commercially available assistive technology products),

*centers where individuals can try out devices and equipment,

*assistance in obtaining funding for and repairing devices, and

*equipment exchange and recycling programs.

APPENDIX B: INTERVIEW QUESTIONS FOR ASSESSING DISABILITY UNDER THE AMERICANS WITH DISABILITIES ACT AMENDMENTS ACT (ADAAA)

1. **What is the condition that you believe was the basis for the employer's alleged discrimination?** [Note: tailor the questions to "record of" or "regarded as" disability, as necessary.] Do you have any documentation (e.g., medical records or a doctor's note) showing that you have this condition?

2. **What did the employer do or say that makes you think that your condition is the reason for the employer taking the action you think is discrimination?**

3. **How long have you had this condition? How long is your condition expected to last?**

4. **If your condition comes and goes, please explain. If your condition is in remission (i.e., is not currently active), please explain.**

5. **Does your condition affect a major bodily function? If yes, please explain.** (You may need to provide examples, such as diabetes affects endocrine function, HIV affects the immune system, and asthma affects respiratory function.) Below are some examples of major bodily functions.

___immune system function	___special sense organs and skin	___bowel function
___digestive functions	___genitourinary function	___brain function
___bladder function	___neurological function	___respiratory function
___circulatory function	___cardiovascular function	___lymphatic function
___endocrine function	___hemic function	___reproductive function
___musculoskeletal function	___normal cell growth	___ other

6. **Which of the following activities are affected by your condition? (These are traditional major life activities. Note that the condition has to substantially limit only ONE major life activity in order to be a disability. Also note that working is the major life activity of last resort. See Question 9 below for a discussion of the major life activity of working. But check all that apply.)**

– walking	– speaking	– learning
– standing	– breathing	– thinking
– sitting	– lifting	– concentrating
– seeing	– reaching	– interacting with others
– hearing	– sleeping	– reproduction or sexual relations
- eating	– caring for self	– eliminating/controlling bodily waste
– bending	– reading	– performing manual tasks
– communicating	--working	– other

7. **Is it harder for you to do these activities than it is for most people (when your condition is active)? If so, how**? (Note: ask if the individual can do the activity for less time or to a lesser extent, needs more time to perform the activity, experiences pain or performs the activity in a different way than most other people).

8. **Do you take any medications, receive any treatment, or use any assistive devices for your condition? Or have you developed any coping behaviors to modify the effects of the impairment? If yes, please explain how they affect you? What would happen if you did not take your medications, receive this treatment, use your coping behaviors, or use your assistive device? (Note: assess impact on the major bodily function, or the impact on the individual's ability to perform a major life activity, in light of the person NOT USING any mitigating measures).**

9. **Is your condition something that adversely affects you only at work? If so, how does or did your condition interfere with doing one or more jobs or job duties? How long has this been the case?**

10. **Is your employer aware of your condition, and if so, how? Has your employer received any records or documents, including doctor's notes, which discuss your condition or any limitations resulting from your condition? If yes:**

What records were given to your employer and when?

What did those records say and whom were they from?

11. **If we need additional information regarding your condition, may we contact your health care provider? If so, please provide us with your health care provider's contact information and fill out an authorization to release medical information.**

APPENDIX C: ANNOTATED INTERVIEW QUESTIONS FOR ASSESSING DISABILITY UNDER THE AMERICANS WITH DISABILITIES ACT AMENDMENTS ACT (ADAAA)

1. **What is the condition that you believe was the basis for the employer's alleged discrimination?** [Note: tailor the questions to "record of" or "regarded as" disability, as necessary.] Do you have any documentation (e.g., medical records or a doctor's note) showing that you have this condition?

Explanation: The ADA prohibits discrimination on the basis of disability. The term "disability" is defined in the statute as a physical or mental impairment that substantially limits a major life activity, a record of such an impairment, or being regarded as having such an impairment. Discrimination includes failing to provide a reasonable accommodation for someone with a substantially limiting impairment or a record of a substantially limiting impairment. Individuals covered only under the "regarded as" prong of the definition of "disability" are not entitled to reasonable accommodation.

The ADAAA reinstated Congress' intent that the definition of the term "disability" be interpreted broadly. The ADAAA explicitly rejected certain Supreme Court interpretations of the term "disability" and a portion of the old EEOC regulations that Congress found had inappropriately narrowed the definition of disability.

By asking this first question, you are determining whether the CP has a physical or mental impairment, a record of an impairment, or has been regarded as having an impairment. A "physical or mental impairment" can include a health condition, a disease, a congenital disorder, disfigurement or anatomical loss, sensory loss, etc.

Note: If the condition is one of those listed at 29 C.F.R. 1630.2(j)(3)(iii), the condition should easily be found to be a disability. These conditions are: Deafness; blindness; partially or completely missing limbs; mobility impairments requiring the use of a wheelchair; intellectual disability (formerly termed mental retardation); autism; cerebral palsy; major depressive disorder; bipolar disorder; post-traumatic stress disorder; obsessive compulsive disorder; schizophrenia; cancer; diabetes; epilepsy; HIV infection; multiple sclerosis; and muscular dystrophy. Even though much of the information in this questionnaire will not be necessary to establishing disability if the condition is on the (j)(3)(iii) list, the questions below should be asked for the purposes of intake and as the law under the ADAAA develops.

2. **What did the employer do or say that makes you think that your condition is the reason for the employer taking the action you think is discrimination?**

Explanation: The ADA prohibits discrimination "on the basis of" disability. This question helps establish whether there is a nexus between the employer's action and the CP's condition. This will be important for establishing a violation of the ADA.

In addition, under the "regarded as" prong of the definition of disability, an employer "regards" an individual as having a disability if it takes an action prohibited by the ADA (e.g., failure to hire, termination, or demotion) based on an individual's impairment or on an impairment the employer believes the individual has. This question can help establish coverage under the regarded as prong.

3. **How long have you had this condition? How long is your condition expected to last?**

Explanation: An individual will be covered under the "regarded as" prong of the definition of "disability" if the impairment on the basis of which an employer takes an allegedly discriminatory action is not BOTH transitory and minor. "Transitory" is defined as lasting or expected to last for six months or less. This question helps establish whether the impairment is transitory. Note, however, that even short term impairments, even those lasting fewer than six months, can be disabilities under the "actual" or "record of" prongs of the ADA.

4. **If your condition comes and goes, please explain. If your condition is in remission (i.e., is not currently active), please explain.**

Explanation: Under the ADAAA, episodic impairments or impairments that are in remission are disabilities if they are substantially limiting when *active*. These questions are helpful in understanding whether the condition is episodic or in remission and what the condition is like in its active state.

5. **Does your condition affect a major bodily function? If yes, please explain.** (You may need to provide examples, such as diabetes affects endocrine function, HIV affects the immune system, and asthma affects respiratory function.) Below are some examples of major bodily functions.

___immune system function	___special sense organs and skin	___bowel function
___digestive functions	___genitourinary function	___brain function
___bladder function	___neurological function	___respiratory function
___circulatory function	___cardiovascular function	___lymphatic function
___endocrine function	___hemic function	___reproductive function
___musculoskeletal function	___normal cell growth	___ other

Note: The operation of a major bodily function includes the operation of an individual organ within a body system (e.g., liver function, kidney function).

For example:

a coronary blockage (an impairment) decreases blood flow to the heart (a circulatory or cardiovascular function);
asthma (an impairment) makes it difficult to breathe (a respiratory function);

rheumatoid arthritis (an impairment) makes it painful to move joints (a musculoskeletal function);
hypothyroidism (an impairment) adversely affects the ability of the thyroid to produce thyroid hormone (an endocrine function);
monocular vision (an impairment) makes seeing difficult (a function of a special sense organ); and
Parkinson's disease (an impairment) makes it difficult to control hands, arms and legs (a neurological function).

The ADAAA specifically defines "major life activities" as including "major bodily functions." As a result, if an impairment substantially limits a major bodily function, the impairment is a disability under the ADAAA. In many cases it will be easier to establish coverage under the ADAAA through evidence that the CP's condition substantially limits a major bodily function, rather than a traditional major life activity. In addition to asking the CP questions, evidence can also be obtained from the CP's health care provider, medical reference books, or reputable medical sites on the internet (e.g., www.nih.gov; www.cdc.gov)

6. **Which of the following activities are affected by your condition?** (These are traditional major life activities. Note that the condition has to substantially limit only ONE major life activity in order to be a disability. Also note that working is the major life activity of last resort. See Question 9 below for a discussion of the major life activity of working. But check all that apply.)

– walking	– speaking	– learning
– standing	– breathing	– thinking
– sitting	– lifting	– concentrating
– seeing	– reaching	– interacting with others
– hearing	– sleeping	– reproduction or sexual relations
– eating	– caring for self	– eliminating/controlling bodily waste
– bending	– reading	– performing manual tasks
– communicating	_ working	– other

Explanation: While the ADAAA added "major bodily functions" to the list of major life activities, "traditional" major life activities like those listed above may still be relevant in assessing whether an individual's impairment is substantially limiting.

Where CP does not describe limitations in terms of the specifically listed MLAs, an investigator should determine whether the limitations described would add up to limitations of one of the listed activities (e.g., where someone finds it difficult to do shopping, work around the house, cook, etc., the CP may be describing a substantial limitation in caring for self).

Examples of impairments that may substantially limit traditional major life activities include:

"slipped disc" (a back impairment) that causes pain when sitting;
carpel tunnel syndrome (impairment) that makes it difficult for the individual to

perform manual tasks such as tying shoes, gripping, and keyboarding; dyslexia (impairment) that makes reading slow or difficult;
torn ligament in knee (impairment) that causes difficulty in walking.

7. **Is it harder for you to do these activities than it is for most people (when your condition is active)? If so, how**? (Note: ask if the individual can do the activity for less time or to a lesser extent, needs more time to perform the activity, experiences pain or performs the activity in a different way than most other people).

Explanation: In assessing whether a person is substantially limited in a major life activity, including a major bodily function, it may be helpful to consider the "condition, manner, or duration" under which the major life activity can be performed or the major bodily function operates. Assessing the condition, manner, or duration under which a major life activity can be performed may include consideration of the difficulty, effort, or time required to perform a major life activity; pain experienced when performing a major life activity; the length of time a major life activity can be performed; and/or the way an impairment affects the operation of a major bodily function.

Where the impairment is episodic or in remission, focus on what limitations exist or would exist if the impairment is active.

8. **Do you take any medications, receive any treatment, or use any assistive devices for your condition? Or have you developed any coping behaviors to modify the effects of the impairment? If yes, please explain how they affect you? What would happen if you did not take your medications, receive this treatment, use your coping behaviors, or use your assistive device? (Note: assess impact on the major bodily function, or the impact on the individual's ability to perform a major life activity, in light of the person NOT USING any mitigating measures).**

Explanation: Medications, treatments, and assistive devices are collectively called "mitigating measures." The ADAAA directs that the positive (or ameliorative) effects from an individual's use of one or more mitigating measures should be ignored in determining if an impairment substantially limits a major life activity. In other words, if a mitigating measure eliminates or reduces the symptoms or impact of an impairment, that fact cannot be used in determining if a person meets the definition of disability. Instead, the determination of disability must focus on whether the individual would be substantially limited in performing a major life activity ***without*** the mitigating measure. This may mean focusing on the extent of limitations prior to use of a mitigating measure or on what would happen if the individual stopped using a mitigating measure.

For example:

an individual with anxiety disorder who did not take medications might be substantially limited in brain function and sleeping;
an individual with emphysema who did not use supplemental oxygen might be

substantially limited in respiratory function and breathing; and
an individual who did not use hearing device might be substantially limited in the function of special sense organs and hearing.

Additionally, negative effects of a mitigating measure may be taken into account in determining whether an individual meets the definition of disability. Establishing substantial limitation as the result of negative effects of mitigating measures generally should be unnecessary, but negative effects will sometimes be relevant in determining whether a CP needed a reasonable accommodation.

Note: The rule concerning mitigating measures does not, however, apply to people whose vision is corrected with ordinary eyeglasses or contact lenses.

9. **Is your condition something that adversely affects you only at work? If so, how does or did your condition interfere with doing one or more jobs or job duties? How long has this been the case?**

Explanation: In certain situations, an impairment may limit a person's ability to perform some aspect of his or her job, but otherwise not substantially limit any other major life activity of that person. This will be a ***rare*** situation, given how broadly the amended ADA defines major bodily functions and major life activities. However, in these rare situations, the individual may be substantially limited in the major life activity of working.

To determine a substantial limitation in working, assess the difficulty the person has in performing either a "class of jobs" or a "broad range of jobs in various classes." Demonstrating a substantial limitation in performing a unique element of a single specific job is not sufficient to establish that a person is substantially limited in the major life activity of working. Rather, a person needs to show that he or she is substantially limited in a "class" of jobs because of the nature of the work -- e.g., the person cannot do any commercial truck driving or any assembly line jobs, or is unable to perform specific job-related requirements due to his or her impairment -- e.g., extensive walking, prolonged standing, or repetitive or heavy lifting -- that would apply to more than just a single, particular job.

As noted above, given all of the changes made by the ADAAA, it should generally be ***unnecessary*** to determine whether someone is substantially limited in working. Most people who have limitations at work will probably also have a significant limitation on a major bodily function or some other major life activity. **The major life activity of working should be analyzed only as a last resort.**

10. Is your employer aware of your condition, and if so, how? Has your employer received any records or documents, including doctor's notes, which discuss your condition or any limitations resulting from your condition? If yes:

What records were given to your employer and when?

What did those records say and whom were they from?

Explanation: Information in records given to an employer may contain evidence regarding substantial limitation of a major bodily function or a traditional major life activity.

11. **If we need additional information regarding your condition, may we contact your health care provider? If so, please provide us with your health care provider's contact information and fill out an authorization to release medical information.**

Explanation: As noted above, in many cases, coverage will most easily be achieved through medical evidence that the CP is substantially limited in a major bodily function. It will be easiest to get the CP's permission to contact his or her health care provider during the intake process. If necessary, this will allow you to subsequently contact the health care provider, ask questions, request medical records, and/or request confirmation that CP's condition substantially limits a major bodily function.

APPENDIX D: Checklist for Disability Coverage under the ADAAA

Prong One: "Impairment that substantially limits a major life activity"
Does PCP have an impairment?

If not obvious, medical documentation will be needed.

Major life activities affected?

Major bodily functions?

Note that the following impairments, listed at 29 C.F.R. § 1603.2(j)(3)(iii) (known as "the (j)(3)(iii) impairments") will affect one or more major bodily functions: Deafness, blindness, partially or completely missing limbs or mobility impairments requiring the use of a wheelchair; intellectual disability (formerly mental retardation); autism; cerebral palsy; mental impairments such as major depressive disorder, bipolar disorder, post-traumatic stress disorder, obsessive compulsive disorder, and schizophrenia; cancer; diabetes; epilepsy; HIV; multiple sclerosis and muscular dystrophy.

"Traditional major life activities?

Does impairment "substantially limit" one or more major life activities as compared to most people?

The (j)(3)(iii) impairments listed above should easily be found to substantially limit a major life activity. However, some evidence of the limitations these impairments pose for a particular PCP should be gathered.

Evidence may include PCP's description of his/her limitations, medical documentation,, or information from others who know the PCP.

Does PCP use mitigating measures? If so, what is impairment like without them?

Is impairment episodic or in remission? If so, what is impairment like when active?

Prong Two: "Record of a Disability"
□ History of a disability or a misclassification of a disability?

□ Evidence such as educational, medical or employment records?

Prong Three: "Regarded as Having a Disability"

□ Does PCP have an impairment? Or did R think PCP had an impairment? What impairment?

□ Did R take adverse action because of the impairment?

Is impairment objectively not transitory and not minor?

APPENDIX E: MODELS OF PROOF TO ESTABLISH DISABILITY COVERAGE UNDER THE ADAAA

Model of Proof for impairments that are on the (j)(3)(iii) list in the EEOC regulations: *(1) If a PCP has a "(j)(3)(iii)"physical or mental impairment, and (2a) the impairment is readily observable, or (2b) there is medical documentation of the impairment, (3) then the impairment should easily be concluded to be a disability under the ADAAA. Impairments listed in (j)(3)(iii) are deafness; blindness; partially or completely missing limbs or mobility impairments requiring the use of a wheelchair; intellectual disability (formerly termed mental retardation); autism; cerebral palsy; major depressive disorder; bipolar disorder; post-traumatic stress disorder; obsessive compulsive disorder; schizophrenia; cancer; diabetes; epilepsy; HIV infection; multiple sclerosis; and muscular dystrophy.*

Models of Proof for impairments that are not on the (j)(3)(iii) list:

Model of Proof for substantially limited major bodily functions: *(1) If there is medical evidence that a physical or mental impairment substantially limits a major bodily function; or (2) a substantial limitation of a major bodily function is readily observable, then the impairment is a disability under the ADAAA.*

Model of Proof for substantially limited traditional major life activities: *(1) If a PCP has a physical or mental impairment, and (2) there is evidence that the impairment substantially limits a traditional major life activity, then the impairment is a disability under the ADAAA. The evidence could be PCP's experience, medical evidence, or information from persons who know the PCP.*

Model of Proof for mitigating measures: *If there is evidence that: (1) the impairment substantially limited a major life activity before using the mitigating measure; or (2) the impairment would substantially limit a major life activity if the mitigating measure was stopped, then the impairment is a disability under the ADAAA . Major life activities could be major bodily functions ,traditional major life activities or both.*

Model of Proof for episodic impairments or impairments in remission: *If there is evidence that (1a) an episodic impairment, or (1b) an impairment in remission (2) would substantially limit a major life activity when active, then the impairment is a disability under the ADAAA. Major life activities could be major bodily functions, traditional major life activities, or both.*

Model of Proof for "record of a disability": *If the evidence shows that a PCP (1a) had an impairment that substantially limited a major life activity or (1b) was misclassified as having an impairment that substantially limited a major life activity then the impairment is a disability under the "record of" prong. Major life activities could be major bodily functions, traditional major life activities, or both.*

Model of Proof for "regarded as" having a disability: *If there is evidence that: (1a) PCP has an impairment or (1b) R believed PCP has an impairment; (2) R took an adverse action against PCP; (3) R took the adverse action because of the actual or perceived impairment; and (4) the impairment is objectively not transitory and not minor, then PCP is "regarded as" having a disability.*

APPENDIX F: KEY EEOC ADA AND GINA DOCUMENTS

ADA at 25" Anniversary webpage
www.eeoc.gov/eeoc/history/ada25th/index.cfm

Recruiting, Hiring, Retaining, and Promoting People with Disabilities: A Resource Guide for Employers
https://www.eeoc.gov/eeoc/interagency/upload/employing_people_with_disabilities_toolkit_february_3_2015_v4-2.pdf

ADA Amendments Act of 2008

Notice of Rights Under the ADA Amendments Act of 2008
www.eeoc.gov/laws/types/adaaa_notice_of_rights.cfm

Amended EEOC Regulations, 29 C.F.R. Part 1630
www.gpo.gov/fdsys/pkg/CFR-2011-title29-vol4/xml/CFR-2011-title29-vol4-part1630.xml

Questions and Answers on the Final Rule Implementing the ADA Amendments Act of 2008
www.eeoc.gov/laws/regulations/ada_qa_final_rule.cfm

Questions and Answers for Small Businesses: The Final Rule Implementing the ADA Amendments Act of 2008
www.eeoc.gov/laws/regulations/adaaa_qa_small_business.cfm

Fact Sheet on EEOC's Final Regulations Implementing the ADAAA
www.eeoc.gov/laws/regulations/adaaa_fact_sheet.cfm

Pregnancy-Related Impairments

EEOC Enforcement Guidance on Pregnancy Discrimination and Related Issues (rev. July 2015) *(see Section II on ADA)*
www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm

Fact Sheet for Small Businesses: Pregnancy Discrimination
www.eeoc.gov/eeoc/publications/pregnancy_factsheet.cfm


Legal Rights for Pregnant Workers Under Federal Law
www.eeoc.gov/eeoc/publications/pregnant_workers.cfm


Helping Patients Deal with Pregnancy-Related Limitations and

Restrictions at Work
www.eeoc.gov/eeoc/publications/pregnancy_health_providers.cfm

ADA and Particular Impairments


Depression, PTSD, & Other Mental Health Conditions in the Workplace: Your Legal Rights

https://www.eeoc.gov/eeoc/publications/mental_health.cfm


What You Should Know About HIV/AIDS and Employment Discrimination
www.eeoc.gov/eeoc/newsroom/wysk/hiv_aids_discrimination.cfm


Living with HIV Infection: Your Legal Rights in the Workplace Under the ADA
www.eeoc.gov/eeoc/publications/hiv_individual.cfm


Helping Patients with HIV Infection Who Need Accommodations at Work
www.eeoc.gov/eeoc/publications/hiv_doctors.cfm

Q&A: Deafness and Hearing Impairments in the Workplace & the ADA (rev. 2014)
www.eeoc.gov/eeoc/publications/qa_deafness.cfm

Q&A: Blindness & Vision Impairments in the Workplace & the ADA (rev. 2014)
www.eeoc.gov/eeoc/publications/qa_vision.cfm

Q&A: Cancer in the Workplace & the ADA (rev. 2013)
www.eeoc.gov/laws/types/cancer.cfm

Q&A: Intellectual Disabilities in the Workplace & the ADA (rev. 2013)
www.eeoc.gov/laws/types/intellectual_disabilities.cfm

Q&A: Epilepsy in the Workplace & the ADA (rev. 2013)
www.eeoc.gov/laws/types/epilepsy.cfm

Q&A: Diabetes in the Workplace & the ADA (rev. 2013)
www.eeoc.gov/laws/types/diabetes.cfm

Enforcement Guidance on the ADA and Psychiatric Disabilities (3/25/97)
www.eeoc.gov/policy/docs/psych.html

Pandemic Flu, Zika, and Pandemic Preparedness

Pandemic Preparedness in the Workplace and the ADA (10/9/09)
www.eeoc.gov/facts/pandemic_flu.html


EEO Laws for Employees Affected by the Zika Virus (2016)
https://www.eeoc.gov/eeoc/publications/zika-eeo-laws.cfm

Analyzing "Qualified" and "Individual with a Disability"

Enforcement Guidance on the Effect of Representations Made in Applications for Benefits on the Determination of Whether a Person is a "Qualified Individual with a Disability" Under the ADA (2/12/97)
www.eeoc.gov/policy/docs/qidreps.html

Reasonable Accommodation

Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the ADA (rev. 10/17/02)
www.eeoc.gov/policy/docs/accommodation.html


Employer-Provided Leave and the Americans with Disabilities Act (5/9/16)
https://www.eeoc.gov/eeoc/publications/ada-leave.cfm

Work at Home/Telework as a Reasonable Accommodation (2/3/03)
www.eeoc.gov/facts/telework.html

Practical Advice for Drafting and Implementing Reasonable Accommodation Procedures Under Executive Order 13164 (7/19/05)
www.eeoc.gov/policy/docs/implementing_accommodation.html

Policy Guidance on Executive Order 13164: Establishing Procedures to Facilitate the Provision of Reasonable Accommodation (7/26/00)
www.eeoc.gov/policy/docs/accommodation_procedures.html

The Mental Health Provider's Role in a Client's Request for a Reasonable Accommodation at Work (2013)
www.eeoc.gov/eeoc/publications/ada_mental_health_provider.cfm

What You Should Know About the EEOC and Enforcement of the ADA
www.eeoc.gov/eeoc/newsroom/wysk/ada_enforcement.cfm

Performance and Conduct

The ADA: Applying Performance and Conduct Standards to Employees with Disabilities (9/3/08)
www.eeoc.gov/facts/performance-conduct.html

Disability-Related Inquiries, Medical Exams, and Confidentiality

Enforcement Guidance: Disability-Related Inquiries & Medical Examinations of Employees Under the ADA (7/27/00)
www.eeoc.gov/policy/docs/guidance-inquiries.html

Enforcement Guidance: Preemployment Disability-Related Questions & Medical Examinations (10/10/95)
www.eeoc.gov/policy/docs/preemp.html

Obtaining and Using Employee Medical Information as Part of Emergency Evacuation Procedures (10/31/01)
www.eeoc.gov/facts/evacuation.html

Wellness Programs

Small Business Fact Sheet: Final Rule on Employer Wellness Programs and Title I of the ADA
www.eeoc.gov/laws/regulations/facts-ada-wellness-final-rule.cfm

Small Business Fact Sheet: Final Rule on Employer-Sponsored Wellness Programs and Title II of GINA
www.eeoc.gov/laws/regulations/facts-gina-wellness-final-rule.cfm

Sample Notice for Employer-Sponsored Wellness Programs
www.eeoc.gov/laws/regulations/ada-wellness-notice.cfm

Questions and Answers: Sample Notice
www.eeoc.gov/laws/regulations/qanda-ada-wellness-notice.cfm

ADA and Particular Types of Work

How to Comply with the ADA: A Guide for Restaurants & Other Food Service Employers (10/28/04)
www.eeoc.gov/facts/restaurant_guide.html

Reasonable Accommodations for Attorneys with Disabilities (5/23/06)
www.eeoc.gov/facts/accommodations-attorneys.html

Q & A: Health Care Workers and the ADA (2/26/07)
www.eeoc.gov/facts/health_care_workers.html

Discrimination Based on Association with an Individual with a Disability

Q&A: Association Provision of the ADA (10/17/05)
www.eeoc.gov/facts/association_ada.html

Job Applicants

Job Applicants and the ADA (10/7/03)
www.eeoc.gov/facts/jobapplicant.html

Small Business

The ADA: A Primer for Small Business (8/15/02)
www.eeoc.gov/eeoc/publications/adahandbook.cfm

Contingent Workers

Enforcement Guidance on Application of the ADA to Contingent Workers Placed By Temporary Agencies & Other Staffing Firms (12/22/00)
www.eeoc.gov/policy/docs/guidance-contingent.html\

Interrelationship of ADA and Other Statutes

Enforcement Guidance: Workers' Compensation & the ADA (9/3/96)
www.eeoc.gov/policy/docs/workcomp.html

FMLA, ADA, and Title VII (November 1995)
www.eeoc.gov/policy/docs/fmlaada.html

Health Insurance

Interim Enforcement Guidance on the Application of the ADA to Disability-Based Distinctions in Employer Provided Health Insurance (6/8/93)
www.eeoc.gov/policy/docs/health.html

Veterans


EEOC Efforts for Veterans with Disabilities

https://www1.eeoc.gov/laws/types/veterans.cfm?redirected=https://www.eeoc.gov/laws/types/disability.cfm

Veterans and the ADA: A Guide for Employers (2/28/12)
www.eeoc.gov/eeoc/publications/ada_veterans_employers.cfm

Understanding Your Employment Rights Under the ADA: A Guide for Veterans (2/28/12)
www.eeoc.gov/eeoc/publications/ada_veterans.cfm

Mediation

Q & A for Mediation Providers: Mediation and the ADA (5/10/05)
www.eeoc.gov/eeoc/mediation/ada-mediators.cfm

Q & A for Parties to Mediation: Mediation and the ADA (5/10/05)
www.eeoc.gov/eeoc/mediation/ada-parties.cfm

State Government - Best Practices

Final Report on Best Practices for the Employment of People with Disabilities in State Government (10/31/05)
www.eeoc.gov/facts/final_states_best_practices_report.html

Federal Sector Affirmative Employment

Q & A: The EEOC's Final Rule on Affirmative Action for People with Disabilities in Federal Employment (1/3/17)
https://www.eeoc.gov/laws/regulations/qanda-ada-disabilities-final-rule.cfm

Affirmative Action for Individuals with Disabilities in Federal Employment (Regulations under Section 501 of the Rehabilitation Act)
https://www.federalregister.gov/documents/2017/01/03/2016-31397/affirmative-action-for-individuals-with-disabilities-in-federal-employment

Q & A: Promoting Employment of Individuals with Disabilities in the Federal Workforce (8/26/08)
www.eeoc.gov/federal/qanda-employment-with-disabilities.cfm

The ABCs of Schedule A
www.eeoc.gov/eeoc/initiatives/lead/abcs_of_schedule_a.cfm


Tips for Applicants with Disabilities Applying for Federal Jobs
https://www.eeoc.gov/eeoc/publications/applicants_with_disabilities.cfm

Genetic Information Nondiscrimination Act (GINA)

Background Information for EEOC Final Rule on Title II of the Genetic Information Nondiscrimination Act of 2008
www.eeoc.gov/laws/regulations/gina-background.cfm

GINA Regulations, 29 C.F.R. Part 1635
www.gpo.gov/fdsys/pkg/CFR-2011-title29-vol4/xml/CFR-2011-title29-vol4-part1635.xml

Questions and Answers for Small Businesses: EEOC Final Rule on Title II of the Genetic Information Nondiscrimination Act of 2008
www.eeoc.gov/laws/regulations/gina_qanda_smallbus.cfm


What You Should Know: Questions and Answers about GINA and Employment

www.eeoc.gov/eeoc/newsroom/wysk/gina_nondiscrimination_act.cfm

Overview: New Investigator Training on the Americans with Disabilities Act

I. Definition of Disability

- *Does the CP have a "physical or mental impairment" that "substantially limits" a "major life activity"?*
    - *Evidence supporting existence of a physical or mental impairment if not obvious?*
    - *What is/are the major life activities (including major bodily functions) affected by the impairment?*
    - *Evidence supporting that impairment substantially limits one or more major life activities compared to most people? (May include CP's description of his/her limitations, medical documentation, and/or information from others who know CP.)*

        - *Does the CP use one or more "mitigating measures" (e.g., medication) that ameliorate the impact of an impairment? If yes, our inquiry is would the impairment be substantially limiting without the mitigating measures?*
        - *Is the impairment "episodic" or "in remission"? If yes, our inquiry is would the impairment substantially limit a major life activity "when active"?*
        - *Is the CP's impairment one of the impairments identified in the regulations as easily found to be substantially limiting?*
        - *Is the "condition, manner or duration" of performing one or more major life activities relevant to finding if a disability exists (e.g., half-hour limitation on standing, or takes CP much longer than others to walk particular distance)?*

- *Does the CP have a "record of" (past history of) a substantially limiting impairment? Use the same analysis as above in determining whether an impairment that no longer exists in substantially limiting form was substantially limiting in the past. Relevant evidence may include educational, medical, or employment documentation indicating the past history of disability.*

    NOTE: Because of the various rules of construction for determining whether an impairment is substantially limiting under the first prong of the definition of disability, including the rule that conditions that are episodic or in remission can be disabilities if they would be substantially limiting when active and the rule that the benefits of mitigating measures (such as medications) are to be disregarded when determining whether a CP has a disability, it will often be unnecessary to assess coverage under the "record of" prong.

- *Did R "regard" CP as having a disability, meaning did R take an adverse action against the CP based on a real or perceived impairment?*

- *Does CP have an impairment?*
- *If no, what is the perceived impairment that R believed CP to have?*
- *Is the impairment (real or perceived) objectively **both** transitory (lasting six months or less) **and** minor, thus precluding a finding that R regarded CP as having a disability?*
    - *If R did not raise this defense, confer with the Legal Unit re: how to proceed.*
- *If the impairment is not both transitory and minor, what is the adverse employment action that R took?*
- *What is the evidence to support that R took the adverse employment action based on CP's real or perceived impairment rather than on some other basis? NOTE: Much of the evidence relevant in answering this question may be relevant when assessing liability (i.e., whether discrimination actually occurred).*

II. Types of Disability Discrimination Claims

Claims requiring CP is individual with a disability

- *Disparate treatment*
- *Harassment*
- *Qualification standards (either disability-based or neutral) that screen out based on disability*
- *Failure to provide a reasonable accommodation*

Claims that do NOT require disability coverage:

- *Unlawful disability-related inquiries or medical examinations*
- *Violation of confidentiality provision*
- *Retaliation*
- *Interference*

III. Investigating the Merits

➢ ***Disparate Treatment***

Qualified

- *Is the CP "qualified" for the position at issue?*
- *Did CP meet the requisite skill, experience, education, and other job-related requirements of the position?*

- *Could the CP perform all the "essential functions" of the position, with or without reasonable accommodation (meaning, with accommodation if needed and not an undue hardship)? If there is a question about CP's ability to perform any job duty, then determine if the function is "essential" or "marginal."*
    - *EXCEPTION: A CP covered only under the "regarded as" definition of disability is not entitled to accommodation. Can CP perform <u>all</u> essential functions without reasonable accommodation?*

- *These additional "essential function" questions apply only if CP has an actual disability or a record of one and needs accommodation to be qualified:*

    - *If there is a dispute over CP's ability to perform a particular job duty, or CP sought as accommodation to be excused from performing the duty, what evidence supports a finding that the specific job duty is only a marginal function? (Employer need not excuse performance of essential functions as an accommodation.)*

    - *If the function(s) at issue is an essential function, identify the reasonable accommodation(s) that CP required, determine if they would have posed an undue hardship, and determine if with the accommodation(s) CP could have performed the function.*

<u>Causation</u>

- *Was the challenged adverse action taken because of CP's disability?*

<u>Defenses</u>

- *If R admits it took an action because of CP's disability, does R have a defense (e.g., CP posed a direct threat to health or safety of self or others, or the action taken was mandatory for R under another federal law or regulation)?*

➢ ***<u>Harassment</u>***

- *Analyzed the same as harassment on other bases.*

➢ ***<u>Qualification Standards Not Met Because of Disability</u>***

- *<u>Disability-Based</u>: Was CP subject to adverse action for not meeting a disability-based qualification standard (e.g., R does not hire anyone who takes hypertension medication for patrol officer positions)?*

- *Neutral (ADA-specific version of disparate impact): Was the CP screened out because of failure to meet a neutral "qualification standard"? (e.g., must be able to lift 70 pounds) (note: declaratory and injunctive relief but no damages available for this type of claim)*

- *If yes to either question, what is the qualification standard and is it "job-related and consistent with business necessity?"*
    - *Is the standard at issue safety-related? If yes, does the standard meet the "direct threat" test? (See below for more on "direct threat")*
    - *If the standard is job related and consistent with business necessity, could CP meet the standard or perform the job with reasonable accommodation? If yes, CP is qualified.*
    - *If the standard is not job-related and consistent with business necessity, could CP perform the essential functions of the job with or without reasonable accommodation? If yes, CP is qualified.*

➢ ***Denial of Reasonable Accommodation***

- *Does CP have an actual disability or record of a disability? CP is not entitled to reasonable accommodation if only covered under the "regarded as" definition of disability.*

- *Did CP (or a third party on CP's behalf) request a reasonable accommodation from R?*

- *What happened after CP requested a reasonable accommodation? What evidence supports that CP and R engaged in an "interactive process" to determine if reasonable accommodation was required and, if so, what the appropriate accommodation would be? Did either CP or R fail to engage in the interactive process or cause a breakdown in the interactive process? (Note: This is not itself a violation, but may affect who prevails if there was a reasonable accommodation available that could have been provided without undue hardship.)*

- *If CP was entitled to reasonable accommodation, and such an accommodation existed, did R provide it? If not, why? Did R propose an alternative accommodation to one requested by the CP (or a third party on behalf of the CP)? If so, was the alternative accommodation effective?*
- *Did a possible reasonable accommodation violate a seniority rule or collective bargaining agreement? If so, are there exceptions to the seniority rule or, even in the absence of specific exceptions, has R made exceptions to the seniority rule, such that special circumstances would exist for granting a reasonable accommodation?*

- *If there was a possible reasonable accommodation, did R provide evidence that demonstrates it would have caused an undue hardship?*

➢ ***Unlawful disability-related inquiries or medical examinations***

- *Did R ask for or seek "disability-related" information, or require a medical examination, during the pre-offer period?*
    - *If R asked for disability-related information, does it fall under one of the very limited exceptions to the general prohibition (for example, asking whether there is a need for reasonable accommodation to perform a specific job duty where disability is known and it is reasonable to suspect accommodation might be needed; or R seeks information on disability specifically for affirmative action purposes)?*
- *Did R ask for or seek disability-related information, or require a medical examination, during the post-offer period?*
    - *If yes, did R revoke the job offer based on information learned from such inquiries/medical examination?*
    - *If yes, what evidence did R provide to show that its revocation of the job offer was "job-related and consistent with business necessity"?*
- *Did R ask for or seek disability-related information, or require a medical examination, once CP was working for R?*
    - *If yes, what evidence did R provide to show that its inquiry/medical examination was "job-related and consistent with business necessity"?*
    - *Did R have a reasonable belief, based on objective evidence that CP, due to a medical condition, might be unable to perform an essential function or might pose a direct threat?*
    - *Did another federal law or regulation require R to ask for medical information or conduct a medical examination (e.g., a DOT regulation applicable to drivers of commercial motor vehicles)?*
    - *Did R have some other lawful reason for requesting medical information or conducting a medical examination, such as where it conducts periodic medical examinations of employees who are actually in positions affecting public safety?*

- ***Violation of confidentiality provision***

  - *Did R automatically violate the ADA by failing to maintain CP's medical information separate from the regular personnel file?*
  - *Even if the information was stored properly, If the information was otherwise disclosed by R, what were the circumstances?*
  - *Was R permitted to disclose the information under one of the exceptions to the confidentiality rule?*

- ***Retaliation***
  - *Did CP engage in prior protected activity (or was there anticipatory retaliation, e.g., employer policy restraining protected activity)? Protected activity includes not only actions such as opposing employer conduct an employee reasonably believes are discriminatory and participating, or assisting others in participating, in the EEO process (e.g., by filing a charge with EEOC), but also making a request for a reasonable accommodation.*
  - *Did the employer take a materially adverse action (action that would deter reasonable person from engaging in protected activity)?*
  - *Is there a causal connection between the protected activity and the employer's action?*

- ***Interference***
  - *Did R coerce, intimidate, threaten, or otherwise interfere with CP's exercise of ADA rights, or with CP assisting another to exercise ADA rights? May overlap with claims for retaliation or unlawful denial of accommodation. Examples of interference:*
    - *coercing an individual to relinquish or forgo an accommodation to which he or she is otherwise entitled;*
    - *intimidating an applicant from requesting accommodation for the application process by indicating that such a request will result in the applicant not being hired;*
    - *threatening an employee with loss of employment or other adverse treatment if he does not "voluntarily" submit to a medical examination or inquiry that is otherwise prohibited under the statute;*
    - *issuing a policy or requirement that purports to limit an employee's rights to invoke ADA protections (e.g., a fixed leave policy that states "no exceptions will be made for any reason");*
    - *interfering with a former employee's right to file an ADA lawsuit against the former employer by stating that a negative job reference will be given to prospective employers if the suit is filed; and*
    - *subjecting an employee to unwarranted discipline, demotion, or other adverse treatment because he assisted a coworker in requesting reasonable accommodation.*

IV. Additional Defenses

Direct Threat

- *Does R justify its actions based on the "direct threat" defense; i.e., does R defend its adverse action against CP based on health or safety concerns? If yes, is there evidence that CP's disability posed a "significant risk of substantial harm" to the health or safety of CP or others?*

- *Is there evidence relating to the existence of all four factors that must be considered to find direct threat:*
  - *Duration of the risk*
  - *Nature and severity of the potential harm*
  - *Likelihood that potential harm will occur*
  - *Imminence of the potential harm?*

- *If evidence supports a finding of direct threat, is there a reasonable accommodation (available only to individuals with a currently substantially limiting impairment or record of a substantially limiting impairment) that would eliminate or reduce the direct threat?*

Other Federal Law

- *Did a federal statute or regulation require the employer to take the challenged action?*
  - *State or local laws would not support this defense.*
  - *Federal laws or regulations that permit, but do not require, the employer action at issue would not support this defense.*

The Americans with Disabilities Act

Title I of the ADA

An employer cannot discriminate in any aspect of employment against an "individual with a disability" who is "qualified."

ADA Amendments Act of 2008

- Signed into law September 25, 2008
- Effective date: January 1, 2009
- Makes important changes to definition of "individual with a disability"
- Much easier for a CP to establish s/he is "an individual with a disability"
- Do not rely on pre-Amendments Act case law or pronouncements about definition of disability

Amendments Act provides:

- The definition of "disability" in the ADA "*shall be construed broadly*" and "*should not demand extensive analysis*."

The "*primary object of attention" in ADA cases should not be on the definition of disability* but rather on whether individual can be accommodated absent undue hardship, or whether discrimination occurred.

Definition of Disability

- **Physical or Mental Impairment that Substantially Limits a Major Life Activity****
- **"Record of" such an Impairment (past history)**
- **"Regarded as" (adverse action taken based on an actual or perceived impairment that is not transitory and minor)**

*** If applicant or employee needs accommodation, must satisfy first or second prongs of definition. For disparate treatment or harassment claims, can be covered under any one of the three prongs. CP need NOT be an individual with a disability for ADA claims of improper disability-related inquiries or medical examinations, disclosure of confidential medical information, or retaliation/interference.*

PRINT AND USE THESE GUIDES

Available in appendix to training participant manual and on Insite at
:

- Interview Questions for Assessing Disability Under the ADAAA
- **Annotated Interview Questions for Assessing Disability Under the ADAAA**
- **Checklist for Disability Coverage under the ADAAA** --
- **Models of Proof of Coverage** --

Impairment

-- A physiological disorder or condition

-- A mental or psychological disorder

Statutory Exemptions and Limitations of Coverage

By statute, these cannot be invoked as the basis for disability under the ADA:

- Current illegal use of drugs
- Certain behavior disorders, compulsive gambling, kleptomania, pyromania, etc.
- Gender identity disorder not related to physical impairment
- Homosexuality and bisexuality
- Traits and emotions not related to an impairment

Medical Documentation

- Confirm Medical Condition
- Obvious v. Hidden Impairment
- Health Professionals

Major Life Activities

"Major life activities" under the ADA include "major bodily functions":

e.g., functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, hemic, lymphatic, musculoskeletal and reproductive functions
-- also includes operations of an individual organ within a body system, such as the operation of kidney, liver, or pancreas

Major Life Activities

"Major life activities" under the ADA also include activities such as:

Substantially Limits

- The limitation need not prevent, or severely or significantly restrict, performance of a major life activity in order to be a "substantial" limitation.
- Do not rely on pre-Amendments Act case law or other pronouncements that used a much higher standard.

Mitigating Measures

Examples of Mitigating Measures

medication, medical supplies, equipment, or appliances, low vision devices, prosthetics (including limbs and devices), hearing aids and cochlear implants or other implantable hearing devices, mobility devices, oxygen therapy equipment and supplies

use of assistive technology

reasonable accommodations

learned behavioral or adaptive neurological modifications (e.g., monocular vision, learning disabilities)

psychotherapy, behavioral therapy, physical therapy

Mitigating Measures (cont'd)

• Exception to mitigating measures rule: ameliorative effects of ordinary eyeglasses or contact lenses "*shall be considered*" in determining disability

• Definition: "lenses that are intended to fully correct visual acuity or eliminate refractive error"

• Distinguished from "low vision devices," defined as "devices that magnify, enhance, or otherwise augment a visual image" -- ameliorative effects of these are not considered in determining disability

Episodic or in Remission

An impairment that is *episodic* (e.g. multiple sclerosis, epilepsy, or bipolar disorder) *or in remission* (e.g. cancer) is substantially limiting if it would *substantially limit a major life activity when active*

Example: cancer, when active, substantially limits the major bodily function of "normal cell growth"

EEOC's Amended ADA Regulations

"Substantially Limits": Nine Rules of Construction -- § 1630.2(j)(1)

1. Substantially limits shall be construed broadly in favor of expansive coverage
2. [illegible] "substantially limits" is not meant to be a demanding standard
3. [illegible]

"Substantially Limits": Nine Rules of Construction § 1630.2(j)(1)

4. Individualized assessment still required, but "substantially limits" is a lower standard than pre-ADAAA
5. Assessing ability to perform major life activity as compared to most people usually will not require scientific, medical, or statistical evidence, although presentation of such evidence is not prohibited
6. Ameliorative effects of mitigating measures (other than ordinary eyeglasses or contact lenses) shall not be considered

"Substantially Limits": Nine Rules of Construction – § 1630.2(j)(1)

7. Impairments that are episodic or in remission can be substantially limiting if would be when active

8. Individual need only be substantially limited in one major bodily function or other major life activity to have a disability

9. No minimum duration -- Impairment lasting fewer than six months may be substantially limiting

Types of Impairments That Will Virtually Always Be Found To Be Substantially Limiting -- § 1630.2(j)(3)(ii)

- Regulations emphasize that individualized assessment still required
- But, for certain impairments, this individualized assessment will virtually always result in a finding of substantial limitation due to the inherent nature of those conditions AND the extensive changes Congress made to the definition of disability

Examples of Types of Impairments That Should Easily Be Concluded To Be Substantially Limiting – § 1630.2(j)(3)(iii) List

Deafness, blindness, mobility impairments requiring use of a wheelchair, intellectual disability (mental retardation), partially or completely missing limbs

Autism, cancer, cerebral palsy, diabetes, epilepsy, HIV infection, multiple sclerosis, muscular dystrophy

Mental impairments such as major depressive disorder, bipolar disorder, post-traumatic stress disorder, obsessive compulsive disorder, schizophrenia

Condition, Manner, or Duration – § 1630.2(j)(4)

- In determining whether a substantial limitation exists, it may be relevant to consider the condition, manner, or duration of the person's ability to perform a major life activity.
- Relevant facts might include: difficulty, effort, or length of time required to perform major life activity; pain; amount of time major life activity may be performed; the way an impairment affects the operation of a major bodily function

"Record of" Disability

- protects an individual who may have had a physical or mental impairment that substantially limited a major life activity in the past but no longer does
- e.g., employer did not want to hire qualified individual due to past history of mental health treatment
- accommodation available for "record of" if still needed

"Regarded As"

An applicant or employee is "regarded as" disabled if he or she is subject to an action prohibited by the ADA (e.g., failure to hire or termination) because of an actual or perceived impairment

- defense to "regarded as" coverage: impairment is *both* transitory (lasting or expected to last six months or less) and minor

Even if "regarded as" coverage shown, violation not necessarily established.

- CP must be qualified
- employer may have a defense (e.g., direct threat to health or safety)

- *REMEMBER: no accommodation if only "regarded as"; must be covered under "actual" or "record of" if need accommodation*

"Regarded as" Examples

- refusal to hire because of skin graft scars – regarded as
- termination because of cancer – regarded as
- termination of employee with angina due to belief he will pose a safety risk – regarded as
- termination of employee with bipolar disorder– regarded as; employer can't assert it believed impairment was transitory and minor
- termination of employee with hand wound that employer mistook as HIV – regarded as because the perceived impairment (HIV) on which the employer acted is not transitory and minor

Important Analysis for Investigators

Typically, most of your investigation will not focus on whether the CP has a disability; the focus will be on whether accommodation was needed and could be provided absent undue hardship, or whether discrimination occurred.

However, it is very important for the investigation to obtain basic information for assessing disability, using the Annotated Interview Questions for Assessing Disability Under the ADAAA, the Checklist for Disability Coverage under the ADAAA, and the Models of Proof of Coverage (see slide 6).

Important Analysis for Investigators (cont'd)

Best practice: Confer with your Legal Unit before concluding a CP is *not* an "individual with a disability" under the ADA standards.

"Qualified"

- Employer permitted to exclude individual based on disability if not "qualified."
- To be "qualified," applicant or employee must:
  - satisfy the requisite skill, experience, education, and other job-related requirements (i.e., "qualification standards"), and,
  - be able to perform the *essential* (or fundamental) functions of a position "with or without reasonable accommodation" (meaning the individual can be qualified even if accommodation is needed).

"Qualified"

Disputes over "qualified" arise most often when:

- **CP requested to be excused from job duty** due to medical condition (e.g., CP asks to be excused from lifting boxes or reaching dock due to back problem)
- **Employer believed CP not able to perform job duty** due to medical condition (e.g., employer excludes CP from job due to back impairment)
- **Employer believed CP not fit for job because could not meet qualification standard** (e.g., employer excluded CP from job because CP could not meet 40 pound lifting requirement due to medical condition)

Qualification Standards

Where Dispute is About Whether CP Meets a Qualification Standard:

- If employer rejects applicant or removes employee from position because of not meeting a qualification standard, determine if CP did not meet the standard because of a disability (i.e., was screened out because of the disability) and if so, is the qualification standard job-related and consistent with business necessity (JRCBN).
- If the standard is JRCBN, the employer was allowed to exclude CP for not meeting the standard unless CP could meet the standard or perform the job with a reasonable accommodation.
- If the standard is not JRCBN, determine if CP could perform the essential functions of the job. If so, CP was qualified.

Special Rule for Vision-Related Qualification Standards

Under the ADA as amended, ALL vision-related qualification standards must be job-related and consistent with business necessity.

Therefore, any applicant or employee can challenge a vision standard, regardless of whether he or she has a disability.

Special Rule for Safety-Based Qualification Standards

- Safety related qualification standards (i.e., qualification standards that an employer seeks to justify for safety reasons) must meet the "direct threat" defense.
- In other words, as part of proving that the standard is job-related and consistent with business necessity, the employer's evidence must show that the standard is needed due to a significant risk of substantial harm.

Essential or Marginal

Focus on purpose of the function/result to be accomplished, not how function is performed

- CP actually required to perform?

- Consequence of removing function?

Essential or Marginal

Relevant information in determining whether a function is essential may include:

- Employer's judgment
- Terms of a written position description
- Terms of a collective bargaining agreement
- Experience of current or past employees
- Amount of time spent performing the function
- Consequences of not performing the function

Essential or Marginal

Is there an occasion when it may be necessary to modify a duty that is an essential function?

- **If it is an essential function**, it may not be removed, but can employee be accommodated to do it?
- **If it is *not* an essential function**, could it be given to others or swapped without undue hardship?
- **If employee cannot be accommodated in current position**, can he be reassigned to a vacant position for which he is qualified, even absent reassignment of last resort?

Reasonable Accommodation and Undue Hardship

Reasonable accommodation is a change made by the employer for the known physical and mental limitations of an individual with a disability.
It is required unless the employer can show undue hardship.

Examples of Reasonable Accommodation

- Physical modifications
- Sign language interpreters and readers
- Assistive technology and modification of equipment or devices
- Modified work schedules
- Making exceptions to policies
- Job restructuring (swapping or eliminating *marginal* functions)
- Changing supervisory methods
- Job coach
- Telework
- Leave (use of accrued leave, or if none, unpaid leave)
- Reassignment to a vacant position

Reassignment

- Available to employees only (not applicants)
- Vacant position (employer need not create a position or bump another employee)
- CP must be qualified
- Equivalent position, if possible; if not, closest available
- Not to a position that would be a promotion

Actions Not Required as an Accommodation

- Lowering production or performance standards (but employer must pro-rate production requirements accordingly for leave granted as an accommodation, and provide accommodation if requested to *meet* the standards)
- Excusing violations of uniform conduct rules that are job-related and consistent with business necessity (but provide accommodation if requested to *meet* the standard)
- Removing an essential function
- Monitoring an employee's use of medication
- Providing personal use items
- Changing someone's supervisor (though changing supervisory methods may be required)
- Actions that would result in undue hardship (i.e., significant difficulty or expense)

Undue Hardship Defense

Must be significant difficulty or expense

Consider:
- Nature of the accommodation
- Net cost of the accommodation
- Overall financial and other resources of the employer
- Impact of the accommodation on employer's operation

Direct Threat Defense

Direct threat exists when a person, because of his/her disability, poses a significant risk of substantial harm to the health or safety of the individual or others that cannot be reduced or eliminated by a reasonable accommodation.

Factors to Consider

- Duration of the risk
- Nature and severity of the potential harm
- Likelihood that the potential harm will occur
- Imminence of the potential harm

Disability-Related Questions

A question is "disability-related" if the answer is likely to disclose whether or not an individual has a disability.

Medical Examination

A procedure or test is a "medical examination" under the ADA if it seeks information about an individual's physical or mental impairments or health.

Disability-Related Questions and Medical Examinations

Pre-offer:
general rule – none permitted

- *Post-Offer, Pre-employment*:
  permitted, if required of all entering employees in same job category

Questions/Medical Examinations of Current Employees

During Employment: Permissible if job-related and consistent with business necessity, i.e.,

Confidentiality of Medical Information

-includes all medical information of all applicants and employees, from whatever source obtained

-includes fact that someone has requested or received an accommodation

-violation of ADA to disclose to other managers, co-workers, or even other employers unless exception applies

- documents containing confidential medical information cannot be kept in regular personnel files

Limited Exceptions

Otherwise confidential medical information may be disclosed in the following circumstances:

- supervisors and managers who may need to be informed in order to provide a reasonable accommodation or to restrict an employee's work restrictions

- first aid and safety personnel, if an employee might need emergency treatment or require some other assistance in an emergency (such as help during an evacuation because of a medical condition)

- individuals investigating compliance with the ADA and with similar state and local laws, and

- pursuant to workers' compensation laws (e.g., to a state workers compensation office, in order to evaluate a claim) or for insurance purposes

Additional Issues

- ADA Insurance Issues
- Employer Wellness Programs – *final EEOC Rule issued in 2016, goes into effect in 2017*
- Comparing ADA, FMLA, Workers' Compensation, and SSDI

What Might ADA Wellness Charges Look Like?

- My employer required me to fill out a Health Risk Assessment (HRA) and take a biometric screen in order to get health insurance or to get into the plan I wanted.
- My employer used to pay part of the cost for my health insurance, but I didn't participate in the company wellness program and now I pay everything.
- Ever since I filled out a HRA for my employer's wellness program, I've been receiving marketing emails for products I can take to lower my cholesterol or that may help me manage my diabetes.

What Might ADA Wellness Charges Look Like? (continued)

- A month after I responded "yes" to a question on a HRA about whether I have ever been diagnosed with depression, I started receiving warnings for poor performance. I've always received good evaluations in the ten years I've been with the company.
- My employer asks people to fill out a health questionnaire and take a medical exam as part of its wellness program. But no one's ever told me what's going to happen to the information I provide.

What Might ADA Wellness Charges Look Like? (continued)

- For months, my boss has been saying I should join the company wellness program. She says she doesn't understand why I'm being so stubborn when everybody else is doing it.

What Might GINA Wellness Charges Look Like?

- My employer said "my spouse did not" fill out the Health Risk Assessment, we could not participate in group health plan or could only participate in a particular group health plan
- My employer said "my spouse did not" fill out the HRA (or piece of health information provided by spouse), I would be fined
- My employer required my spouse to participate in a wellness program that asked for questions about her health but did not provide any individual feedback.
- My employer told me that it would pay for part of my family's health insurance if my spouse fills out a HRA that asks questions about his health. Otherwise, we have to pay the entire cost.

Recap: Claims Under ADA

Protections for individuals with disabilities:

- Disparate treatment or harassment based on a physical or mental impairment (as long as not both transitory and minor)
- Denial of reasonable accommodation absent undue hardship (for impairments that substantially limit a major life activity or for a record of such an impairment)
- Use of a qualification standard that screens out an individual based on disability (must be job-related and consistent with business necessity)

Recap: Claims Under ADA (cont'd)

Protections for all applicants and employees of covered entities:

- Improper disability-related inquiry or medical exam
- Disclosure of confidential medical information
- Retaliation or interference

Priority Charge

Handling Procedures

PRIORITY CHARGE HANDLING PROCEDURES

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PRIORITY CHARGE HANDLING PROCEDURES

LEARNING OBJECTIVES:
Following this session, participants will have the tools necessary to:

- **Make rational charge priority assessments**
- **Recognize the possibility of expanding charges to include related issues and/or class allegations**

OBJECTIVES OF PRIORITY CHARGE HANDLING PROCEDURES

All charges do not receive the same level of investigation. The level of investigation varies based on the categorization of the charge under the agency's Priority Charge Handling Procedures (PCHP) and on strategic enforcement and litigation considerations. The primary purpose of PCHP is to focus investigative resources on developing significant cause cases, with an emphasis on national and local enforcement priority issues. PCHP promotes:

- The appropriate allocation of staff time and resources to charges that will have the greatest impact on EEOC's mission and priorities.
- Early identification and priority treatment of meritorious charges.
- Prompt identification and disposition of charges clearly lacking merit.
- Expeditious management of investigations through prompt reassessment of the charge categorization as new information is received.
- Attorney/investigator collaboration throughout the investigation, and
- Strategic enforcement and litigation focused on priorities and other issues that will have significant impact.

PCHP places substantial decision-making authority in field offices and with front line investigators and attorneys. Although PCHP must take into

account the agency's limited resources, it should not be applied in a way that deprives charging parties of a fair opportunity to present their case.

The Strategic Enforcement Plan (SEP) works directly with PCHP by establishing the agency's issue priorities – the P in PCHP. Clearly defined substantive area priorities allow the agency to consistently allocate resources where government enforcement is needed and impactful. A charge supported by strong evidence that raises an SEP substantive area priority or is likely to have strategic impact should receive priority in charge handling. These charges should receive greater investigatory attention and resources to ensure timely and quality enforcement action. The SEP directs that:

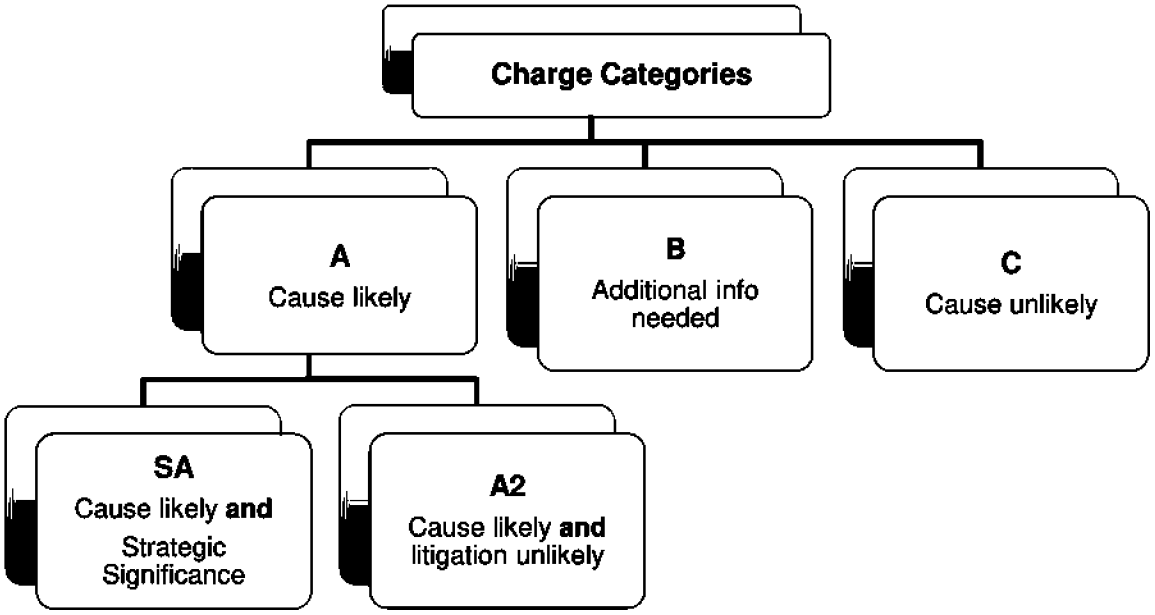
- *Charges shall be screened promptly to determine if an SEP or district priority issue is raised.*
- *Where a preliminary assessment indicates that a priority issue in a charge is likely to have merit, the charge shall be initially designated as the highest category in PCHP.*

CHARGE PRIORITIZATION

Charge prioritization is the cornerstone of the Commission's Priority Charge Handling Procedures (PCHP). While the Commission is essentially a charge-driven agency, charge prioritization enables the agency to focus its resources on those charges that are most likely to result in a **cause finding** and will have a significant impact in advancing the EEOC's mission as a national law enforcement agency.

The Commission's charge prioritization system provides for the classification of charges into three categories:

- Category "A" charges will receive priority treatment;
- Category "B" charges will be investigated to determine their relative merit; and
- Category "C" charges will be dismissed without further investigation.



PRIORITY CATEGORIZATION SYSTEM

Charges are classified into one of the three categories described below.

Category A: Potential Cause Charges

The first category includes charges where further investigation may likely result in a cause finding. These are the charges where it appears "more likely than not" that discrimination has occurred, i.e., the evidence appears credible, the charging party seems credible and you believe it is likely that the events the charging party complained of occurred. These cases are the highest priority.

Cases should also be classified as Category A if the case appears to have merit or irreparable harm will result unless processing is expedited.

An example of a charge raising the issue of irreparable harm would be a disability charge of a credible charging party with terminal cancer who has been discharged, has lost insurance coverage, and is unable to pay for life extending medication.

Some factors that support categorizing a charge as "A" include:

- there is strong documentary support, or
- strong witness corroboration, or
- strong comparative evidence;
- the timing of events leads to an inference of discrimination;
- there is a per se violation;
- there is a facially discriminatory policy;
- there is an adverse impact on a protected group.

Category A charges have two **sub-categories**:

SA: Charges that are likely to result in cause findings, and Enforcement and Legal have jointly determined that EEOC's enforcement will have **strategic significance.**

A2: Charges where it is likely that discrimination has occurred, but the office has determined it will not or cannot litigate.

An example may be where the case law in the Circuit Court that covers the District Office does not support the finding and a strategic decision has been made not to challenge the precedent. Also, Title VII, ADA and GINA charges against state and local government respondents may be categorized as **A2** (when the case has merit) because EEOC does not have authority to litigate cases against state and local government employers. The Department of Justice's Civil Rights Division has authority to litigate such cases, which are referred to DOJ after conciliation failure.

➢ **Subcategory SA: Cause is Likely *and* Government Enforcement Has Strategic Significance**

❖ Enforcement and legal will jointly determine whether a charge receives the SA designation based on the following two assessments:

✓ Cause is likely, **and**

- ✓ Government enforcement (conciliation and/or litigation) will have **strategic significance.** "Strategic significance" means the EEOC's enforcement will:

  1. broadly deter the conduct (beyond the parties), **or**
  2. impact a large number of individuals, **or**
  3. impact the development of the law, **or**
  4. have a broad impact due to EEOC's leadership role (e.g., geographic presence or as the primary enforcer, such as ADEA state and local enforcement).

❖ **How to Use the SA Subcategory:**

- All charges that are assessed as "A" (cause likely) must be evaluated for strategic significance by application of the above criteria (1 through 4), unless they clearly fall within the A2 designation, e.g., charges against state and local government entities. This includes charges that raise SEP and/or DCP priorities and other charges that raise potential systemic allegations.
- Charges that do not raise SEP or DCP priorities or potential systemic allegations may be assessed as "SA" if they meet any of the above criteria (1 through 4).
- Charges assessed as "SA" should receive significant attention and resources.
- Charges that are assessed as "SA" and that raise SEP or DCP priority issues take precedence over SA charges that do not raise such priority issues, where the charges are of equal merit, strength, and likely impact.

➢ **A2 Subcategory: Cause is likely but litigation is unlikely**

Use this category for charges where cause is likely but where litigation by the EEOC is not likely, e.g.:

- When EEOC does not have litigation authority, such as Title VII, ADA or GINA charges against state or local governments or public educational institutions.
- When the office determines it will not litigate.

Category B: **Charges Requiring Additional Information.**

Many charges will initially appear to have some merit but will require additional evidence to determine whether continued investigation is likely to result in a cause finding. In other cases, it will simply not be possible to make a judgment about the merits of the charge at Intake. In these cases, additional investigation will be needed, as resources permit, to determine whether these charges should be given priority status or dismissed.

Some factors that support categorizing a charge as "B" include where the CP has stated a prima facie case, but:

- the comparative evidence needs clarification,
- there is a lack of supporting documents or witnesses, or
- the reason CP was given for the adverse action appears to be a legitimate, nondiscriminatory reason.

Moving "B" Charges: Once you have received the additional information needed take the following actions:

- Promptly reassess the category B designation once you have analyzed the additional information and determined if another action can be taken in the investigation to accelerate resolution of the charge through issuance of a cause finding.

- B charges should be closed as soon as you have sufficient information to conclude that further investigation is unlikely to result in a cause finding.

- If sufficient information is obtained to issue a cause finding on a B charge, the charge should be **immediately** recoded up to category "A."

Do not use subcategories of "B" charges to avoid categorizing charges as "C."

***Category C:* Charges Suitable For Dismissal.**

These are charges where the charging party has presented his/her evidence and we conclude that it is unlikely further investigation will result in a cause finding.

Examples of cases that can be resolved under Category C immediately after completion of charge receipt and intake counseling are:

- Non-jurisdictional charges, e.g., the employer has fewer than 15/20 employees, or the matter is not covered by the laws EEOC enforces (e.g., employer withheld pay but not because of CP's protected group status – CP should be referred to the Department of Labor, Wage and Hour Division).

- Self-defeating charges, i.e., those in which the charging party provides information that negates an inference of disparate treatment due to a protected basis. For example, a CP who is a Puerto Rican male and has alleged national origin discrimination in promotion asserts that although the individual who received the promotion was Puerto Rican, he believes he was more deserving of the promotion.

- Charges with no supporting direct or circumstantial evidence of discrimination. Charging party is **in a position to know** and has no specific examples of disparate treatment, or the comparator is not similarly situated.

- Charges in which the charging party demonstrates a substantial lack of credibility or is not believable based on prior dealings with the office, including repetitive charge filers.

- Charges in which the allegations are not credible or believable in light of normal business behavior or experience. (Charging party's story doesn't "ring true" and s/he has nothing to support it.)

- Charges in which the employment action complained of causes no real harm, e.g., being given a task that charging party doesn't like but that is within the scope of his/her duties and is not significantly more work than his/her colleagues.

- Charges where the respondent is in bankruptcy, dissolved, or otherwise unable to provide any relief.

- Charges filed more than 180/300 days after the date of violation (DOV) and there are no allegations of harassment or continuing violations. When a CP files a charge more than 180/300 days from the DOV, absent equitable considerations, such charge is untimely for purposes of preserving private suit rights. The CP should be informed that if s/he chooses to file, the charge will be dismissed. CPs should be informed of the timeliness problem if they want to consider pursuing their private suit rights.

As with all charges that are filed, these charges must be served on the respondent. However, you should not request a position statement or other documents from respondents on the "C" charges described above. Where the CP was counseled during Intake that his/her charge would be dismissed immediately, it is not necessary to conduct a Pre-Determination Interview or a Determination Interview before dismissing a charge for one of the above reasons.

It is important to continue applying PCHP to charges throughout the course of the Commission's investigation to ensure the Agency is utilizing its resources on those charges that are most likely to result in a cause finding and have strategic impact. Investigators will typically reassess the charge after the following:

- When new information is received
- Following failed mediation efforts
- Upon receipt of the position statement/CP's rebuttal
- Upon receipt of RFI response
- Completing Onsite or fact finding conference

Reassessment of the charge will assist with determining whether the charge category should be upgraded or downgraded, whether investigation should continue or if the charge is suitable for dismissal

Topics of Interest

Topics of interest are a way for the Commission to track certain emerging or persistent issues. If a topic of interest is identified in a charge, it does not necessarily mean that a charge should be coded as SA. Below are explanations of selected topics of interest:

- Arbitration: Arbitration is a form of alternative dispute resolution that some employers use to address employee complaints including internal complaints of discrimination as well as charges filed with EEOC. Arbitration agreements do not impact EEOC's ability to investigate allegations of discrimination and obtain relief for class members, but they can impact the EEOC's ability to obtain relief for the charging party. During charge counseling, you should explain that absent a mandatory arbitration provision, a charging party can receive a NRTS and have the option to bring their claim in court. However, if bound by an arbitration clause, an employee may be required to resolve their claim only in arbitration. Sometimes these provisions are in an application for employment, in onboarding paperwork, or employee handbooks/manuals. Many employees are unaware that they are bound by such clauses. Depending on the provisions, arbitration programs can be more or less problematic. For example, some arbitration programs discourage workers from talking to the EEOC, shorten the statute of limitations, require the complaining party pay all fees if he or she doesn't prevail, or contain other overly broad provisions. If you learn of an arbitration clause, make sure the charging party understands the implications it has on EEOC's investigation. If you learn of an arbitration clause that appears overly broad, it may fall within the SEP's Access to Justice priority. You should discuss it with your supervisor.

- Unemployment Status: Some employers may require that job applicants currently have a job, and bar or discourage the unemployed from applying for a job.

- Leave Policy: Some employers may have leave policies such as maximum leave policies—either on their books or in practice—that don't

provide any flexibility for leave, which can be a violation of the ADA under some circumstances.

CHARGE RECEIPT: INITIAL CASE CATEGORIZATION

Charge receipt is a critical point under PCHP since an initial assessment of a charge's priority status will be made at this stage of the investigation. However, it is important to keep in mind a key principle of PCHP is charge reassessment based on the receipt of additional information.

1. Importance of Charging Party Interview

The filing of a charge should ideally be preceded by an interview of the charging party (CP) conducted either in person or by phone by experienced staff that will counsel the CP and provide an assessment of the charge. All offices are required to have walk-in hours each work day. To augment walk-in hours, offices have the option to use an appointment system for charge receipt.

- This interview may be lengthy in certain circumstances, for example, when the case appears to involve systemic discrimination. In other situations, a shorter interview may be appropriate, for example, where the individual alleges age discrimination, but is 38 years old, and therefore not within the age group protected by the ADEA, and there are no allegations that would suggest a broader pattern or practice of discrimination. The following sets out guidance for counseling of CPs and assessment of charges.

2. Charge Counseling

The following are essential elements of charge counseling:

- At Intake, you should expressly inform the potential charging party (PCP) that s/he has a right to file a charge and that filing the charge is necessary to preserve the right to file a law suit in court under Title VII, GINA, ADA, or the ADEA. You should also explain to the individual that if a formal charge is filed, the EEOC must provide notice of the charge to the respondent. You should inform the individual that she/he is protected by law against retaliation, but that

there is a risk of retaliation, and that a PCP may file a charge alleging retaliation. If it occurs, refer the PCP to the info on EEOC's website (http://www.eeoc.gov/employees/howtofile.cfm) and provide the Uniform Intake Brochure about essential facts to convey to potential charging parties.

- If the charge appears to be weak, based on the initial interview, you should counsel the PCP about the elements of proof, the lack of merit and about our process. If the PCP still wishes to file a charge, advise him/her that it will be served on the respondent and might be dismissed shortly after that time. Further advise that s/he will have to undertake private enforcement if s/he wants to continue to challenge the alleged discrimination. Document that you informed the PCP about the imminent dismissal. You must, however, recognize that the decision to file is very important to the PCP and must be made by him/her.

- In limited cases, calls to respondents or witnesses during the Intake process may be helpful to explore settlement or gather information. While this practice will not always be appropriate, pursuing such opportunities may save resources or benefit a party. For example, if contacted during charge receipt, a witness may or may not verify a potential CP's version of the facts or an employer might have second thoughts about a recently taken adverse action.

- Provide PCPs with a copy of the Uniform Intake Brochure and/or the link (https://egov.eeoc.gov/eas/) to EEOC's Assessment System on our website. Use the Uniform Intake Checklist as a tickler to cover all important aspects of charge counseling.

3. Prompt Charge Assessment

Assess new charges as promptly as possible after they are filed (including signed Intake Questionnaires and other correspondence with all five indicia of a charge during the period the charge is being perfected).

Consider the following:

- Use the elements of proof to assist in deciding which category is most appropriate for a charge. See "Models of Proof."

- After the charge is filed, offices may use questionnaires to obtain more detailed information from CP relating to statute, basis, and issues to assist in beginning the investigation. Offices are encouraged, however, to obtain this information through a discussion with CP whether in person or on the phone.

- Intake staff should assemble intake notes and memoranda to the file, gathering as much information as necessary to facilitate priority charge assessment. For example, detailed intake notes or a written statement from CP about matters within the CP's knowledge may preserve valuable evidence and save investigative resources later on.

- Including information on the face of the charge sufficient to allow respondents to adequately respond to the charge, or a Request for Information ("RFI") if one is issued, can expedite the investigation. Be specific about allegations of discrimination in "terms and conditions" and of "harassment." Include the names of relevant managers and supervisors only if appropriate (see guidance in section 4 on charge intake and drafting). In other instances, it may be advisable to identify only the positions of the managers or supervisors, not their names, on the face of the charge. Do not include the names of witnesses. Do not include the name of the disability in an ADA case.

- To assist in the assessment of the charge the office may require, in appropriate cases, that the CP provide a statement that includes: each specific harm the person has suffered and the date on which each harm occurred; for each harm, a specification of the act, policy, or practice that is alleged to be unlawful; and for each act, policy, or practice that is alleged to have harmed the person, the facts that lead the person to believe that the act, policy, or practice is discriminatory, pursuant to 29 CFR § 1601.15(b).

INVESTIGATION AFTER INITIAL CATEGORIZATION

Investigation

The investigation of each case should be appropriate to the particular charge, taking into account the EEOC's priorities and resources.

Investigators must seek *only* that amount of evidence needed to make an informed decision as to whether it is more likely than not that a statute has been violated. Investigators should use the elements of proof to assess the available evidence and decide whether it is sufficient to reach a conclusion.

This avoids misapplying resources by over-investigating charges that could be resolved with less information, or by pursuing cases that are facially non-meritorious. At the same time, it has the beneficial effect of shifting the agency's limited resources to cases that are the most likely to fall within the SEP and DCP enforcement priorities or to have strategic impact and that otherwise result in findings of violations.

As soon as practicable after receipt of a position statement and the charging party's response to the position statement, or a response to a RFI, the office should decide whether to take further investigative or settlement action. If no further investigative or settlement action is appropriate, the charge should be dismissed at that time.

Investigations must be done on a timely basis in light of the nature and complexity of the case, the cooperation of the parties, the size of the workload, and the resources available. Cases should be moved expeditiously. Additional information should be promptly analyzed to determine if another action would accelerate enforcement or resolution of the charge.

Timeliness will be evaluated by considering whether the actions taken were reasonable given the totality of the circumstances, including available resources

The evidence collected should be sufficient to make the proper determination under PCHP. The evidence can be derived from the intake interview, RFI, on-site, witness interviews, data analysis, etc.

Make timely decisions based on the evidence collected. Exercise proper judgments in relation to the evidence collected and the need for further actions depending on the judgment made.

CLASS AND SIGNIFICANT IMPACT CHARGES

(Expanding the scope of individual charge Investigations and amending charges.)

The Commission places a high priority on class cases and cases that have a significant impact beyond the individual parties to the dispute.

The scope of an investigation may routinely include all allegations in the charge that directly affect the charging party as well as other class members. The investigation of a charge may also encompass any other issue that grows out of a reasonable investigation of the original allegations.

Before expanding an investigation to include issues/bases not alleged in the original charge, the Investigator should first consult with field office management and with the assigned Attorney.

Example of EEOC litigation

In *EEOC v. ThyssenKrupp Elevator Manufacturing, Inc.* (W.D. Tenn. Oct. 25, 2005), the Commission alleged that defendant, which manufactures, installs, and repairs elevators throughout the United States, failed to hire and promote black employees at its Middleton, Tennessee facility because of their race. The Middleton facility employs mechanics, temporary mechanics, and helpers in its construction and service departments. Jobs in the service department, where all the employees were white, were cleaner and less strenuous than in the construction department, and had better working hours, more overtime, fewer layoffs, and extra training opportunities helpful in passing the mechanic's test. For 6 years, two black employees unsuccessfully sought transfer/promotion from the construction department into the service department, while defendant hired and transferred less qualified whites into the service department.

The 2-year consent decree resolving this case provided $175,000 in monetary relief to a class of black claimants identified by the Commission and enjoins defendant from race discrimination and retaliation. Defendant must use its best efforts to hire qualified minority applicants, including advertising in a designated newspaper and in other area newspapers. Defendant must invite previously rejected black applicants, identified by

EEOC, to take a pre-employment test, and must make a good faith effort to hire individuals who pass the test.

The original charge filed with the Commission alleged only failure to promote based on race. The issue of failure to hire based on race arose during the course of the investigation.

SYSTEMIC PROGRAM

Systemic investigations and lawsuits typically have strategic impact as they address significant legal issues or policies, or have a wide influence on an industry, occupation or geographic area, as underscored in Advancing Opportunity - A Review of the Systemic Program of the U.S. Equal Employment Opportunity Commission. The Strategic Enforcement Plan FY 2017-2021 reaffirms the Commission's commitment to a nationwide, strategic, and coordinated systemic program as one of EEOC's top priorities.

The Commission recognizes that an individual charge or case can have strategic impact, as defined above. Effective strategic enforcement includes a balance of individual and systemic cases, and of national and local issues, recognizing that each may have strategic impact in varied ways.

The Commission places a high priority on class cases and cases that have a significant impact beyond the individual parties to the dispute. The scope of an investigation may routinely include all allegations in the charge that directly affect the charging party as well as other class members. The investigation of a charge may also encompass any other issue that grows out of a reasonable investigation of the original allegations.

Before expanding an investigation to include issues/bases not alleged in the original charge, the Investigator should first consult with field office management, and with the assigned Attorney.

Systemic discrimination involves a pattern or practice, policy, or class case where the alleged discrimination has a broad impact on an industry, profession, company, or geographic area. A charge filed by an individual with class issues, which meets these criteria, may be designated by EEOC as a systemic case. If there is not a current charge against the proposed

respondent, and EEOC has reliable information about class discrimination meeting these criteria, EEOC may seek a Commissioner's Charge (signed by one of the EEOC's Commissioners).

Example of EEOC litigation

In November 2004, the Commission settled for $50 million a lawsuit filed against Abercrombie & Fitch on behalf of a class of African Americans, Asian Americans, Latinos, and women allegedly subjected to discrimination in recruitment, hiring, assignment, promotion and discharge based on race, color, national origin, and sex. *EEOC v. Abercrombie & Fitch Stores, Inc.* No. 04-4731 (N.D. Cal. April 14, 2005)
In this Title VII action, the Los Angeles District Office alleged that defendant, a national clothing retailer with over 700 stores, engaged in a pattern or practice of race, color, national origin, and sex discrimination in the recruitment, hiring, assignment, promotion, and discharge of blacks, Hispanics, Asians, and women. The suit, developed jointly by the Chicago and Los Angeles District Offices, was based upon evidence that defendant, which centered its marketing efforts around an "image" or "look" that it called "Classic All-American," targeted its recruitment efforts at primarily white high schools and colleges (and at primarily white fraternities and sororities at the colleges); channeled minority hires to stock and night crew positions rather than sales associate positions; maintained a 60%/40% ratio of male to female employees; failed to hire and promote minorities and women into management positions; and discharged minorities and women when corporate representatives believed they were "overrepresented" at particular stores.

The case was resolved through a consent decree. The decree, which has a term of 6 years, enjoins defendant from discriminating against African Americans, Asian Americans, or Latinos on the basis of race, color, or national origin; from discriminating against women on the basis of gender; and from retaliation. The decree provides that defendant's marketing materials (taken as a whole) will reflect diversity as reflected by the major racial/ethnic minority populations of the United States. Defendant will create an Office of Diversity headed by a Vice President who will report directly to defendant's Chief Executive Officer or Chief Operating Officer. Defendant will hire 10 full-time diversity recruiters within the first 6 months of the decree and 15 additional full-time diversity recruiters within 12 months.

In consultation with an industrial organizational psychologist, defendant will develop a recruitment and hiring protocol requiring that it affirmatively seek applications from qualified African Americans, Asian Americans, and Latinos of both genders. Defendant will advertise for in-store employment opportunities in periodicals or other media that target African Americans, Asian Americans, and/or Latinos of both genders; attend minority job fairs and recruiting events; and use a diversity consultant to aid in identifying sources of qualified minority candidates. The decree establishes percentage benchmarks for the selection of African Americans, Asian Americans, Latinos, and women into sales associate (brand representative), manager-in-training, assistant manager, and store manager/general manager positions. The decree provides for court appointment of a monitor who will prepare annual reports on defendant's compliance with the terms and objectives of the decree.
Defendant will establish a settlement fund of $40 million to provide monetary awards (15% back pay and 85% compensatory damages) to a settlement class consisting of African Americans, Asian Americans, Latinos, and women who applied or were discouraged from applying for positions with defendant since February 24, 1999, and were not hired, or who were employed in one of defendant's stores for any length of time since that date. Defendant also will pay attorneys for the private classes $7.25 million for fees, expenses, and costs incurred prior to the decree approval date and $600,000 for fees, expenses, and costs related to monitoring and defending the decree.

SETTLEMENT OF CHARGES

Settlement is an important enforcement option. It should be encouraged by working closely with both charging parties and respondents to explore whether an amicable resolution of their differences is possible. Offices have discretion in evaluating whether settlements are appropriate in particular cases. As part of the exercise of this discretion, offices should take into careful consideration the interests of the affected parties and not simply impose their view of appropriate relief. Keep in mind any policy changes that respondent may need to make to be in compliance with the law. Of course, settlement in “B” cases may not be appropriate where there are class implications, e.g., sex or racial harassment where there are other victims, unless relief for those victims is also included in the settlement.

SA charges, regardless of the issue(s) raised, require the agreement of the District Director and Regional Attorney to be subject to settlement discussions.

PRE-DETERMINATION/DETERMINATION INTERVIEWS

Pre-Determination Interviews (PDIs) should be conducted with charging parties when the evidence indicates that the charge will be dismissed. The purpose of the PDI is to review the respondent's position and evidence with the charging party and provide him or her with an opportunity to rebut that evidence.

Charging Parties should be given an appropriate amount of time to review and respond to the evidence prior to a PDI. A PDI will:

- Remind the CP of the elements of proof necessary to find it is more likely than not that discrimination occurred and review the elements that have not been met.
- Allow the CP the opportunity to provide investigative leads focused on the respondent's position and the specific evidence needed to prove his or her case.
- Provide the CP with a measure of customer service that reduces complaints and ultimately saves the investigator time that would otherwise be spent responding to requests for reconsideration and Congressional Inquiries.
- Ensure that charges are not dismissed prematurely.

The best practice is to conduct PDIs either in person or over the phone. The goal is to fully communicate the reasons underlying the pre-determination and to explain the CP's options to him or her. As needed, the investigator may ask to have a legal unit attorney meet the CP.

- Where it is not possible to reach the charging party to conduct a PDI in person or over the phone, there is the option of conducting the PDI by letter. In such cases the investigator needs to extract the relevant evidence, present it neutrally in a letter, and ask the charging party to respond within a reasonable time period, (such as five or ten days) by sending a written response, either in a letter or an email to the attention of the investigator.

Prior to the PDI, the CP should have an opportunity to review and respond to the Respondent's position statement. The PDI provides an opportunity for the investigator to assess the CP's response and inquire about whether the CP has any additional information to provide.

In a few circumstances, it may be appropriate to conduct a Determination Interview (DI) rather than a PDI. In these cases, the decision to dismiss is final and the interview is being conducted to explain the basis for the dismissal. For example, a DI could be conducted where the charging party claims that he was discharged because of his national origin but the evidence indicates that respondent discharged all its employees and is no longer in business. Where an in-person or phone DI would not be an expeditious use of limited resources in these types of cases, a letter briefly explaining the reasons for dismissal may suffice.

Where a charge is categorized as a "C" and the charging party was counseled at intake that his or her charge would be dismissed, it is not necessary to conduct either a PDI or a DI.

Cases ready for dismissal for various reasons at a later stage of processing.

Examples include:

- Cases where the CP has rejected a settlement offer that would afford appropriate relief and we are not able to conclude that the available evidence establishes a violation of the statutes.

- Cases where the CP has failed to respond to a request for additional information after 30 days and we are not able to conclude that the available evidence establishes a violation of the statutes.

- Cases where we cannot locate the CP and we are not able to conclude that the available evidence establishes a violation of the statutes.

- Cases where the CP is unable to offer a rebuttal to respondent's legitimate, nondiscriminatory reason after being given an opportunity to respond.

- Cases where CP's allegations are being or were addressed in another forum. Occasionally, CPs file suit on the same basis (such as race or age) under State law. Once such a charge has been reviewed and determined not to be in Category A, the charge may be dismissed. If the office decides to dismiss a charge on this basis, contact the CP and tell him/her that EEOC will be dismissing the charge and issuing a NRTS. You may give the CP the option of requesting a NRTS, rather than having a dismissal.

- Cases where a Title VII/ADA CP has requested a Notice of Right to Sue (NRTS) prior to 180 days from filing may generally be closed and a NRTS issued if the Director has certified that processing cannot be completed within 180 days. ADEA charges generally may be closed with the issuance of a notice of dismissal or termination at the request of the CP prior to 60 days from filing after a §7(d) conciliation attempt. In the case of a Category SA charge, you should not close the charge until you have consulted with the Regional Attorney.

- ADEA cases in which the CP is the only victim, and CP has signed a valid release, consistent with all requirements of the Older Workers Benefit Protection Act (OWBPA). Because the OWBPA's waiver requirements are complicated, consult with Legal or OLC first.

EXERCISE: CATEGORIZING A CHARGE

Intake Scenario #1

Carlos Montoya alleges that Stoneworks, Inc. employed him for four years as a bricklayer apprentice, laid him off several months ago, and then refused to recall him because he is Hispanic. Montoya was an associate member of a union that represented bricklayers at Stoneworks.

According to Montoya, his Hispanic friends who also had been laid off by Stoneworks had returned to work. However, after Montoya had visited the work site five times looking for employment, a superintendent told him that he would not get a job because that superintendent did not like Latinos, especially Montoya. Montoya also states that he spoke to a union steward who told him that rehire decisions were solely within the discretion of

Stoneworks' superintendents.

What are the statute, issue and basis?

Relying on the information described above, how would you categorize this charge? Why?

Note: Depending on the information you receive from the union, you might consider whether to examine the union's actions apart from R's.

- **Reminders: Self-defeating? CP credibility?**

SEP/DCP/Topics?

Intake Scenario #2

Roger Wilcox applied for a job as an assembler at the XYZ Manufacturing Company six months ago. A question on the employment application form asked "will you need reasonable accommodations to perform the job? If so, please explain". He did not complete this section. During an interview with the foreman, Sally Smith, he was asked why he didn't complete the question, and whether or not he had ever filed a worker's compensation claim. He replied that he had filed a worker's compensation claim 3 years ago for a sprained ankle, which completely healed. He was also asked if he had any felony convictions, and he replied that he had been convicted of DUI five years ago. Sally told him that is ok because the job does not involve driving. Sally asked why he had left his previous employer and he replied that there was a personality conflict with the supervisor, who did not like him. The next day Sally called Roger to tell him that he was not hired. No reason was given.

What are the statute, issue and basis?

Relying on the information described above, how would you categorize this charge? Why?

SEP/DCP/Topics?

Intake Scenario #3

Timmy Tuff, a white male, alleges that he was discharged by TrueTemps, a temporary agency, due to his race and sex. Mr. Tuff worked as a placement coordinator for six months prior to his discharge. Mr. Tuff states that he was told by Betty BoPeep, the General Manager, to send only men to manufacturing jobs and only women to clerical jobs. When Mr. Tuff sent a female for placement at a stamping plant, Ms. BoPeep reprimanded him verbally and told him to call the female back and cancel the placement. The next day Mr. Tuff sent an African American female for placement at ABC Cash Bank. The bank manager, Mr. Cash, called Ms. BoPeep to complain that the placement didn't "fit in" with their office. Ms. BoPeep once again gave Mr. Tuff a verbal warning for not following "company policy". The next week Ms. BoPeep discharged Mr. Tuff because of his low volume of sales. Mr. Tuff acknowledges that he only placed 60 persons during his six months of employment, which is below the average. All other placement coordinators at this office are white men. When Mr. Tuff comes to EEOC to file a charge, he alleges that TrueTemps sends only women to clerical jobs and only men to industrial jobs.

What are the statute, issue and basis?

Relying on the information described above, how would you categorize this charge? Why?

SEP/DCP/Topics?

Intake Scenario #4

Jose Hernandez works in a catfish factory in the Delta of Mississippi. He has worked at this facility for the past year as a cleaner. His job is to clean out the vats once the catfish are caught and cleaned. Mr. Hernandez does not speak English well, was recruited through an employment agency, and works 12 hour days.

Mr. Hernandez is brought to the EEOC by a representative of La Raza, a community based advocacy organization. The representative states that Mr. Hernandez and other Hispanic workers are paid less than the minimum wage and are forced to buy all of their goods from the company store at inflated prices. All of the workers are Hispanic except for the supervisors and managers. Mr. Hernandez states that there is one Hispanic supervisor over all of the Hispanic workers. He doesn't think they treat the Hispanic supervisor very well but he doesn't complain. He has heard them yell and scream at him. They all get teased about being illegal and told that they will be returned to Mexico if they don't comply with the rules.

What are the statute, issue and basis?

Relying on the information described above, how would you categorize this charge? Why?

SEP/DCP/Topics?

Intake Scenario #5

Lois Laine, a 52 year old African American female, applied for a job as a car salesperson with the SuperAutos Dealership by mailing a resume in response to an ad in the local newspaper. SuperAutos has four dealerships in the area. In April, Ms. Laine was interviewed by Jimmie Kent, an older white man. While at the dealership, she noticed that most of the employees were men, including both white and African American, but there were a few women on the showroom floor. A week after her

interview, Mr. Kent called Ms. Laine to tell her that they had hired a salesman who was better qualified with experience selling new cars and trucks. Ms. Laine worked previously for 10 months selling used cars in another city. Two weeks later, Ms. Laine noticed the same job ad for the same dealership in the newspaper. Ms. Laine walks into the EEOC office and loudly demands to file a charge based on race, sex, and age.

What are the statute, issue and basis?

Relying on the information described above, how would you categorize this charge? Why?

SEP/DCP/Topics?

Intake Scenario #6

Regency Works hired Emma Nently as a parts clerk in May 2003, reporting to Jay, the parts manager. Eighteen months ago, Jay was transferred and Regency's general manager, Plom, asked Nently to "hold down the fort." Nently has performed Jay's job since then without a pay raise to bring her to the level at which Jay was paid.

When Nently asked Plom for a raise, he said that he could not afford it due to a downturn in business. Plom also told her that she doesn't merit the same salary that Jay earned because Plom helps her do her job more than he had to help Jay. Nently says that Plom offers minimal assistance, but then describes interaction between them that occurs every day. Nently is not aware of how often Plom and Jay interacted, because she sat apart from them.

What are the statute, issue and basis?

Relying on the information described above, how would you categorize this charge? Why?

Reminder: Is this concurrent EPA/Title VII?

SEP/DCP/Topics?

Intake Scenario #7

Cathy Call, female, works as a service technician for a local telephone company. Call began working for the company as a quality control technician, earning $7/hour. After a three month probationary period, Call's supervisor assigned her to respond to customer requests with no supervision. Six months later, Call was given a raise to $8/hour. Three months ago Call was promoted to service technician. Although Call received her annual wage increase, she did not receive any raise for the promotion. Two males who were promoted to service technician at the same time as Call told her that they received both their annual wage increases and raises, bringing their salary to $11/hr. After Call complained to the company about the disparity, her salary was raised to $10/hr. The Personnel Director told her that the male technicians earned more because their most recent job performance evaluations had been better than hers.

Call states that her last job evaluation was one level below "outstanding," out of five possible levels. Call asserts that her evaluation would have been better if she received training opportunities that were offered to the two male comparators during the summer, but that she was denied. Call states that the company has acknowledged to her that it has not treated her fairly with respect to training. Furthermore, Call has asked other male service technicians about their salaries and job evaluations, and she names three individuals who told her that their salaries were raised to $11/hr. at the time of their promotions even though they had received less than "outstanding" job evaluations.

What are the statute, issue and basis?

Relying on the information described above, how would you categorize the charge? Why?

SEP/DCP/Topics?

Intake Scenario #8

Jesus Diego, a Cuban male, has worked in the maintenance department of a large brewery since April 1999 as a Custodian. He protested to the company three months ago about being assigned duties in addition to his own at a different building in the employer's complex. He admits that he has the time to complete the duties in both buildings, but he thinks it is wrong as he has to go several blocks to the other site. He believes that this additional duty was added because of his national origin. He wrote several letters and had conversations with several persons in authority about this alleged discrimination. The brewery then reassigned him to the corporate building. Mr. Diego claims that this reassignment is retaliatory, because he feels it is a bad assignment. As an explanation for this view, he asserts that the corporate kitchen has roaches. He also questions why he was reassigned to the corporate building when others had requested that assignment.

What are the statute, issue and basis?

Relying on the information described above, how would you categorize the charge? Why?

Reminders: What is opposition?

Importance of counseling - good customer service includes giving an honest assessment of the charge.

SEP/DCP/Topics?

Intake Scenario #9

Bowman & Bowman, L.P. hired Roy Reese, a 55-year-old African American in June 1999, and his current title is senior patent attorney. Reese has been told by his manager that he would be considered for promotion only if he could meet advanced job requirements. Reese states that in order to satisfy those requirements, he needs formal training, but his requests for such training have been denied.

Reese states that several months ago the firm promoted a White senior patent attorney in her 40's who had less seniority then Reese, after giving her formal training in advanced areas. When Reese told the Supervising Partner, Ron Bowman, that he wanted the same treatment, Bowman offered him a conditional promotion, without training, provided he could perform the advanced work in an unfamiliar, specialized area of technology. Reese rejected the offer. Two months ago, the firm promoted a White senior patent attorney, aged 35, who was also less senior than Reese and had also been provided advanced training. Reese doesn't know how many total senior attorneys there are or how many are minority; he knows of at least one African American senior patent attorney who received a promotion last year.

What are the statute, issue and basis?

Relying on the information described above, how would you categorize the charge? Why?

SEP/DCP/Topics?

Intake Scenario #10

Erica Brown was hired six months ago as a deli worker. She alleges that the store manager, Mal Handler, began sexually harassing her soon after she was hired and continues to do so. The harassment has included occasions in which the manager would touch her buttocks and breasts, offer her money to have oral sex, follow her to the women's room, and make sexual advances or requests for sexual favors. Brown has refused each of Handler's advances, but she has not made an internal complaint because Handler is a manager and she is not aware of anyone else to whom to report the harassment. Brown is not aware of any company policy regarding harassment.

Brown states that Blanche Harris and Lola Green work in the deli and that Lola has also been sexually harassed by Handler and has witnessed many of Handler's actions towards Brown. She also states that Barbara Fisher quit two weeks ago due to sexual harassment by Handler. Brown believes that both of these other individuals intend to file charges as well, or would at least corroborate her allegations.

What are the statute, issue and basis?

Relying on the information described above, how would you categorize the charge? Why?

Reminders: Liability for harassment by a supervisor. Potential class implications? Possibility harassment is repeated and egregious.

SEP/DCP/Topics?

Intake Scenario #11

Secure, Inc. hired Joe Safely as a security guard three years ago. Initially, Safely was scheduled to work weekdays only. Last month, Safely's supervisor informed him that Safely would have to work some weekends due to a change in rotations. Safely told the supervisor that he did not want to work on Saturdays because he volunteers to work at his church's gift shop on that day.

Secure scheduled Safely to work last Saturday. Safely found a replacement worker, and his supervisor initially agreed with the arrangement. However, the second line supervisor refused to give approval because the replacement worker required overtime pay. Safely refused to report to work on Saturday and was suspended.

What are the statute, issue and basis?

Relying on the information described above, how would you categorize this charge? Why?

SEP/DCP/Topics?

Intake Scenario #12

Amardeep Singh, who is Sikh, applied for a position as a security guard at an amusement park and was hired for the position by Joel Jones. The required uniform included a red beret. After he was issued his uniform, Mr. Singh immediately told Mr. Jones that he could not wear a beret because of his religious practice, which requires that he wear a turban and offered to wear a matching red turban in place of the beret. Mr. Jones agreed to the requested accommodation. However, several days later in the employee lounge, Mr. Jones noticed that Mr. Singh was wearing a small sword (kirpan) on a shoulder strap under his shirt. Even though the kirpan was not visible to the public as the uniform shirt was always buttoned, Mr. Jones was very upset and asked Mr. Singh what he was doing wearing a

sword. Mr. Singh explained that it was part of his religious practice. Mr. Jones stated yelling at Mr. Singh that he needed someone who didn't have all these crazy religious issues. He needed a straight up Christian. The following day, Mr. Singh was fired.

What are the statute, issue and basis?

Relying on the information described above, how would you categorize this charge? Why?

SEP/DCP/Topics?

Intake Scenario #13

Charlie Beamer (Black) was hired in October 2005 by Lucky Limos as a chauffeur, driving limos and buses. He was supervised by a White dispatcher, Peter Bentley. Beamer testifies that Lucky Limos fired its only Black dispatcher six months ago. He states that all managerial and clerical employees are White; that White drivers are given the more lucrative, out-of-town assignments; that Blacks cannot enter the management office while Whites can; that Whites can park at Lucky Limos' premises while Blacks cannot; and that Black chauffeurs are assigned to the vehicles that are unsafe or have mechanical problems.

Four months ago, a Black driver quit rather than drive a faulty bus to which no White driver had ever been assigned. Bentley assigned Beamer to replace the driver who quit. Beamer drove the bus for several days and complained of excessive fumes and heat in the driver's compartment. While Beamer was on four days' sick leave due to sinusitis and bronchitis, Lucky replaced him with a Black woman who was also affected by the fumes and complained. After Beamer returned to work, he continued to complain of fumes. Bentley claimed that he smelled nothing and discharged Beamer for his continued complaints. Lucky hired a Black driver to replace Beamer.

What are the statute, issue and basis?

Relying on the information described above, how would you categorize this charge? Why?

SEP/DCP/Topics?

Intake Scenario #14

Rosie Riveter, one of only five female machine operators employed by Sheet Metal Works, alleges that several male co-workers have been sexually harassing her for weeks. Rosie alleges that one of her co-workers posted a "Playboy"-style calendar on the wall of the common lunchroom and that the shop foreman, Homer Simple, never sought to remove it. She learned that sexually-explicit graffiti has been drawn in the men's room using her name; and several male co-workers make "grunting" noises when she walks by. Other male co-workers refer to Riveter and other female employees using the "c" or "b" word. She has never formally complained to anyone, and does not know if her employer has a complaint process. But she states that both Homer Simple and the union steward, Bo Hogg, eat in the lunchroom, use the men's room, and have been on the floor when her male co-workers use either the "c" or the "b" word to refer to Riveter or other female workers.

What are the statute, issue and basis?

Relying on the information described above, how would you categorize this charge? Why?

Reminders: Liability for sexual harassment by co-workers; Potential class implications (4 other females)

SEP/DCP/Topics?

Intake Scenario #15

Lily Pond worked as a secretary in the sales office of an appliance company. She alleges that approximately three days after she told her supervisor, Jack Devine, about her pregnancy, he commented that he could not go home and tell his wife that there was "another one pregnant." Lily does not believe anyone else heard the remark. Also at about that time, Lily mentioned to Devine that she knew she was entitled to three months of maternity leave and that she intended to return to her job as soon thereafter as possible.

Two weeks after Lily announced her pregnancy, Devine and the company's national personnel manager, Agnes Urnmore informed her that she would be laid off. Urnmore stated that the company was "cutting back."

Lily asserts that, to her knowledge, no one else has been let go. She also said she got a part-time job in the same building where she used to work for the company and has seen a new employee sitting at her former desk, apparently performing the duties she had performed.

Lily asserts that during her term of employment, she received no written or verbal warnings or any other indication that Devine or any other company official was in any way dissatisfied with her work.

What are the statute, issue and basis?

Relying on the information described above, how would you categorize this charge? Why?

SEP/DCP/Topics?

Intake Scenario #16

Carol Vensin was an executive secretary at the law firm of Tittle and Paddle. She was secretary to the Senior Partner, Mr. John Tittle. Ms. Vensin states that she and John Tittle had an affair that lasted 8 years. About 2 months ago she broke off the relationship. Ms. Vensin wants to file a sexual harassment charge stating that John Tittle continues to ask her out and won't take "no" for an answer. He constantly puts his hands on her and massages her shoulders. Carol states that she and John are still friends but she wants him to stop harassing her. Carol maintains that Mr. Tittle buys her gifts and leaves them on her desk. She states that she tells him to stop spending money on her but he won't listen.

What are the statute, issue and basis?

Relying on the information described above, how would you categorize this charge? Why?

SEP/DCP/Topics?

Intake Scenario #17

Charlie Watts alleges that Flexiwork, a temporary employment agency, has not referred him to jobs in the area of accounting and finance because he is a Black male. Watt's accounting experience is exclusively as a temp. He does not have a college degree, has some Excel proficiency, and he has no experience with computerized accounting packages.

Watts states that he met with a White placement officer and submitted the proper application materials over a year ago. Watts specified that he would work only in the downtown area at locations accessible to the subway. Two other placement officers have since told him that he does not meet the specific requirements of the agency's employer clients and that Flexiwork mostly fills receptionist jobs. Recently, however, Flexiwork's receptionist told Watts that the agency had filled accounting jobs.

Watts believes that women are preferred because Flexiwork is run by women and because a Black female acquaintance recently got a clerical job through the agency. He also states that Flexiwork may be denying him assignments because he was fired from a previous temp agency, allegedly for making long-distance calls from the client's phone.

What are the statute, issue and basis?

Relying on the information described above, how would you categorize this charge? Why?

SEP/DCP/Topics?

Intake Scenario #18

Laura Petree, age 57, worked for Cashiers bank for 23 years. She started as a teller, but quickly became the supervisor of bookkeeping. Petree held that position for 18 years, until a merger 5 years ago. Since then, Petree has worked as a bookkeeper.

Petree says that she has always received good performance reviews. She further says that her most recent review, completed two months ago, showed good performance and a high level of satisfaction from her immediate supervisor.

Three weeks ago, Petree was suddenly called to a meeting with her supervisor and the personnel director. At the meeting, Petree was told that a change in check handling procedures had reduced the staffing needs of her department and that she was being laid off in four weeks. Petree asked why she, the most senior bookkeeper in the department, was being terminated, but she was given no answer.

Petree sought an explanation for her termination by making an appointment last week to see the bank's president. At that meeting,

Petree says that the bank president admitted the "whole thing" had been handled poorly and granted Petree two weeks' severance pay. Petree says that she asked for a reason for her termination at least five times but was never given one. Instead, she was told that "the bank was preparing to expand," which Petree viewed as hardly a rational reason for terminating her.

Petree's former co-worker told her that since she left, a younger bookkeeper in the office has been performing her job. According to that co-worker, the only other employee who was let go was a 54 year-old employee. Petree and that other employee were the two oldest people in the office.

What are the statute, issue and basis?

Relying on the information described above, how would you categorize this charge? Why?

Reminder: Are there other victims (class implications); Assessing for pretext

SEP/DCP/Topics?

Intake Scenario #19

Priscilla Penn runs a business providing technical writing services. Penn states that last month, she contracted with TwoBytes Computer Company to serve as a technical writer drafting a project proposal. Penn was to serve on a team of TwoBytes employees who were working on the project. The term of Penn's contract was expected to last approximately four months, with the possibility of another eight months of work if the proposal was accepted. Penn was to do much of the work away from the TwoBytes' premises, using her own computer and office supplies. She was to be paid on an hourly basis, with no benefits, and no taxes withheld.

Penn says that on the first day of this job, she was invited to breakfast with the project manager, Graham, and another TwoBytes manager. At the breakfast, Graham discussed at great length a situation at a prior job where a woman had brought a sexual harassment suit against Graham's colleague for telling off-color stories and had cost the man his job, while Graham himself had done the same things and the woman had not been offended. According to Penn, Graham bemoaned the fact that "you just can't have fun anymore." Penn responded that many women had strong reasons to seek redress for harassment. As they were preparing to leave, Graham stood in back of her, placed his hands on her shoulders close to her neck, and made a couple of massaging motions. Penn felt very uncomfortable with Graham's behavior.

A few weeks later, Penn was discharged. Graham told her that the reason was that she was "too slow." Penn states that under the terms of her contract, she could be terminated with or without cause.

What re the statute, issue and basis?

Relying on the information described above, how would you categorize this charge? Why?

Reminder: Independent contractor

SEP/DCP/Topics?

Intake Scenario #20

Mattie Gunn, a Black female, has worked as a police officer for approximately 10 years. She alleges that a particular sergeant in the police department, Sgt. Conway (female/White), has denied her overtime assignments because of gender and race bias. Gunn says that Sgt. Conway has been the supervisor who most often selects officers for

overtime assignments, and Conway usually gives those assignments to two White male officers, Richards and Hartz. Gunn says that she has more seniority than Officer Richards and that it is the policy of the police department to assign overtime in accordance with seniority. Gunn says that "everyone is aware" that Sgt. Conway favors Richards.

Four months ago, Gunn told the police captain that it was her belief that Sgt. Conway was excluding her from overtime work because of her race and sex. A few days later, Sgt. Conway met with Gunn and said she had lost all respect for Gunn because of her complaint.

Gunn says that one of the police officers, Officer Jones, told her two months ago that he overheard Sgt. Conway say to another supervisor that Gunn was a trouble maker, and that Sgt. Conway will be sure to tell other supervisors not to give Gunn any overtime assignments. Since that time, Gunn has not been called for any overtime assignments, even from supervisors who had previously given her such assignments.

What are the statute, issue and basis?

Relying on the information described above, how would you categorize this charge? Why?

SEP/DCP/Topics?

Intake Scenario #21

Ajil Zibari alleges that he was subjected to harassment from a supervisor and that he was discharged by his employer, Stay Alert, due to his ethnic and national origin (Kurdish/Iraqi) and in retaliation for complaining about the harassment.

Zibari was hired by Stay Alert as a "general production worker" two years ago. One year ago, Zibari's supervisor showed him an ethnically insensitive cartoon at the workplace. Zibari says that when he complained

to higher management, Stay Alert confirmed the incident and suspended the offending supervisor for a week. No further incidents of harassment occurred.

Six weeks ago, Zibari's supervisor and the union steward discovered Zibari sleeping on the job and immediately discharged him. Zibari asserts that Stay Alert had no specific policy stating that this sort of misconduct warranted discharge, and he believes that his supervisor discharged him because of his ethnic and national origin and in retaliation for his EEO complaint. Upon questioning, Zibari acknowledged that the same supervisor had previously discharged two other employees, one White and one Asian, immediately after they were discovered sleeping on the job

What are the statute, issue and basis?

Relying on the information described above, how would you categorize this charge? Why?

Reminder: Customer service and appropriate counseling

SEP/DCP/Topics?

Intake Scenario #22

Alice Williams, an African American female, was hired as a production worker at the Oak Lumber Company six years ago. Her primary duties were to build floor and roof trusses. Production employees work on teams. Of the 65 production employees at the plant, she was the only woman, and one of two African American employees. Shortly after she was hired, she was subjected to racial comments by Billy Gote, a co-worker, who also displayed a confederate flag on his car. Ms. Williams complained to the plant manager in August, and following an investigation, Billy Gote was fired.

In October, Ms. Williams and six other production workers were laid off due to lack of business. Ms. Williams states that when she was recalled to the plant six months later, co-workers were very cold to her and refused to work with her. She believes that some of the co-workers were whispering racial comments about her, and trying to run her over with the tow truck. Ms. Williams complained to the supervisor, who told her to just do her job. Within three months, Ms. Williams was discharged for poor performance. The Company states that she failed to meet the production quotas for the past two months, and their standard practice is to discharge employees for this reason. One month before Ms. Williams was terminated; the Company hired a new male employee who is Black.

What are the statute, issue and basis?

Relying on the information described above, how would you categorize this charge? Why?

SEP/DCP/Topics?

Intake Scenario #23

Murpal Singh, who is Sikh, was hired as a security officer for a private company. Upon hire, Mr. Singh was given the company's personnel policies manual, which included a section on random drug testing. After approximately eight months on the job, Mr. Singh was approached by his supervisor and told that he was to report to the company's wellness department for a random drug test. Mr. Singh reported for the test and was told by the company nurse that they would need to take hair samples at the root from this head for the testing. Mr. Singh advised the nurse that, for religious reasons, he did not want to cut his hair but offered to undergo another testing method, such as giving a urine sample. The company agreed to take a urine sample from Mr. Singh. The urine sample was returned as inconclusive. The company's policy was that if a drug test resulted in a positive or inconclusive finding, the employee would

automatically be terminated. Mr. Singh was terminated the following day. Mr. Singh tells the Investigator that the Respondent terminated seven people as a result of their drug tests. Of the seven, three had inconclusive results and four had positive results; all seven were of varying religious faiths.

When asked if there were other Sikhs employed by the company, Mr. Singh replied yes, one was an uncle who had gotten him his job and had worked for the company for 15 years.

What are the statute, issue and basis?

Relying on the information described above, how would you categorize the charge? Why?

SEP/DCP/Topics?

Intake Scenario #24

Promo Print hired Bill Nguyen, a 62-year-old Vietnamese male, to operate its printing machines in 1990 and Nguyen performed the job without problems for 12 years. In April 2002, Promo Print hired a White, 32-year-old male as director of Nguyen's department. In October 2001, the Director appointed a White woman, age 28 (Doyle) as Nguyen's direct supervisor. Seven months ago Doyle gave Nguyen his annual performance appraisal and rated him as good overall, but noted that he "lacked communications skills." No one had ever before mentioned Nguyen's communications skills, and his position description does not state that a certain level of communications skills is necessary for his job.

Nguyen asked the director about the possibility of promotion to the vacant printing supervisor job about four months ago, but the director told him not to apply because he did not speak English well enough. The director hired a 28-year-old Black man for the job.

Nguyen went on approved sick leave last month. Two weeks ago Doyle insisted that he return to work because Doyle allegedly had contacted Nguyen's personal physician who said that Nguyen could return to light duty. Nguyen says that he told Doyle that another physician had recommended immediate surgery for his medical condition. Yesterday, Nguyen received a letter from Doyle stating that he had been fired for failing to report to work.

What are the statute, issue and basis?

Relying on the information described above, how would you categorize the charge? Why?

SEP/DCP/Topics?

Intake Scenario # 25

Jane was offered a job as an Emergency Room doctor at a Hospital. After she accepted, she was asked to complete a medical questionnaire and report for a medical exam conducted by the Hospital's doctor. The medical questionnaire requested information about Jane's physical and mental health and any medical conditions she or her family members had. Jane indicated that her father had passed away of heart disease. When she reported to work on her first day, she was informed that she would be working in the Hospital's Internal Medicine Clinic, instead of in the Emergency Room, because one of the clinic physicians had unexpectedly quit and the clinic was short-staffed. Clinic physicians make less money and have fewer advancement opportunities than do Emergency Room doctors.

What are the statute(s), issue(s), and basis/bases?

Relying on the information described above, how would you categorize this charge? Why?

Reminders:
With limited exceptions not applicable in this scenario, requesting genetic information, including family medical history, is prohibited by GINA, regardless of whether or not the information is provided. The fact that the CP in this example provided the genetic information is irrelevant; the request, alone, was unlawful.

Potential class implications, GINA (if other new hires are also asked to complete the medical questionnaire that requests family medical history).

In this scenario, there are no ADA violations regarding disability-related inquiries and medical exams, assuming that the employer requires that all entering employees in that job category undergo medical inquiries and exams. Under the ADA, an employer may conduct post-offer medical exams consistent with ADA requirements. Post-offer, employers may ask disability-related questions and conduct medical exams, regardless of whether they are job-related, as long as they do so for all entering employees in the same job category. However, if certain criteria are used to screen out one or more individuals with disabilities as a result of such inquiries or examinations, the employer must establish that the exclusionary criteria are job-related and consistent with business necessity.

SEP/DCP/Topics?

APPENDIX

SLIDE SHOW

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Withheld pursuant to exemption

(b)(7)(E)

of the Freedom of Information and Privacy Act

Page 0411 of 1288

Withheld pursuant to exemption

(b)(7)(E)

of the Freedom of Information and Privacy Act

Brief Justification

Supervisor Review		**Legal Review**	
Name:		Name:	
Date:		Date:	
Concur:	Do Not Concur:	Concur:	Do Not Concur:
Reason:		Reason:	

PRIORITY CHARGE HANDLING PROCEDURES

Objectives of PCHP

- Focus investigative resources on developing cases where cause is likely, with an emphasis on national and local enforcement priority issues.
- Allocate resources to have the greatest impact on mission and priorities

2

Strategic Enforcement Plan

- Sets forth the Substantive Priority Areas
- The P in PCHP
- Charges with priority issues receive greater investigatory attention
- If Priority issue likely to have merit, then designated as the highest category in PCHP

SEP National Priorities

Eliminating Barriers in Recruitment and Hiring

Protecting Vulnerable Workers, Including Immigrant and Migrant Workers, and Underserved Communities from Discrimination

Addressing Selected Emerging and Developing Issues

Ensuring Equal Pay Protections for All Workers

Preserving Access to the Legal System

Preventing Systemic Harassment

PCHP promotes:

- The appropriate allocation of staff time and resources to charges that will have the greatest impact on EEOC's mission and priorities.
- Early identification and priority treatment of meritorious charges.
- Prompt identification and disposition of charges clearly lacking merit.
- Expeditious management of investigations through reassessment of the charge category as new information is received.

PCHP – Bottom Line

- Not every charge gets the same investigation
- The level of investigation varies based on the categorization of the charge under the PCHP and on strategic enforcement and litigation considerations.

Charge Categorization

- Category "A" charges get priority treatment
  - *potential cause determination
  - *more likely than not discrimination occurred
- Category "B" charges - requires additional information to determine merit
- Category "C" charges - dismissed without further investigation beyond the charge itself and intake process.

PCHP Category "A" Charges

Defined as:

- Where it appears "**more likely than not**" that discrimination has occurred

Your assessment is:

- the evidence appears credible
- the charging party seems credible

"A" Subcategories: SA & A2

Category A charges have two **sub-categories:**

- **SA = Cause is likely *and* government enforcement has strategic significance**
- **A2:** Charges where it is likely that discrimination has occurred, but the office has determined it will not or cannot litigate.

SA Subcategory

Enforcement and legal will jointly determine whether a charge receives the SA designation based on the following two assessments:

1. Cause is likely, **and**
2. Government enforcement (conciliation and/or litigation) will have **strategic significance**.

"Strategic significance" means the EEOC's enforcement will:

have a broad deterrent impact (beyond the parties), **or**
have an impact on a large number of individuals, **or**
have an impact on the development of the law, **or**
have an impact from the presence of EEOC enforcement (e.g., geographic presence or as the primary enforcer, such as ADEA enforcement against state entities).

How to Use the SA Subcategory

- Assess all A charges (cause likely) for strategic significance by application of the four criteria for strategic significance
- Includes charges that raise SEP and/or DCP priorities, charges that raise potential systemic allegations and other charges.
- Charges assessed as "SA" should receive significant attention and resources.
- "SA" Charges raising SEP or DCP priority issues take precedence over SA charges that do not raise such priority issues, where the charges are of equal merit, strength, and likely impact.

Category "A2" Cause is likely but litigation is unlikely

Use when:

- EEOC does not have litigation authority (e.g., Title VII, ADA or GINA charges against state or local governments – coordinate with U.S. Department of Justice).
- EEOC decides it will not litigate

Category "B" – Charges Needing More Information to Determine Merit

Factors that support categorizing a charge as "B" -- where the CP has stated a prima facie case, BUT

- the comparative data needs clarification,
- there is a lack of supporting documents or witnesses, or
- the reason CP was given for the adverse action appears to be a legitimate, nondiscriminatory reason.

Moving "B" Charges

- Promptly reassess the category once you have more information
- Close as soon as you have sufficient information to conclude that further investigation is unlikely to result in a cause finding.
- Do not use subcategories of "B" charges to avoid categorizing charges as "C."

Category "C" Charges – Suitable for Dismissal

After reviewing the charge, it is clear that:

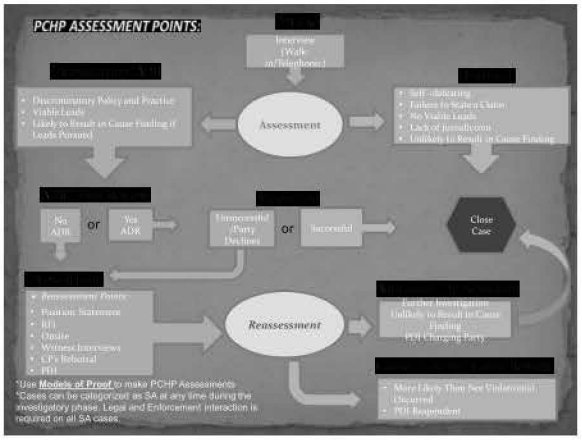
- the charge is filed untimely;
- the Respondent is not covered;
- the charge fails to state a claim;
- the charge is self-defeating;
- the Charging Party is not credible; **or**
- it is unlikely that further investigation would result in a cause finding.

Ongoing Reassessments

- At key points in the investigation – whenever new information received
- After charges come out of mediation
- After position statement and CP's rebuttal are received
- When RFI response is received
- New information added to IMS
- After onsite or fact-finding
  - *Is cause likely??*

Reassess to Recommend:

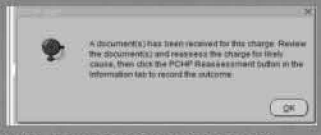
- Upgrading the category to A or SA
- Continuing investigation under current category
- Downgrading the current category (only from SA to A – consult legal)
- Dismissing the charge



New PCHP Reassessment Tool

- Initial guidance - April 2016 OFP memo
- "PCHP Reassessment" button on IMS between the buttons "Online Charge Status" and "Process Type."
- This new tool will help us establish a baseline and set timing goals for future years.

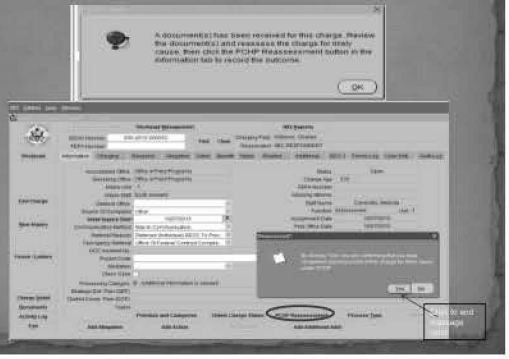
REASSESSMENT PROCESS IMS ACTIVITY



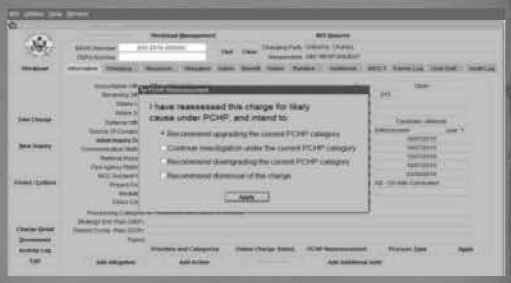
What triggers the reassessment message?

- A 30-day cycle starts when new information is uploaded or new action is entered into IMS.
- RFI response received in Respondent Portal.
- Uploading charging party's response to the position statement.
- Fact-finding conference - entering an H1 action code in IMS.
- Onsite conducted - entering an H2 action code in IMS.

Reassessment Process Document Receipt Activity



Reassessment Process - IMS Activity



PCHP REASSESSMENT TOOL

THE MESSAGE OFFERS TWO CHOICES:

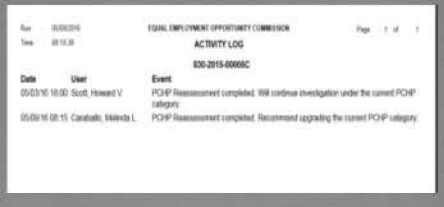
"Yes" produces the following choices:

I have reassessed this charge for likely cause under PCHP, and intend to:
- **Recommend upgrading the current PCHP category**
- **Continue investigation under the current PCHP category**
- **Recommend downgrading the current PCHP category**
- **Recommend dismissal of the charge**

One of the four choices must be selected and applied.
The selection is recorded in the charge's Activity Log.

"NO" dismisses the message.

Document Receipt Activity


EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ACTIVITY LOG

Date	User	Event
05/03/16 10:00	Scott, Howard V	PCHP Reassessment completed. Will continue investigation under the current PCHP category.
05/09/16 08:15	Caraballo, Melinda L	PCHP Reassessment completed. Recommend upgrading the current PCHP category.

Once the reassessment is completed the event will be documented into the "Activity Log."

Charge Receipt: Initial Charge Categorization

- Importance of Charging Party Interview
- Intake/Charge Counseling
  - Right to file charge
  - Potential for retaliation
  - Models of Proof
  - Best initial assessment of the evidence
- Prompt Charge Assessment

Investigation After Initial Categorization

- Investigation
  - Starts with Intake Interview
  - Evidence needed to make informed decision (RFI, Witness Interviews, Data Analysis, Onsite)
  - Consider resources
  - Position Statement and Rebuttal = Decision Point

Systemic Cases

- Pattern or practice
- Discriminatory policy
- Broad impact (class case)
  - industry
  - profession or occupation
  - company
  - geographic area

Pre-Determination Interviews (PDI's)

- **When = Evidence indicates cause is unlikely, but before a determination to dismiss is reached**
- **If CP has provided a response to the position statement** (CP has 20 days to respond) – then review all evidence and explain why cause is unlikely.
- **If you have only R's Position Statement:** Review the R's position and evidence with CP and provide CP an opportunity to rebut.

Fact Finding Conferences

FACT FINDING CONFERENCES

TABLE OF CONTENTS

Fact Finding Conference Demonstration

Ali Safa v. Consular Hotels and Resorts
Charge number 123-2009-34567

Preliminaries

Greet the CP and R
Invite them to sit on either side of the table
Pass around an attendance sheet
Read the Opening Statement
Administer the Oath

Read the Summary of the Charge:

Mr. Ali Safa, the charging party, alleges that he was discriminated against because of his age, 64, and national origin, Iranian, and in retaliation for complaining about discrimination.

Mr. Safa states that he was employed for 22 years as the Complimentary Service Manager – responsible for all aspects of the food and beverage service provided by the hotel's complimentary breakfast. He won many awards and had a good performance record over these 22 years.

In December 2014, the hotel came under new management. Mr. Safa states that he was demoted and unjustly disciplined by the new General Manager, Jack Matte (American, age 40-45) and the Food and Beverage Director, Dan Lean (American, age 50). Mr. Safa states that he complained about the discrimination to the Human Resources Manager, Carmen Miranda and was subsequently discharged.

CP's Opening Statement: emotional and very proud

Everything I said in the charge is true. For over 20 years I worked for the hotel. The complimentary breakfast area always received one of the highest service scores under my leadership. Unfortunately, all that changed when HEI bought the company. Since day one, the General Manager was very rude to me. He never showed me the basic respect that I should expect as an employee.

After two months, Mr. Matte and Mr. Lean told me they had decided to eliminate my "Manager" position and create a "Supervisor" position for Complimentary Services. I applied for the position. Since I had over 20 years of experience,

they couldn't turn me down. I was doing the same job, but with a big reduction in my pay. I was humiliated in front of my department.

In April, they gave me a final warning because I did not vacuum the complimentary breakfast area, which is not true. There are many guest complaints about cleanliness and bad customer service; but no one else has been written up for it.

On May 6, I was told that my last day would be the next Wednesday because I'm not doing my job. I was set up from the beginning. I was not given time to work on any plan of action to improve my performance.

Respondent's Opening Statement

Sherlock Watson, Regional HR Manager
Also at the table are Jack Matte, General Manager, Dan Lean, Food and Beverage Manager, and Carmen Miranda, HR Manager

We categorically deny discriminating against Mr. Safa. We terminated Mr. Safa's employment because he was not fulfilling his role as a supervisor. Mr. Safa's supervisor gave him numerous opportunities to complete required tasks, which Mr. Safa chose to ignore. Mr. Safa never complained to Ms. Miranda about discrimination.

After HEI purchased the hotel, it underwent restructuring. Mr. Safa's position was eliminated and he was invited to apply for other positions. He was hired as the Food and Beverage AM Supervisor. He was responsible for the hotel's complimentary breakfast and morning break service for people in meeting rooms. He supervised six staff members and reported directly to Dan Lean, Food and Beverage Manager.

Almost immediately after starting in the position, Mr. Safa had problems with his performance. In February, Mr. Lean issued him a written warning for allowing staff to work additional hours without proper authorization. Mr. Safa received a second warning in March for failing to read a banquet order, which resulted in no breakfast service for a meeting being held at the hotel.

In April, the hotel brought in a third-party vendor to inspect the kitchen premises for cleanliness. The inspection failed. On April 24, 2014, Mr. Safa received a final warning.

As part of the final warning, Mr. Lean instructed Mr. Safa to make a checklist of all items that must be done by the breakfast staff to ensure that all duties were being completed on a daily basis. We hoped that this would help Mr. Safa improve his performance.

Following the meeting, Mr. Safa spoke to Ms. Miranda. He told her he was unhappy with the warning. Mr. Safa stated that he knew what needed to be done based on his many years of experience and did not need a list. He also told her that he believed that the General Manager did not like him. He never, at this meeting or at any other time, state that he was being discriminated against because of his age, national origin, or any other protected category.

By May 7, Mr. Safa had not produced the checklist and was still not performing consistently. Mr. Lean again discussed the need for the list and walked Mr. Safa around the hotel dining room giving him suggestions for the things that needed to be on the checklist. Mr. Lean told Mr. Safa that if he did not have the checklist completed by May 14, he would have no choice but to terminate Mr. Safa's employment.

Despite the repeated warnings to take full responsibility of the breakfast team, Mr. Safa did not make any effort to complete the checklist. On May14, 2014, Mr. Lean and Ms. Miranda met with Mr. Safa and explained the reason for his termination – his failure to perform his job and his failure to follow his supervisor's instructions.

Developing the Facts:

Investigator: Mr. Safa, do you have any response to Mr. Watson's' statement?

Safa: I did not need a list. I have been doing this job for over 20 years, why do I need a list?

Investigator: Mr. Matte, what is the difference between the manager position previously held by Mr. Safa, and the supervisor position, other than the difference in pay?

Mr. Matte: We eliminated all of the middle-level management positions during the restructuring shortly after we took over the property. We thought that there were too many levels of management. The duties and responsibilities did not change dramatically. Mr. Lean took over most of the staffing issues, except scheduling.

Investigator: So, Mr. Safa is correct in saying that his job duties remained the same, but he received less pay?

Mr. Matte: Yes.

Investigator: And did the restructuring affect any other managers?

Mr. Matte: Yes. The Housekeeping Manager also became a supervisor as did the Front Desk Manager. They both report directly to me now, with no mid-level manager.

Investigator: I may need to review their files. Can you tell me their names, national origin and age?

Mr. Matte: Tyra Riverbanks is the Housekeeping AM Supervisor. I believe she is Jamaican and about 50 years old. The Front Desk AM Supervisor is Ricky Lakewater. She is American and about 35.

Investigator: Mr. Matte, Mr. Safa stated that staff hours were cut and that is when he was assigned to manage and set up the breakfast and morning breaks for the meeting rooms. When did Mr. Safa take over those responsibilities?

Mr. Matte: Those duties were always assigned to the complimentary breakfast team. I am not sure which member of the team performed those assignments.

Investigator: With respect to the third-party vendor, was the contract only to inspect the kitchen or did they also inspect other areas of the hotel?

Mr. Matte: They inspected other areas as well.

Investigator: Can you tell me what areas and what were their findings?

Mr. Matte: Other areas inspected included housekeeping, the front desk, and the gym. Some deficiencies were found in these areas as well.

Investigator: And were any other employees disciplined or discharged as a result of the inspection?

Mr. Matte: No. No other employee had a history of poor performance such as Mr. Safa.

Mr. Safa interrupts: That is not true!

Investigator: Mr. Safa, please do not interrupt. Can you provide the names of any supervisor/manager who had poor performance and also had deficiencies after the inspection?

Mr. Safa: Please excuse me. I am so upset. Yes. I can provide their names.

THE FACT FINDING CONFERENCE –

GENERAL OVERVIEW

What is a Fact Finding Conference?

The fact finding conference is:

- an informal investigative forum intended to
    - further define the issues,
    - determine what is undisputed,
    - clarify disputed issues, and
    - determine what other evidence is needed.
- It is not a hearing or an adversarial proceeding.

Fact finding allows the investigator to convene a meeting where both parties to a charge are present and can provide information upon which to base a determination. In addition, with the parties together in one location, settlement of the charge may be accomplished.

What types of cases are most appropriate for fact finding?

- "B" cases
  Generally, fact finding should be considered in B cases where the charging party and/or respondent have declined mediation and in cases where mediation was not successful.

- "A" cases with legal concurrence

<u>Other Considerations</u>

- Cases needing additional information after charging party's rebuttal of the respondent position statement. Saves time – rather than shuttling back and forth between respondent and charging party to get information/documents and rebuttals.

- Retaliation cases – Limits effects of the adverse action as soon as possible

- ADA cases with catastrophic illness

- Complicated/muddled cases where you need to get the facts ironed out and focus on the relevant disputed facts

- In general, fact finding conferences should be conducted in "SA" cases only when enforcement and legal agree that it would be beneficial to the development of the case. For example, where there may be one or more facts in dispute between the respondent and charging party, a fact finding conference may help assess the credibility of the parties, including how credible the charging party may be if a lawsuit were filed.

  Prior to any fact finding conference in an "SA" case, the investigator and assigned attorney should meet to discuss and concur on appropriate settlement terms and handling. An attorney should also be available for consultation on the day of the conference.

Fact Finding v. Mediation

The fact finding conference will appeal to both charging parties and respondents for different reasons and may be attractive to respondents that are not receptive to mediation. The respondent who thinks that agreeing to mediation early in the game is a "sell out," will possibly welcome the opportunity to come to the table to clarify its position/reasons for its actions, etc. The conference also provides an opportunity for respondent headquarters' representatives or top management at a local facility to assess the credibility of their employees who file charges. The charging party will welcome the opportunity to be heard.

The purpose and format of fact finding conferences and mediations are different. Attendance at a fact finding conference is not voluntary, and the investigator will evaluate/analyze the evidence and make decisions on the merits of the case. By contrast, the purpose of mediation is to assist the parties in reaching a mutually acceptable resolution to the dispute. Mediation is voluntary; the mediator does not evaluate/analyze evidence and makes no decision on the merits of the charge.

Once the investigator determines that a fact finding conference is the most appropriate investigative technique for the case, the parties are required to cooperate with the Commission's investigation, as when the Commission schedules an on-site investigation.

Both charging party and respondent should be informed that due to the EEOC "fire-wall" between mediation and investigation, statements/discussions made during mediation will not be disclosed or considered during the fact finding conference.

What cases may not be appropriate for fact finding?

While offices are encouraged to be flexible in selecting cases for fact finding, some cases are generally inappropriate for fact finding. These include:

- "C" cases
- Charges filed on behalf of aggrieved persons whose identity is being kept confidential
- Cases where charging party has expressed a fear of the employer
- ADA cases in which the charging party's disability, such as a mental impairment, results in difficulty communicating and understanding the proceedings.
- Cases in which the charging party has already exhibited belligerent, loud, or abusive conduct to Commission staff.

PREPARING FOR THE FACT FINDING CONFERENCE

FLIP CHART: Preparing for the Conference

- Review the file - charge, intake notes, respondent position statement, etc.
- Prepare plan for the conference, including any necessary data request
- Identify all parties who must attend the conference
- Make pre-conference contacts
- Schedule the conference/
- Handle requests for postponement
- Coordinate logistics
- Complete the boilerplate settlement agreement with all information except the possible terms

Conference Plan/Outline

Conducting a fact finding conference demands a great deal of concentration and attention to detail. Since most of what happens is unpredictable and must be handled on the spot, you should prepare in advance.

Depending on the type of case, there are certain standard questions or types of information that must be obtained. Use the elements of proof for the issue(s)/ basis(es) to assist in developing the plan.

To ensure an effective conference, your plan should:

- briefly summarize charge allegations

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Respondent Counsel

- External Counsel hired by the respondent may not speak for the respondent at the conference, but may provide advice and counsel to his client.

- In-house counsel, such as the company General Counsel, who has firsthand knowledge about the facts surrounding the charge and who can sign a settlement agreement may act as respondent's representative. However, the investigator should invite other respondent officials with knowledge of relevant facts necessary to accomplish conference objectives.

Pre-Conference Interviews

Who would you contact for pre-conference interview? What information do you need to cover?

- Charging party
  - Call charging party to review the position statement and obtain rebuttal. Explain what is needed to prove the allegation(s) – elements of proof.
  - If the case is appropriate for fact finding, explain Commission procedure and the purpose of the fact-finding conference.
  - Determine whether charging party will provide a brief statement explaining the events that led to the filing of the charge (opening remarks) at the conference or whether you will simply restate the allegations.
  - Discuss settlement and, if appropriate, prepare a boilerplate settlement agreement with all information except the terms.
  - Confirm charging party's availability and explain logistics.
  - Determine whether charging party needs an interpreter or other reasonable accommodation, and if so, arrange for one.
  - If charging party requests permission to bring an attorney or a non-attorney representative, explain that this person will not be allowed to speak for the charging party at the conference, but is welcome to attend.

- Respondent
  - Once you have decided to hold a fact finding conference, call the respondent and explain Commission procedure and the purpose of the fact-finding conference.
  - Request respondent bring any additional information/records needed.
  - Identity respondent officials who should attend the conference.

- Confirm availability and explain logistics.
- If respondent is represented by counsel, explain that the attorney will not be allowed to speak for the respondent at the conference, but is welcome to attend.

- Witnesses
  - Determine if witness interviews needed.
  - Attempt to interview current non-management employees who may be concerned about appearing at the conference prior to the conference.
  - Identify witnesses who should attend and what information each witness can provide.

Schedule the Conference

No less than half a day should be allotted to each conference.

In general, a conference should not require more than two – three hours, plus additional time for settlement discussions. Even in complex cases, this time frame should suffice to define the issues and collect relevant information. Most conferences should be scheduled for the morning or very early afternoon if possible. If a settlement discussion is underway, everyone can keep working until it is completed, an important settlement technique.

Postponements

What should you consider in determining whether to grant a request for postponement?

Respondent

The investigator should use his/her best judgment in granting a request for postponement. You should be fairly flexible for a first request, as respondent may have to bring a number of people together and assemble written materials. Most requests for a postponement will be based upon someone's unavailability on a given date, or a prior commitment of the attorney representing the employer. Establish whether this individual's presence is really required. If it is, settle upon another date immediately. Do not leave it open. If the employer has to check with a number of people, provide two or three alternate dates, and insist that respondent call to confirm one of them by a specific deadline.

Before finalizing a change in dates, check charging party availability as well as available conference space. Usually, charging parties are more flexible than

respondents. However, if the new date is not convenient for the charging party, you will have to work with the parties to find a mutually agreeable time.

The Commission's interest is to conduct a prompt investigation in a cooperative atmosphere. When a respondent asks for an inordinately lengthy postponement, the investigator should refuse, unless the circumstances are compelling.

Charging Party
A charging party's request for postponement should be evaluated on the same basis as a respondent's request. A charging party is not expected to have as many logistical problems as a respondent. If a charging party requests a very long delay, or more than one postponement, you may have to question his or her genuine desire to have the investigation go forward.
The problem may be a reluctance to confront the respondent. The investigator should be sympathetic with an apprehensive charging party and try to resolve any fears. However, the charging party must cooperate with the Commission and give the respondent an opportunity to defend itself against an outstanding charge of unlawful activity.

Having set the new conference date, the investigator should immediately mail a confirmation letter.

What would you do if respondent indicated an unwillingness to attend?

Respondent
Not infrequently, a respondent may indicate an unwillingness to appear at the conference, or to supply the requested data. Generally, this does not happen with large employers, who are experienced in handling charges of discrimination as well as internal complaints. Small employers, however, may be unfamiliar with the Commission and with anti-discrimination law in general, and/or outraged at the accusation and regard it as personal. The investigator should explain fully and clearly the role of the Commission, what we do, and the investigative process.

You may want to start by saying that EEOC is a law enforcement agency created to enforce the laws against discrimination in employment. Explain that individuals have the right to file charges if they believe they have experienced discrimination on the job. Stress that the Commission has not taken a position as to the merits of the charge at this stage but is investigating it. The employer has every right to present its position, and this conference is the opportunity to do so. The Commission will make a decision on the merits based upon the

information supplied by both sides, unless the dispute can be settled without further investigation.

It may be necessary to mention the Commission's subpoena powers. You should stress, however, that the Commission prefers a less adversarial investigation, starting with a fact-finding conference.

Charging Party
Charging parties generally want to attend the fact finding conference to have their "day in court." The charging party may want to insist that certain questions be asked at the conference. Although the investigator must listen, it is not wise to explicitly agree to any recommendations.

Invariably, in all of these discussions about scheduling and procedure, both sides will try to persuade the investigator of the merits of their position. It is important to allow for some venting. However, the investigator should assure the parties that all of these matters will be discussed at the conference.

Coordinate Logistics

- Conference Location - Normally, conferences are held in EEOC offices or, when this is not feasible because of the geographic location of the parties, in another federal office or other government space more convenient to the parties. However, in some cases, it may be appropriate to hold the conference at the respondent's facility.

- Conference Space - Make sure to arrange for additional space for settlement discussions or for witnesses.

- Determine whether any person attending the conference will need an interpreter or other accommodation.

- Prepare forms - Sign-in sheet, Opening Statement, Boilerplate settlement agreement

- Coordinate with the legal unit for a potential cause case

CONDUCTING THE FACT FINDING CONFERENCE

Beginning the Conference

The conference should begin on time. If there is to be any delay, it should not be caused by the investigator. If one of the respondent representatives or a witness is late, invite those present into the conference room, wait for five - ten minutes and then, even if the late-comer has not arrived, begin the conference.

Issues With Attendance

Respondent

- If an individual scheduled to attend the conference does not show up, the investigator should ask respondent to call the individual to see if that person can be located.

- If the investigator discovers he needs testimony from another respondent witness after the conference is underway, the witness may participate by teleconference.

- The conference should proceed even if a respondent representative is not present. Some progress can always be made with those present. Furthermore, failure to attend should not be permitted to benefit anyone. If a respondent can succeed in delaying the investigation by non-attendance, whether or not it is deliberate, the charging party suffers unnecessarily.

- If respondent appears at the conference with one or more additional attendees, the investigator must determine what facts they may bring to the proceeding. If they are not necessary to the conference, politely advise respondent that their attendance is not required.

- If the only respondent representative who arrives for the conference is outside Counsel, do not conduct the conference.

Charging Party

- Should the charging party fail to appear, without advance notice, the situation should be discussed with your Supervisor and a decision made according to the particular details. There may be serious doubt about his or her intention to pursue the case and a decision to dismiss may follow.

Seating Arrangements

Respondent should sit on one side of the table, and the charging party on the other. This allows the parties to look at each other directly, instead of having to

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speak for the client (e.g., encourage the party to state the facts directly, though the attorney may address the investigator to explore the issues or legal interpretative matters).

- If an interpreter (sign language or a non-English language) is present, the interpreter will interpret what is being said by each person at the conference.

- Ample time will be allowed for charging party to explain and support the allegation and for respondent to present its position.

- The parties are not allowed to cross-examine each other and there should not be any cross-conversation. The investigator asks the questions and participants answer. If the participants wish to ask questions of each other, they must first propose them to the investigator who will consider whether they are relevant. This procedure must be strictly enforced particularly when there is an over-active lawyer present.

- Other than to assist persons with disabilities in the actual conduct of the conference, recording devices are not permitted.

- Settlement - Either party or the investigator may initiate settlement discussions either during or at the end of the conference.

Attendance Sheet

After reading the opening statement, circulate an attendance sheet. When the attendance sheet is completed, identify everyone at the table by name and title, as the parties may not know each other.

Data Submissions

If the respondent has brought additional evidence to the conference, briefly describe each document, ensuring that the charging party is aware of the evidence presented. Charging parties often fear that the Commission will accept an employer's word or will not conduct a full investigation. If they hear that relevant documents are being collected for the file, they may feel more confident about the quality of the investigation.

The investigator should explain the legal status of the documents.

Under PCHP, the parties have access upon request, to the positions of the other. This exchange, including documents as appropriate, should permit the parties to narrow the issues, encourage them to resolve disputed facts.

The Commission's notes on this conference will only be available after the case is closed and if litigation is instituted.

Confidential information may present a problem - especially medical and salary information. In many cases, the investigator may avoid identifying personal confidential information. For example, in the case of salary information, the investigator may simply say the record shows "a male was paid 'more than' the charging party." If it is not possible to avoid discussing the specifics, the investigator may explain that the records will be evaluated at a later time. Another approach may be to ask certain individuals to step out for a moment while you discuss the confidential information.

Administering the Oath

At this point in the conference, a good practice for the investigator would be to certify that the information the participants are about to provide will be true and accurate. Ask each participant to respond individually, in turn.

The oath should be administered to each witness who testifies.

Reading the Charge

The investigator should read the charge without comment by either side.

A Note about Notes

The participants should understand that the notes are not a stenographic record, but rather a full but informal set of investigative notes, to be consulted if the Commission makes a determination on the merits.

There are different note-taking styles, but the note-taker must ensure that the notes are accurate and cover the essential information. The note-taker should not hesitate to interrupt the proceedings and ask for clarification or repetition if the point is especially important or the proceedings are moving too fast. On the other hand, the note-taker should not suspend note-taking for a long while (unless settlement discussions are under way, in which case it is off the record)

as the participants may believe that the contents of the conference are not being recorded.

To simplify the write-up:

- Do not rewrite repetitive statements or include irrelevant conversation
- Consolidate information on the same topic
- Include significant quotes, especially if they refer to the essence of the dispute, or if they are particularly revealing of attitude, demeanor, or overall position on the case. For example, if the respondent has repeatedly stated that the charging party was "qualified but not fully qualified" for the position, and this is essentially the defense, the phrase itself should be noted.
- When quoting, always identify the person making the statement.
- Concentrate on the details of the disputed incident, the sequence of statements and events, the time, place, and people present.

Discussion of the Facts

Establishing the Context of the Dispute

Events are best understood within their context. The context within which the alleged discriminatory events took place should be established at the start of the conference. The investigator should begin the discussion of the facts by asking the respondent general questions about its operations. These opening questions help to set a non-adversarial tone as there will be no disagreement on these general matters.

As appropriate, ask the respondent for a general description of the company -

- What does it make or sell or what services does it provide?
- How many employees does the company have? At the charging party's location? Nationwide?
- What are the types of jobs?
- What is the major function of the charging party's department? What is its relationship to other departments? Relationship to the organizational structure?
- How do the respondent representatives present at the conference fit into this larger structure? What is their relationship to the charging party?

When you have a general sense of the context within which the disputed events took place, ask the charging party for a general overview of his/her employment history with the respondent.

Getting to the Point

Explain that each side will have a full opportunity to give their interpretation in detail, without interruption by the other side. It is especially important to be firm at this stage, since any sign of vacillation now will only encourage further interruptions later on.

Charging Party's Allegation(s)

Ask the charging party to explain the events which led to the filing of the charge. It may take some prompting to get all the relevant details, while excluding the irrelevant ones, but this information must be pinned down at the beginning of the conference.

If the charging party's description seems sketchy or incomplete, get the details through questioning. Many of these same questions may have been covered in the intake interview, but the situation is quite different now, with the respondent there in front of the charging party, and it may be that new facts will come to light.

Be sure to get specifics about what was said, by whom, where, and when, and whether anyone else was present. The investigator should have a thorough picture of what happened, if not why it happened.

Respondent's Position

When you are satisfied, turn to the respondent and ask for its explanation of the same events. Be sure that the appropriate person answers.

If an altercation with a supervisor is the main issue in dispute, ask the supervisor to describe the incident. Do not let the personnel director give a second-hand version.

Even though respondent has submitted its "official" position statement, it may have been written by an attorney or the Human Resources Manager or some other individual not directly involved in the events. The fact finding conference allows you to get an explanation of the events directly from those involved. You may be able to identify and focus on any differences in respondent's "official position" and the testimony at the conference.

Here again, as with the charging party, it is important to get a full explanation. There may have to be a good deal of questioning.

Handling Difficult Participants

Participants on either side of the table can become difficult. A fact finding conference should not be interrupted by angry outbursts, sniping or grandstanding. If a participant is especially boisterous or aggressive, the investigator should be prepared to recess the conference and have a discussion with the disruptive party. The investigator cannot permit the parties to take control of the conference.

The investigator should never display anger or react emotionally to the parties' misconduct. The objectivity of the whole conference can be called into question if the investigator appears to disfavor either side.

A few seconds of silence can be a very effective means of controlling a hostile situation. The trick is not to respond emotionally oneself. If someone is shouting or behaving irrationally, address the behavior or conduct, not the substance of what they are saying.

What would you do if a respondent lawyer starts shouting that his client cannot be compelled to answer these questions; this is merely a fishing expedition; and the Commission is putting employers out of business with costly and needless investigations. How would you diffuse this situation?

To deflate the attorney's outbursts, try

- agree with him/her, wherever appropriate
- remind the attorney of his/her limited role
- use silence for a few seconds; then address the client directly
- acknowledge and express your understanding of his/her concerns

The investigator should not take the attorney's outbursts personally. It is a common tactic for a lawyer to express indignation, scorn, or disbelief, sometimes in very strong terms, in representing the client. However, the investigator should not allow the attorney to indulge in such tactics.

The lawyer may also attempt to answer questions addressed to his client. The investigator should not allow this, unless the lawyer was actually a witness to the matter under discussion. Of course, the parties may consult with their lawyer before answering any question.

A charging party may also be difficult. This is understandable, since the charging party may feel victimized, and has a personal stake in the process and the outcome. Nevertheless, outbursts do not enhance the case. The investigator

may need to recess and explain the consequences of his/her behavior to the charging party.

In most cases, an attorney representing a charging party will not have direct knowledge of the facts and circumstances surrounding the claim. Therefore, the attorney is unable to provide evidence relevant to the claim. The attorney may not speak for the charging party when the Investigator is seeking evidence relevant to the charge. However, the attorney may consult with the charging party and may provide advice and assistance in the investigative process.

Drawing Inferences from Participants' Behavior or Conduct

Participants' behavior at a fact finding conference may sometimes offer clues as to the source and nature of the dispute. The investigator who is sensitive and observant can focus the conference - and the investigation - by considering these clues. The investigator may not be able to draw conclusions based on behavior during a fact finding conference, but it may offer investigative avenues to pursue.

Can anyone give an example?

> Example: If one of the parties is extremely aggressive or prone to violent outbursts at the conference, should the investigator reasonably assume that this may not be the first time they have behaved this way?

If the behavior is relevant to the facts in dispute and to the finding of discrimination, the behavior at the conference is one more piece of evidence.

> Example: If a party is unable to communicate at the fact finding conference, should the investigator reasonably assume the individual may also have been unable to communicate on the job?

If ability to communicate is relevant to the case, then inability to communicate at the fact finding conference may be relevant to the investigation. In most cases, however, this inability to communicate will not, by itself, justify respondent's actions.

Contradictions in the Participants' Positions

As with any investigative technique, the investigator must resolve contradictions between or within statements, and conflicts between actions and policy at the fact finding conference.

Many contradictions may emerge at a conference, but the investigator must focus only on those that are relevant to a finding. It is tempting to try to pin down a respondent, for example, whose statements are in conflict with the documents presented. The question however, is whether this contradiction sheds any light on the case. If a person makes a mistake, or even lies, it will influence a credibility assessment. But, the primary consideration is whether the discrepancy is relevant to a finding of discrimination.

Concluding the Conference

The conference is over when the investigator believes s/he has all the information s/he needs from the people present. It is always wise to ask each side whether they have anything further to say, or whether they have any unanswered questions. The investigator should not allow the parties to reopen the substantive issues of the case, or permit speeches or self-serving summaries. This is an opportunity for the investigator to reinforce the feeling on each side that they were fully heard.

Inform the parties of any additional actions required of them to complete the case. If, during the conference, the investigator requested further documentation from either side, s/he should clearly re-state not only what it is but who will prepare and forward it, and the due date.

At this time, the investigator should determine whether to recess for settlement discussions. If appropriate, the investigator may ask the charging party to wait outside the conference room and approach the respondent on settlement.

If the investigation is complete, and a settlement has not been reached, the investigator should conduct a Determination Interview with the appropriate party.

The Conference Notes and Write Up

Fact finding conference notes are not stenographic; they are informational. The investigator may want to bring a laptop to the conference to facilitate note-taking. However, handwritten notes are fine, and should be legible.

In general, the notes should be complete. This record will be consulted in making a determination and may ultimately be obtained by lawyers for both sides, if litigation is contemplated.

It is important to record the conclusion of the conference, so that there is no dispute as to who was told what about the submission of further documents and the next stage in the process.

The Role and Responsibility of the Investigator

The investigator must be alert, responsive, and persistent in pursuing only the relevant facts, which requires a cool head and a clear mind at all times. The dynamics of a fact finding conference are unpredictable. The prime requisite is to be in control at all times.

Think of the conference as a condensed version of multiple on site visits. The investigator's role is to collect information in the most expeditious manner. The investigator must be clear about the purpose of the conference to establish and maintain control. The participants are present essentially to answer the investigator's questions. They are not there to fight with each other, to make procedural maneuvers, or to impress their clients or colleagues.

Establishing Control

There are many techniques you may use to establish control during the investigative process, and thus during the fact finding conference. Here are a few of them:

- Identify yourself as a federal investigator and show your EEOC badge at the start of a meeting
- Posture, stance, handshake and other body language
- Take a break to gather your thoughts and/or to give the parties an emotional "time-out"
- Exhibit a professional, neutral demeanor
- Don't be afraid to make the tough decisions

The fact finding conference **Opening Statement** helps to establish control at the fact finding conference. Announce at the outset of the conference that:

- The investigator asks the parties questions; if a party has a question, s/he asks the investigator to pose it

- All answers should be directed to the investigator
- If anyone needs a recess, please ask the investigator
- The investigator may terminate the conference at any time for any reason (time, behavior, inquiry completed)

Maintaining Balance

The investigator must constantly be aware of the balance or imbalance within the conference room. In most instances, the respondent will have more representatives present at the conference, and may also have a lawyer. Generally, the charging party appears alone. Oftentimes, the investigator will need to ensure that the respondent is not threatening or intimidating the charging party. In many instances, this is the charging party's employer, who has authority over the charging party in the workplace. Even if the respondent makes no specific effort to assert such authority, the charging party may be submissive, intimidated, or reluctant to speak. The investigator may need to make a special effort to elicit information from the charging party allowing time for answers, without appearing to favor the charging party.

Interviewing Skills

General factual discussions – establishing the context of the dispute - help everyone to relax and get used to the conference situation, so they are usually covered first. Some stress may develop as the parties explain their positions and the investigator probes disputed and sensitive issues. Underlying attitudes or previously withheld information may come out under stress. The investigator should not steer away from difficult matters just because emotion is expressed. However, the investigator should never become emotionally involved.

Many investigators are apprehensive about the ability to get all the information, control the participants, and properly represent the Commission all at once. However, most investigators find that it comes out much better than they thought it would. For the beginner, it is helpful to remember that this is probably the participants' first conference too. They have no idea what is going to happen, and it is in their interest to cooperate fully with you. As a federal investigator, you are an authority figure to both sides and, unless you let them believe otherwise, you are trained and qualified to conduct the investigation.

END OF MODULE

Appendix

Charging Party Name
Charging Party Address

Respondent Name
Respondent Address Charge #

NOTICE OF FACT FINDING CONFERENCE

You are hereby requested to appear and participate in a Fact Finding Conference scheduled for [date] at [time] at [location].

This Fact Finding Conference is being held pursuant to Sections 1601.15 (c), 1620.19 and 1626.15(a) of the Commission's Regulations. The Conference is an investigative forum intended to define the issues, determine which elements of the charge are undisputed, clarify disputed issues, and gather evidence necessary to resolve the charge. The Commission investigator named below will control and direct the conference. Other Commission employees may assist or observe.

A Fact Finding Conference will ordinarily involve several steps. First, the charge may be summarized and the specific allegations discussed. The Investigator will then ask questions of the parties and any witnesses. The parties present should address all questions and statements to the investigator, and must not interrupt each other. If you have a particular question, you should ask the investigator to pose it. If the question is relevant, the question will be asked. If Respondent or Charging Party is accompanied by an attorney, the attorney may participate solely as an advisor to the client. The Charging Party or Respondent representative is required to answer questions directly rather than have the attorney speak on his or her behalf. Attorneys representing their clients are not permitted to cross examination any person present.

Either Charging Party or Respondent may suggest a recess to discuss settlement of the charge. The investigator may also suggest settlement discussions. Settlement may be discussed separately with each party. If settlement cannot be reached, the investigator may reconvene the conference. When all available information has been gathered, the investigator will explain in general terms the actions which may be required to complete the investigation.

The Conference will be conducted by the Commission representative named below. Because the Commission has found the direct participation of the parties to be crucial to the success of this process, you may neither send a substitute for yourself nor bring

persons not requested without permission from the Commission representative named below.

If you and/or your representative(s) need an accommodation, please notify the Commission investigator named below.

Notice of Non-Retaliation Requirements
Under Section 704(a) of Title VII, Section 4(d) of the ADEA, and Section 503(a) of the ADA, it is unlawful for an *employer* to discriminate against present or former employees or job applicants, for an *employment agency* to discriminate against anyone, or for a *union* to discriminate against its members or membership applicants, because they have opposed any practice made unlawful by the statutes, or because they have made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under the laws.

[If applicable, insert the following on Respondent's copy:]

Please bring the following persons with you to the Conference:

Please respond to the enclosed request for information by [date].

On Behalf of the Commission:

Investigator
Telephone number
E-mail (if desired)

FACT FINDING CONFERENCES
Model Checklist

Purpose: Informal investigative forum, not an adversarial proceeding. Intended to further define the issues, determine what is undisputed, clarify disputed issues and determine what other evidence is needed.

Process:

- Determine who will attend:

  ___CP
  ___CP witnesses
  ___named respondent official(s)
  ___other respondent witnesses
  ___advise witnesses that they will be interviewed one at a time

- Conduct any pre-conference interviews necessary to clarify evidence, reassure any witnesses who may be appearing.

- Prepare a list of the disputed/unresolved issues to be covered and questions in logical sequence to be posed to each attendee.

- Schedule the conference and coordinate logistics.

- At the conference:
  ___ Give an opening statement explaining the purpose of the conference.

  ___ Introduce yourself and the attendees.

  ___ Distribute the attendance sheet.

  ___ If a party has brought additional evidence to the conference, review and describe it briefly so the parties are aware of the type of evidence presented.

  ___ Administer the oath.

  ___ Explain that notes will be taken.

  ___ Attorneys for either party are limited to an advisory role and may not cross examine or testify for their clients.

___ Read the charge.

___ Allow ample time for the CP to explain and support each allegation and for the respondent to present and defend its actions.

___ Allow the parties time to rebut each other's statements.

___ Attempt to resolve any factual disputes as they arise and identify any relevant additional evidence that may be needed.

___ Conduct settlement discussions separately, as appropriate.

- Close the conference. Explain what additional actions may be taken to complete the investigation. Explain also that the notes of the fact finding conference will be included in the Investigative File.

Fact Finding Conference Opening Statement

This Fact Finding Conference is intended to define the issues, determine which elements of the charge are undisputed, clarify the issues in dispute, and gather evidence necessary to resolve the charge. I will control and direct the conference. Other Commission employees may assist or observe.

The Conference will ordinarily involve several steps. First, I will summarize the charge and discuss the specific allegations. Then, I will ask questions of the parties and any witnesses. The parties should address all questions and statements to me, and must not interrupt each other. If you have a particular question, you should ask me to pose it. If it is relevant, I will ask the question.

> [Read only if Respondent or Charging Party is accompanied by an attorney].
> The [Charging Party/Respondent] is represented by an attorney. The attorney may participate as an advisor to his/her client. The [Charging Party/Respondent] is required to answer questions directly rather than have the attorney speak on his or her behalf. Attorneys representing their clients are not permitted to cross examine any person present.

Either Charging Party or Respondent may suggest a recess to discuss settlement of the charge. I may also suggest settlement discussions. Settlement discussions are held separately with each party. If it becomes apparent to me that settlement cannot be reached, I may reconvene the conference.

When all available information has been gathered, I will end the conference and explain in general terms any further actions that may be required to complete the investigation.

I am requesting that all parties place their cell phones on vibrate.

No recording devices are allowed. I will be taking notes during the conference. These are not verbatim notes and no transcript will be made. However, the notes may be used in making a determination on the merits of the charge.

Non-Retaliation: It is unlawful for an employer to discriminate against a present or former employee or job applicant because they have opposed any practice made unlawful by the statutes, or because they have made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under the laws.

Case Study

Arlene Chung

vs

Laverne County Medical Center

723-2017-04152

OUTLINE

Scenario: Case Study
Arlene Chung v Laverne County Medical Centers

Time: 3 hours

Objectives:

- Analyzing and investigating an EPA case including developing Investigative Plans and Requests for Information
- Analyzing and investigating a concurrent Title VII wage claim
- Collaborating with the U.S. Department of Justice on a possible DOJ litigation cases
- Collaborating with the DOL's Office of Federal Contracts and Compliance Programs on cases involving federal contractors
- Working with ORIP
- Good legal/enforcement interaction

CASE STUDY

Arlene Chung v Laverne County Medical Centers
EEOC CHARGE NO: 723-2017-04152

Purpose and Objectives

So far in this training we have worked on a case against a private employer. Now we are going to work on a case against a public employer, the Laverne County Medical Centers.

In this case study, we will highlight how to coordinate the investigation of an EEOC charge with, not only an EEOC trial attorney, but with a Department of Justice trial attorney and the Department of Labor's Office of Federal Contracts and Compliance Programs (OFCCP).

After reviewing the charge and intake notes, we will discuss developing an investigative plan for a public employer EPA and Title VII wage case. We will look at a First-Step RFI, draft a RFI, and prepare for conducting an on-site investigation. (See Section 3 of this Manual for more information about the First-Step RFI, RFI and on-site.)

EXERCISE: REVIEW OF INTAKE CHARGE AND NOTES

You are assigned the Arlene Chung v Laverne County to investigate. Please pull out the Arlene Chung charge and the intake notes and take a few moments to read it.

Intake Notes

Arlene Chung v Laverne County Medical Centers
EEOC Charge No: 723-2017-04152

I was hired in February of 2014 as a Pharmacist earning $72,000 per year. On December 5, 2016, I began my maternity leave, returning on March 31, 2017. I was denied my annual wage increase in February of 2017, which was due while I was out on maternity leave. Generally, employees receive their annual wage increase on their anniversary date. Although I have been back at work for almost four months since returning from maternity leave, I have not received my wage increase.

I don't know what my employer will say is the reason for not giving me my raise. My employer may claim that I did not get my increase because I was on maternity leave for four months and did not complete a year of actual work since my last increase. However, I have worked an additional four months since returning from maternity leave to complete my full year. I believe I should get my raise and I don't think my employer should hold my maternity leave against me. That seems wrong to me.

When I didn't get my raise, I started asking some of my male colleagues if they got their raise. I thought maybe no one got their raises because of budget issues. But I was wrong. I only asked male Pharmacists because I am the only female Pharmacist at this location. There are other female Pharmacists in other locations. My male colleagues were initially reluctant to discuss their pay with me for fear they may violate one of the company's rules, which is not to discuss salary information among employees. However, I kept asking them and finally a couple of them did speak with me. The two male Pharmacists who agreed to speak with me, both said they were given their annual wage increases. They would not tell me exactly how much they received or what their actual salary increases have been throughout my employment. They only told me their salary percentage increase for this year, not the actual dollar figure. I also asked them about last year and their percentage was higher than the salary percentage I received last year.

Page 2 of 2 pages
Arlene Chung
Intake Notes

Because I was so upset, I reached out to three of my female colleagues that work at other locations and found that they think they received lesser salary upgrades than the male colleagues just like me. Although, I am not sure how they would know with the company's rule against sharing pay information. I can provide you their names once I get their approval to do so because I am afraid of retaliation for them.

I also think it is unfair for me not to get my salary increase just because I was on maternity leave. I do not believe my employer can say I did not get it because of my performance, because throughout my employment I have received high performance evaluations.

I think that I was denied a salary increase because I am a female and because I took maternity leave. This was my first time being on maternity leave so I don't know much about how salary upgrades and benefits are affected by maternity leave.

During the three years that I have worked for the company, I am the only Pharmacists to take maternity leave during this time. I am not sure how other female Pharmacist have been treated before I was hired or how other female employees, who are not Pharmacists, are treated with respect to maternity leave and how pay raises affected them.

ARLENE CHUNG

V

LAVERNE COUNTY MEDICAL CENTERS

EEOC Form 5

Charge of Discrimination

EEOC Form 5 (5/01)

CHARGE OF DISCRIMINATION

This form is affected by the Privacy Act of 1974. See enclosed Privacy Act Statement and other information before completing this form.

Charge Presented To: Agency(ies) Charge No(s):

- [ ] FEPA
- [X] EEOC — 723-2017-04152

and EEOC

State or local Agency, if any

Name (indicate Mr., Ms., Mrs.)	Home Phone (Incl. Area Code)	Date of Birth
Ms. Arlene Chung	**(586) 771-7771**	**1964**

Street Address / City, State and ZIP Code

40315 S. Longview Court #103, Grand Township, DI 48000

Named is the Employer, Labor Organization, Employment Agency, Apprenticeship Committee, or State or Local Government Agency That I Believe Discriminated Against Me or Others. (*If more than two, list under PARTICULARS below.*)

Name	No. Employees, Members	Phone No. (Include Area Code)
Laverne County Medical Centers	**2600**	**586-999-9999**

Street Address / City, State and ZIP Code

25079 Brand Avenue, Reeseville, DI 48060

Name	No. Employees, Members	Phone No. (Include Area Code)

Street Address / City, State and ZIP Code

DISCRIMINATION BASED ON (*Check appropriate box(es)*)

- [ ] RACE
- [ ] COLOR
- [X] SEX
- [ ] RELIGION
- [ ] NATIONAL ORIGIN
- [ ] RETALIATION
- [ ] AGE
- [ ] DISABILITY
- [X] OTHER (*Specify below/EPA.*)

DATE(S) DISCRIMINATION TOOK PLACE

Earliest	Latest
02/1/2015	**06/29/2017**

- [X] CONTINUING ACTION

THE PARTICULARS ARE (*If additional paper is needed, attach extra sheet(s)*):

I was hired in February of 2014 as a Pharmacist. On December 5, 2016, I began my maternity leave, returning on March 31, 2017. I was denied my annual wage increase in February of 2017, which was due while I was out on maternity leave. I have not been given the increase since my return from leave which is now overdue, even though I have worked an additional four months since returning from maternity leave. As far as I know, my Male coworkers here at this location were given their annual wage increases. Although I have received high performance evaluations since I began working as Pharmacist, I received a lesser salary increase than Male Pharmacists.

I believe I was denied a salary increase because of my sex, Female and my pregnancy-related leave in violation of the Title VII of the Civil Rights Act of 1964, as amended and the Equal Pay Act of 1963, as amended. I also believe that I and the other Female Pharmacists receive lesser salary increases because of our sex, Female, in violation of the Title VII of the Civil Rights Act of 1964, as amended and the Equal Pay Act of 1963, as amended.

I want this charge filed with both the EEOC and the State or local Agency, if any. I will advise the agencies if I change my address or phone number and I will cooperate fully with them in the processing of my charge in accordance with their procedures.

I declare under penalty of perjury that the above is true and correct.

6/29/2017 — *Date*

Arlene Chung — *Charging Party Signature*

NOTARY – *When necessary for State and Local Agency Requirements*

I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.
SIGNATURE OF COMPLAINANT

SUBSCRIBED AND SWORN TO BEFORE ME THIS DATE
(*month, day, year*)

So, what is the harm alleged by Ms. Chung?

What is the basis?

What is the issue?

What are the statutes involved?

Why do we allege both statutes on wage claims?

What is/are the Theory(ies) of Discrimination?

What initial questions come to your mind as you read the charge and the intake notes?

What do you think may be the employer's defense and what is Charging Party's likely rebuttal?

What might be the employer's defense for the class claim?

Do we have any jurisdictional issues in this case study?

Is there a timeliness issue?

What is the Statute of Limitations (SOL) for an EPA claims?

What are the elements of proof for a Pregnancy Claim?

What are the Elements of Proof for an EPA claim?

What are the Elements of Proof for a Title VII wage claim?

Laverne County Medical Centers

"Providing cutting-edge health care services to Greater Laverne County"
25079 Brand Avenue • Reeseville, DI 48066
Phone: (586) 999-9999 • Fax: (586) 888-8888 • www.lavernecountymc.org

July 16, 2017

William B. Fair, Investigator
U.S. Equal Employment Opportunity Commission
100 W. Green Eggs Road
Whoville, DI 43748

Re: Arlene Chung v Laverne County Medical Centers
EEOC Charge No. 723-2017-04152

Dear Mr. Fair:

This is in response to the charge of discrimination filed by Ms. Arlene Chung against Laverne County Medical Centers, EEOC Charge No. 723-2017-04152, with the Unites States Equal Employment Opportunity Commission (EEOC) on June 29, 2017.

The Laverne County Medical Centers appreciates the opportunity to respond to the claims of discrimination filed by Ms. Chung. Please consider this Laverne County Medical Centers' Position Statement and direct all future inquiries to me at the address referenced herein.

Laverne County Medical Centers Inc. is providing this information to you for purposes of this investigation. Laverne County Medical Centers reserves the right to assert additional defenses and to amend or supplement the information provided in this response when Ms. Arlene Chung's claims are clarified. Laverne County Medical Centers also declares that the information attached is confidential, provided by Laverne County Medical Centers in an effort to be responsive to the allegations made in the charge of discrimination. Laverne County Medical Centers, respectfully requests that this information not be disclosed to Ms. Chung, her representative, or any other parties.

Page 2
EEOC Response
Arlene Chung

With respect to the issues at hand, Laverne County Medical Centers categorically denies the claims made by Ms. Chung. It is our belief that after you review the company's response to Ms. Chung's claims, you will agree that her claims are frivolous and completely false. It is our expectation that you will see this charge, as we do, as an effort to extort money from a public institution during a time when state and local municipalities are struggling to provide their citizens with much-needed services and will immediately dismiss it.

The Laverne County Medical Centers consists of five regional hospitals in the greater Laverne County area, which through its 2,600 employees provides healthcare services to a population of over 4 million people. Laverne County Medical Centers is also a direct contractor for the federal government's Department of Veterans' Affairs providing medical services to Laverne County's American veterans since there is no Veterans Affairs hospital in Laverne County.

Ms. Chung was hired on February 16, 2014, as a Pharmacist Class I and is one of 22 Pharmacists employed at the five regional hospitals. In February 2015 and again in February 2016, Ms. Chung received salary upgrades, in accordance with the Laverne County's Merit Compensation Policies. Please understand that the salary upgrades are not automatic but rather, are awarded based on successful performance on the job and the meeting of very specific criteria. Ms. Chung met the criteria for the 2015 and 2016 upgrades but did not in 2017. One very important condition for the salary upgrade missed by Ms. Chung is completion of the annual Continuing Education requirement for Pharmacists. This is an annual requirement which Ms. Chung knew of and failed to complete. It is interesting that Ms. Chung makes no mention of this requirement in her charge. Once Ms. Chung completes this requirement, we will review her salary upgrade package. With respect to her claim that she received lesser salary upgrades than her male counterparts, we do not know where she gets this preposterous claim. First, we consider salary information to be highly confidential and a violation of State Privacy laws for employees to have salary information of other employees. Second, to maintain a harmonious work environment, free of jealousies and conflict, it is county policy for employees not discuss their salaries with each other.

Page 3
Chung Response

In closing, let me assure you that the Laverne County Medical Centers did not discriminate against Ms. Chung because of her gender. In fact, the Laverne County Medical Centers has a Zero Tolerance policy that prohibits discrimination based on race, sex, religion, color, national origin, age, or disability with respect to hiring, training, promotion, and other terms and conditions of employment. For these reasons, we believe that Ms. Chung's charge is completely devoid of merit and should be promptly dismissed.

Please contact me if you need any further information.

Sincerely,

/s/ Stacy Smiling

Stacy Smiling
Human Resources Manager

EXERCISE: REVIEW OF POSITION STATEMENT

What did we learn from the Respondent's position statement?

Based on your review of the Position Statement, what are respondent's articulated legitimate non-discriminatory reasons for its actions?

Does the Respondent's assertion that Laverne County is a federal contractor give you some other avenues for evidence gathering?

What about the fact that this is a public employer and we are raising Title VII claims, does this raise a red flag for you?

INVESTIGATIVE PLAN AND REQUEST FOR INFORMATION

EXERCISE: DRAFTING OF INVESTIGATIVE PLAN

This is a template that can be used for drafting Investigative Plans. Your offices may have another format they would prefer you to use, however, for purposes of this exercise please follow the template for our discussion. With a little editing, this Investigative Plan template can easily be used as an Investigative Memorandum once the investigation is completed.

Note: The following Request for Approval of Investigative Plan document, may be required for some cases in certain offices. In the Appendix of Section 3 of this Manual, two other sample IP documents are provided. Please follow the protocol for your office. However, for training purposes, you may use the following document or either of the two provided in Section 3.

INVESTIGATIVE PLAN

TO: **Supervisor**

FROM: **Investigator**

SUBJECT: **Request for Approval of Investigative Plan**
Charge No.

In accordance with Section 22 of the Compliance Manual, this Investigative Plan is submitted for your review and approval.

CHARGING PARTY:

RESPONDENT:

BASIS (ES)	ISSUES

DATE OF VIOLATION (s):

FILING DATE:
STATUE(S) OF CHARGE FILED:
NUMBER OF EMPLOYEES:

At Charging Party's location:
Companywide:

BACKGROUND INFORMATION:

(Description of the Respondent)

CHARGING PARTY'S POSITION:

(Summary of allegations as stated in charge.)

RESPONDENT'S POSITION:

(Brief summary of response to the allegations of the charge.)

SETTLEMENT INFORMATION:

THEORY OF DISCRIMINATION (s):

CLASS INVOLVED:

OTHER ACTIVE CHARGES:

ELEMENTS OF PROOF

For each issue lay out the elements of proof. For each element address what evidence we have and what evidence is needed to determine if the element is met or not met.

What we have:

What is needed?

How are we going to get it?

.

METHODOLOGY:

(Discuss how the required evidence will be obtained.)

INDIVIDUALS TO INTERVIEW ON-SITE:

INDIVIDUALS TO INTERVIEW OFFSITE:

EVIDENCE TO OBTAIN IN RFI:

EVIDENCE TO OBTAIN AT ON-SITE:

SUPERVISOR'S APPROVAL:

Let's start planning our investigation. First look at the Title VII claims. Charging Party believes she did not receive a salary upgrade because of her sex and her pregnancy-related leave. What do we need to know?

Besides the information listed above for the Title VII claim, what additional information do we need to address the EPA claim?

In developing our investigative plan, let's think about whether we should we consult or coordinate with anyone? ORIP? Legal? EEOC expert on pay cases?

Disparate treatment can be proven by examining comparative evidence and statistical evidence. What follow up would we need?

As the Investigator, what do you do next?

EXERCISE: DEVELOPING THE REQUEST FOR INFORMATION

What additional evidence do we need from the Respondent? What evidence would you request in an RFI? Why?

INVESTIGATIVE TOOLS

After the RFI, what investigative tool should we use next to get all the information we need in this case?

Who would you interview at the on-site?

RECAP

As we've discussed throughout this training, much of what we do on our cases, as Investigators, is done in stages. We must be able to keep several investigations going forward, simultaneously. Even though we may be really excited by a particular issue or a particular charge, we must use a balanced approach. Good case management techniques dictate that we move on to another project while we wait for information to assess and analyze in another case file.

Good work everyone. We have made great progress with our Laverne County Medical Centers case today.

We reviewed the Form 5 Intake Charge and Intake notes associated with that filed by Charging Party Arlene Chung against the Laverne County Medical Centers. We decided that the Title VII and EPA wage individual and claims needed additional investigation.

We reviewed the Respondent's Position Statement and identified specific defenses to test and follow up on.

We discussed our overall investigative strategy and drafted an Investigative Plan of action.

We also discussed a First-Step RFI that will allow us the opportunity to see whether this small class can be expanded to include a larger group of class members.

We also prepared a RFI that will allow us to further test Respondent's asserted defenses.

Finally, we began to think about what we would want to examine, who we would need to interview at on-site at Laverne County Medical Centre and offsite.

Arlene Chung Case Study Materials

1. Intake Notes
2. Charge of Discrimination
3. Respondent's Position Statement
4. Investigative Plan

ARLENE CHUNG

V

LAVERNE COUNTY MEDICAL CENTERS

Intake Interview Notes

Intake Notes

Arlene Chung v Laverne County Medical Centers
EEOC Charge No: 723-2017-04152

I was hired in February of 2014 as a Pharmacist earning $72,000 per year. On December 5, 2016, I began my maternity leave, returning on March 31, 2017. I was denied my annual wage increase in February of 2017, which was due while I was out on maternity leave. Generally, employees receive their annual wage increase on their anniversary date. Although I have been back at work for almost four months since returning from maternity leave, I have not received my wage increase.

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When I didn't get my raise, I started asking some of my male colleagues if they got their raise. I thought maybe no one got their raises because of budget issues. But I was wrong. I only asked male Pharmacists because I am the only female Pharmacist at this location. There are other female Pharmacists in other locations. My male colleagues were initially reluctant to discuss their pay with me for fear they may violate one of the company's rules, which is not to discuss salary information among employees. However, I kept asking them and finally a couple of them did speak with me. The two male Pharmacists who agreed to speak with me, both said they were given their annual wage increases. They would not tell me exactly how much they received or what their actual salary increases have been throughout my employment. They only told me their salary percentage increase for this year, not the actual dollar figure. I also asked them about last year and their percentage was higher than the salary percentage I received last year.

Page 2 of 2 pages
Arlene Chung
Intake Notes

Because I was so upset, I reached out to three of my female colleagues that work at other locations and found that they think they received lesser salary upgrades than the male colleagues just like me. Although, I am not sure how they would know with the company's rule against sharing pay information. I can provide you their names once I get their approval to do so because I am afraid of retaliation for them.

I also think it is unfair for me not to get my salary increase just because I was on maternity leave. I do not believe my employer can say I did not get it because of my performance, because throughout my employment I have received high performance evaluations.

I think that I was denied a salary increase because I am a female and because I took maternity leave. This was my first time being on maternity leave so I don't know much about how salary upgrades and benefits are affected by maternity leave.

During the three years that I have worked for the company, I am the only Pharmacists to take maternity leave during this time. I am not sure how other female Pharmacist have been treated before I was hired or how other female employees, who are not Pharmacists, are treated with respect to maternity leave and how pay raises affected them.

ARLENE CHUNG

V

LAVERNE COUNTY MEDICAL CENTERS

EEOC Form 5

Charge of Discrimination

EEOC Form 5 (5/01)

CHARGE OF DISCRIMINATION

This form is affected by the Privacy Act of 1974. See enclosed Privacy Act Statement and other information before completing this form.

Charge Presented To: Agency(ies) Charge No(s):

- [ ] FEPA
- [X] EEOC — 723-2017-04152

and EEOC

State or local Agency, if any

Name (indicate Mr., Ms., Mrs.)	Home Phone (Incl. Area Code)	Date of Birth
Ms. Arlene Chung	**(586) 771-7771**	**1964**

Street Address / City, State and ZIP Code

40315 S. Longview Court #103, Grand Township, DI 48000

Named is the Employer, Labor Organization, Employment Agency, Apprenticeship Committee, or State or Local Government Agency That I Believe Discriminated Against Me or Others. (*If more than two, list under PARTICULARS below.*)

Name	No. Employees, Members	Phone No. (Include Area Code)
Laverne County Medical Centers	**2600**	**586-999-9999**

Street Address / City, State and ZIP Code

25079 Brand Avenue, Reeseville, DI 48060

Name	No. Employees, Members	Phone No. (Include Area Code)

Street Address / City, State and ZIP Code

DISCRIMINATION BASED ON (*Check appropriate box(es)*)

- [ ] RACE
- [ ] COLOR
- [X] SEX
- [ ] RELIGION
- [ ] NATIONAL ORIGIN
- [ ] RETALIATION
- [ ] AGE
- [ ] DISABILITY
- [X] OTHER (*Specify below/EPA.*)

DATE(S) DISCRIMINATION TOOK PLACE

Earliest	Latest
02/1/2015	**06/29/2017**

- [X] CONTINUING ACTION

THE PARTICULARS ARE (*If additional paper is needed, attach extra sheet(s)*):

I was hired in February of 2014 as a Pharmacist. On December 5, 2016, I began my maternity leave, returning on March 31, 2017. I was denied my annual wage increase in February of 2017, which was due while I was out on maternity leave. I have not been given the increase since my return from leave which is now overdue, even though I have worked an additional four months since returning from maternity leave. As far as I know, my Male coworkers here at this location were given their annual wage increases. Although I have received high performance evaluations since I began working as Pharmacist, I received a lesser salary increase than Male Pharmacists.

I believe I was denied a salary increase because of my sex, Female and my pregnancy-related leave in violation of the Title VII of the Civil Rights Act of 1964, as amended and the Equal Pay Act of 1963, as amended. I also believe that I and the other Female Pharmacists receive lesser salary increases because of our sex, Female, in violation of the Title VII of the Civil Rights Act of 1964, as amended and the Equal Pay Act of 1963, as amended.

I want this charge filed with both the EEOC and the State or local Agency, if any. I will advise the agencies if I change my address or phone number and I will cooperate fully with them in the processing of my charge in accordance with their procedures.

I declare under penalty of perjury that the above is true and correct.

6/29/2017 — *Date*

Arlene Chung — *Charging Party Signature*

NOTARY – *When necessary for State and Local Agency Requirements*

I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.
SIGNATURE OF COMPLAINANT

SUBSCRIBED AND SWORN TO BEFORE ME THIS DATE
(*month, day, year*)

Laverne County Medical Centers

"Providing cutting-edge health care services to Greater Laverne County"
25079 Brand Avenue • Reeseville, DI 48066
Phone: (586) 999-9999 • Fax: (586) 888-8888 • www.lavernecountymc.org

August 16, 2017

William B. Fair, Investigator
U.S. Equal Employment Opportunity Commission
100 W. Green Eggs Road
Whoville, DI 43748

Re: Arlene Chung v Laverne County Medical Centers
EEOC Charge No. 723-2017-04152

Dear Mr. Fair:

This is in response to the charge of discrimination filed by Ms. Arlene Chung against Laverne County Medical Centers, EEOC Charge No. 723-2017-04152, with the Unites States Equal Employment Opportunity Commission (EEOC) on July 31, 2017.

The Laverne County Medical Centers appreciates the opportunity to respond to the claims of discrimination filed by Ms. Chung. Please consider this Laverne County Medical Centers' Position Statement and direct all future inquiries to me at the address referenced herein.

Laverne County Medical Centers Inc. is providing this information to you for purposes of this investigation. Laverne County Medical Centers reserves the right to assert additional defenses and to amend or supplement the information provided in this response when Ms. Arlene Chung's claims are clarified. Laverne County Medical Centers also declares that the information attached is confidential, provided by Laverne County Medical Centers in an effort to be responsive to the allegations made in the charge of discrimination. Laverne County Medical Centers, respectfully requests that this information not be disclosed to Ms. Chung, her representative, or any other parties.

Page 2
EEOC Response
Arlene Chung

With respect to the issues at hand, Laverne County Medical Centers categorically denies the claims made by Ms. Chung. It is our belief that after you review the company's response to Ms. Chung's claims, you will agree that her claims are frivolous and completely false. It is our expectation that you will see this charge, as we do, as an effort to extort money from a public institution during a time when state and local municipalities are struggling to provide their citizens with much-needed services and will immediately dismiss it.

The Laverne County Medical Centers consists of five regional hospitals in the greater Laverne County area, which through its 2,600 employees provides healthcare services to a population of over 4 million people. Laverne County Medical Centers is also a direct contractor for the federal government's Department of Veterans' Affairs providing medical services to Laverne County's American veterans since there is no Veterans Affairs hospital in Laverne County.

Ms. Chung was hired on February 16, 2014, as a Pharmacist Class I and is one of 22 Pharmacists employed at the five regional hospitals. In February 2015 and again in February 2016, Ms. Chung received salary upgrades, in accordance with the Laverne County's Merit Compensation Policies. Please understand that the salary upgrades are not automatic but rather, are awarded based on successful performance on the job and the meeting of very specific criteria. Ms. Chung met the criteria for the 2015 and 2016 upgrades but did not in 2017. One very important condition for the salary upgrade missed by Ms. Chung is completion of the annual Continuing Education requirement for Pharmacists. This is an annual requirement which Ms. Chung knew of and failed to complete. It is interesting that Ms. Chung makes no mention of this requirement in her charge. Once Ms. Chung completes this requirement, we will review her salary upgrade package. With respect to her claim that she received lesser salary upgrades than her male counterparts, we do not know where she gets this preposterous claim. First, we consider salary information to be highly confidential and a violation of State Privacy laws for employees to have salary information of other employees. Second, to maintain a harmonious work environment, free of jealousies and conflict, it is county policy for employees not discuss their salaries with each other.

Page 3
Chung Response

In closing, let me assure you that the Laverne County Medical Centers did not discriminate against Ms. Chung because of her gender. In fact, the Laverne County Medical Centers has a Zero Tolerance policy that prohibits discrimination based on race, sex, religion, color, national origin, age, or disability with respect to hiring, training, promotion, and other terms and conditions of employment. For these reasons, we believe that Ms. Chung's charge is completely devoid of merit and should be promptly dismissed.

Please contact me if you need any further information.

Sincerely,

/s/ Stacy Smiling

Stacy Smiling
Human Resources Manager

INVESTIGATIVE PLAN

TO: **Supervisor**

FROM: **Investigator**

SUBJECT: **Request for Approval of Investigative Plan**
Charge No.

In accordance with Section 22 of the Compliance Manual, this Investigative Plan is submitted for your review and approval.

CHARGING PARTY:

RESPONDENT:

BASIS (ES)	**ISSUES**

DATE OF VIOLATION (s):

FILING DATE:
STATUE(S) OF CHARGE FILED:
NUMBER OF EMPLOYEES:

At Charging Party's location:
Companywide:

BACKGROUND INFORMATION:

(Description of the Respondent)

CHARGING PARTY'S POSITION:

(Summary of allegations as stated in charge.)

RESPONDENT'S POSITION:

(Brief summary of response to the allegations of the charge.)

SETTLEMENT INFORMATION:

THEORY OF DISCRIMINATION (s):

CLASS INVOLVED:

OTHER ACTIVE CHARGES:

ELEMENTS OF PROOF

For each issue lay out the elements of proof. For each element address what evidence we have and what evidence is needed to determine if the element is met or not met.

What we have:

What is needed?

How are we going to get it?

.

METHODOLOGY:

(Discuss how the required evidence will be obtained.)

INDIVIDUALS TO INTERVIEW ON-SITE:

INDIVIDUALS TO INTERVIEW OFFSITE:

EVIDENCE TO OBTAIN IN RFI:

EVIDENCE TO OBTAIN AT ON-SITE:

SUPERVISOR'S APPROVAL:

Case Study

Ralph Gordon v. Haverhill Mills
Charge No: 723-2017-01730

Tug Wolcott v. Haverhill Mills
Charge No: 723-2017-01731

Raynaud Williams v. Haverhill Mills
Charge No: 723-2017-01732

Jonas Sloan v. Haverhill Mills
Charge No: 723-2017-01733

Brian Burns v. Haverhill Mills
Charge No: 723-2017-02003

OUTLINE

Scenario: Case Study
Ralph Gordon, et.al v. Haverhill Mills.

Time: 3 – 3.5 hours

Objectives:

- Review legal standards – Age-based reduction in force
  Waivers and Releases – OWBPA
- Analyze R's position statement/defenses
- Develop Investigative Plan
- Draft an RFI for a small class case

CASE STUDY

GORDON, WOLCOTT, WILLIAMS, SLOAN & BURNS V. HAVERHILL MILLS
CHARGE NO(S): 723-2017-01730; 01731; 01732; 01733 & 02003

Purpose and Objectives

During the first week of the training we examined the statutes enforced by the EEOC. We also discussed the theories of discrimination and the Models/Elements of Proof. As we have discussed, you need to be able to identify the applicable theory of discrimination and know the appropriate elements of proof to assess the evidence, evaluate the R's defense and determine what investigative step to take next.

This morning we are going to look at the five Haverhill Mills charges. These five charging parties (CPs) have all alleged that they were let go by Haverhill Mills (R) as part of a reduction-in-force (RIF). All five assert that the lay off/discharge was due to their age.

We are going to consider the standards of proof for an age-based RIF case and apply these standards to the information in the case files. We will also talk about R's defenses in these types of cases.

What do you think is the most common R defense in a reduction in force case? What is the R going to tell you in their position statement (PS)?

Usually a R will state that the lay off or discharge was a direct result of poor economic conditions, which required streamlining the workforce. These layoffs may occur in a wide range of businesses and industries. As a result, the EEOC may experience an increase in the number of age-based layoff / discharge charges.

When analyzing R's defense that a reduction in force was caused by economic conditions, the Investigator should always request documentary proof of the economic factors that created the need for the downsizing. Further, we should seek information to establish why the CPs were selected for layoff / discharge or otherwise affected by the reduction in force.

Proof of Disparate Treatment

Before we begin the case study, let's review the basic *prima facie* elements of an ADEA disparate treatment case and some of the defenses applicable to it.

Disparate treatment cases under the ADEA, as under Title VII, involve intentional discrimination, which may be proven through direct or statistical evidence or which can be inferred (via circumstantial evidence) from differences in treatment.

What are the elements of a *prima facie* disparate treatment age case?

In its 1996 decision in O'Connor v. Consolidated Coin Caterers Corp., 116 S.Ct. 1307 (1996), (an ADEA discharge case), the Supreme Court made clear that, to make a *prima facie* case, an individual is not required to show that he/she was replaced by someone outside the protected age group (that is, someone under 40 years old).

This means that we may be able to show intent to discriminate even in cases where the charging party is 54, and the replacement is 44. In a RIF case, it is usually not necessary to prove that the charging party was replaced by a younger person.

What are some common defenses a R may raise in an ADEA case?

- **Legitimate, Nondiscriminatory Reason**

An employer may provide legitimate, non-discriminatory reasons for its actions. As in Title VII, this defense should be analyzed for pretext, i.e., whether it is a cover for age discrimination.

- **Reasonable Factor Other Than Age**

Under Section 4(f)(1) of the ADEA, an employer may justify a difference in treatment based on a "reasonable factor other than age" or "RFOA." This term is defined in EEOC's ADEA regulations, 29 C.F.R. Part 1625, which explain disparate impact claims under the ADEA and set forth the components of the RFOA defense. It is rare that a R will use this term in its position statement. **This defense applies only in a disparate impact case**. Note that while the disparate impact theory of discrimination applies under the ADEA, the scope of liability for the employer is narrower than under Title VII. Under the ADEA, if the employer shows it acted based on an RFOA, we do not consider whether or not a less discriminatory alternative is available.

- **Voluntary Early Retirement Incentive Plans**

During extensive workforce reductions, employers often seek alternatives to the involuntary discharge of employees. One of these alternatives may be to offer a

"voluntary early retirement incentive plan" (VERI), which provides extra benefits to older workers who leave the workforce voluntarily.

The ADEA deals with VERI plans in several ways:

- An employer may offer a VERI plan that is "consistent with the relevant purpose or purposes" of the ADEA.

- The ADEA permits two types of VERI plans that pay greater benefits to younger workers than to older workers: Social Security supplement plans and plans that subsidize early retirement by eliminating all or part of the actuarial reduction for early retirement.

- In addition, colleges and universities are permitted to offer age capped VERI plans to tenured faculty.

- **Waivers**

It has become common in recent years for employers, wary of the risks of litigation, to offer departing employees extra benefits or cash in exchange for the employees' agreeing to waive their rights under the ADEA, and, usually, all other laws.

As we previously discussed in the section on Jurisdiction/Threshold Issues, there may be other instances such as in termination situations, where employers may ask employees to sign a waiver giving up their rights to bring a lawsuit against the employer in exchange for severance pay or some other extra benefit.

While waivers are permitted under all the federal EEO statutes, only the ADEA, as amended by the OWBPA, includes specific requirements that a waiver must meet to be valid. Generally, a waiver that satisfies the OWBPA requirements also will be valid as to the waiver of Title VII and ADA rights. The waiver of rights under state and local laws might be governed by different standards.

A waiver may not prevent the individual from filing a charge with the EEOC under any of the EEO statutes. However, a valid waiver will generally prevent a charging party from obtaining any individual relief, such as back pay, reinstatement, or compensatory damages.

Frequently, in our investigation of reduction in force cases, the R will offer a signed waiver and release from a charging party as a defense and bar to the claim.

Section 7(f) of the ADEA, the Older Worker's Benefit Protect Act (OWBPA), sets forth the specific rules that must be followed by an employer in obtaining a valid waiver of rights from an employee. In addition, EEOC's regulations at 29 CFR 1625.22 address waivers. (See Appendix) Waivers are also covered under the EEOC's SEP priority—Denial of Access to the Legal System.

Valid OWBPA Waiver

To be valid under OWBPA, the waiver must be **"knowing and voluntary."** That is, the agreement must be:

1. Written in plain language calculated to be understood by the average person.
2. It must specifically refer to rights or claims arising under the ADEA.
3. It does not apply to rights or claims that may arise after the date of execution of the agreement.
4. The individual is provided with consideration in addition to anything of value to which the individual is already entitled.
5. The individual is advised in writing to consult with an attorney prior to executing the agreement.
6. The individual is given at least 21 days within which to consider the agreement, or 45 days if the waiver is offered to a group or class of employees.
7. The individual is given at least 7 days to revoke the agreement after executing it.

Further, section 7(f)(1)(H) of the ADEA imposes detailed requirements of disclosure regarding the positions involved and age of the employees who were retained and those that were offered a waiver if the waiver is part of an exit incentive or other employment termination program offered to a group or class of employees.

AGE CHARGES FILED AGAINST HAVERHILL MILLS

Recently five (5) individuals filed charges of discrimination against Haverhill Mills, a large breakfast food producing corporation. These charges were taken by another investigator in your office, but were recently assigned to you. You are in the process of reviewing these cases to determine your next investigative step.

EXERCISE: INTAKE NOTES

(These are the Intake Notes prepared by the Investigator who took the Haverhill charges).

I conducted an intake interview this morning with four CPs. They filed discharge/age charges against Haverhill Mills, a cereal and breakfast food company located in the western part of the state.

I checked the IMS and did not find any previous age based charges against this R. A fifth person (Brian Burns) was identified as an additional harmed party. He could not make the trip in, but he had the others submit an IQ printed out from the internet. Will follow up with Burns via the telephone and mail a charge to him.

The CPs alleged that they were unfairly discharged due to their age. They state that their former employer, Somerset Foods, was taken over by Haverhill Mills. After the takeover, many of their job duties changed and the atmosphere of the production plant grew tense. The new management made it clear that they were looking to clean house.

The CPs provided the following information about themselves at intake. They also characterized their work performance.

1. Ralph Gordon - Age 57
Production Supervisor
32 years experience
"Solid" performance record

2. Tug Wolcott - Age 53

Production Supervisor
30 years experience
"Up & down" performance record

3. Raynaud Williams - Age 54
Production Supervisor
20 years experience
"Good" performance record

4. Jonas Sloan - Age 60
Production Supervisor
35 years experience
"Good" performance record

5. Brian Burns - Age 44
Plant Manager
6 years experience
"Average" performance record

The CPs allege that the R selected them for discharge in an effort to eliminate the older workers and to bring in younger workers. None of the CPs who had been Production Supervisors could identify any newly hired Production Supervisor replacements.

Brian Burns, the former Plant Manager, acknowledged that he had been replaced by Lincoln Crawford, a 43-year-old. He did not know whether Crawford had worked for Haverhill Mills at some other facility, but he knew that Crawford had relocated from Colorado.

When asked whether any of the other Somerset Foods Production Supervisors had been retained by Haverhill after the reduction in force, the CPs stated that four had been retained. They are identified below along with a characterization of their performance:

1. Ryan McArthur - Age 45
Production Supervisor
15 years experience
"Good" performance record

2. Randy Ventura - Age 35
Production Supervisor
10 years experience
"Good" performance

3. Ed Killewald - Age 58
Production Supervisor
27 years experience
"Up & Down" performance

4. Al Cameron - Age 33
Production Supervisor
7 years experience
"Average" performance

After completing the interviews, I drafted the charges of discrimination alleging discriminatory discharge in a reduction-in-force, due to age, in violation of the ADEA.

What else would you have asked these CPs at intake?

Remember what we covered when discussing sound interview techniques? In this case, the intake investigator had four of the CPs present to answer all of the "who, what, where, when, how and why" questions. Yet, much of this is missing from the intake notes and the case file.

Also, there are several topics to pursue to assist us in determining whether there was intent to discriminate based on age. The topic areas and questions include:

The Takeover- Haverhill Mills Purchases Somerset Foods

- When did this happen?
- How were the CPs informed?
- In writing, if so, do the CP's have copies of the documents?
- Who informed them?
- What transpired?
- Who was the new management team?

Changed Duties - CPs Say Duties Changed

- How did their duties change?
- What did they do before?
- What did they do after?
- Who told them of the changed duties?
- Did they get training? What? By who?
- Were the changed duties documented?
- In what documents?
- Do they have a copy?

Atmosphere Grew Tense After the Takeover

- How?
- Describe the tense atmosphere
- Who made the atmosphere tense?
- Who else experienced this? (Names, ages, job titles)
- Who was treated better? (Names, ages job titles)

Cleaning House – CPs Believed R Would Do This

- What was said to make CP's believe this?
- Who said it?
- When? Witnesses?
- What happened after it was said?
- How close in time to their discharge?

What additional information do we need?

- Who were the decision makers?
- What changes were made in the facility?
- Was there really an economic setback? Are the CPs aware of it?
- How they were notified of the discharges?
- What were the criteria for discharge (if they know it)?
- What information do they have about any layoff/discharge policy or practice?
- What is the basis for their characterization of their performance?
- What is the basis for their characterization of the performance of those retained?
- Performance reviews? Policy/practice on this.
- Whether they heard or witnessed any age based comments or remarks?
- Why they believe that age was the reason for their discharge?

The CPs provided some very good leads at intake. But a more thorough intake interview and better intake notes would give us an opportunity to know much more about the evidentiary strength or weakness of these charges and allow us to make a more appropriate PCHP assessment. **Remember, the investigation begins at intake.**

Might it help to interview the CPs separately?

Investigative Plan (IP)

As you ask yourself the various questions we've just gone through above, you should start an Investigative Plan (IP). As you review materials in the Haverhill cases you should update your IP. By identifying the evidence and information that you have, you can determine what you need and how you are going to get it. You can also ensure that you are analyzing these cases in line with the Models of Proof and the appropriate Theory of Discrimination.

Class/Systemic Potential

Five CPs filed a discharge claim based on age against the same company. If you had conducted the intake interview, would you have asked questions to determine whether there were other potential harmed parties? Remember that there may be a larger class or systemic problem at the R as it relates to lay-offs/discharge based on age.

Potential Class Follow up Questions

Do we have enough information from the intake interview to establish a *prima facie* case of discharge based on age? If so, identify; if not, identify the missing information.

Would you ask the CPs whether they had received a severance package? Would you request a copy?

Would you ask the CPs whether they signed a waiver and release? Would you ask for a copy?

EXERCISE: RESPONDENT'S POSITION STATEMENT

Step 1: Review the following R's position statement (PS).

Patrick J. McJustice, Esq.
Attorney At Law

April 10

U.S. Equal Employment Opportunity Commission
Whoville District Office
Attn: EEOC Investigator
100 W. Butter Road
Whoville, DI 93748

RE: Charge No(s): 723-2017-01730; 01731; 01732; 01733; 02003
Ralph Gordon; Tug Wolcott; Raynaud Williams; Jonas Sloan and Brian Burns v. Haverhill Mills, Inc.

Dear Investigator:

Haverhill Mills, Inc. ("Haverhill") is in receipt of the above-referenced charges and is providing your agency with this response to the allegations contained therein. My firm has been retained to represent Haverhill in these proceedings. This document constitutes Haverhill's Position Statement. Please direct all future inquiries to me.

Haverhill is providing this information to the EEOC to be responsive to the allegations contained in the charges. Haverhill categorically denies the allegations of discrimination and is confident that the EEOC will promptly dismiss these charges after reviewing this Position Statement. Haverhill considers this information to be confidential in nature and declares that this information is not to be disclosed to the Charging Parties, their representatives, or any other parties. Haverhill reserves the right to assert additional defenses and to amend or supplement the information provided in this Position Statement. Haverhill is also willing to participate in the mediation of these charges to expedite the processing of this matter.

Haverhill is one of the nation's largest cereal and breakfast food companies. Haverhill has one location in this state and seven additional food processing facilities located throughout the Midwest. Haverhill employs 100 people in this state. Haverhill is renowned not only for their quality food products, but also for their philanthropic endeavors and community involvement. Haverhill received the 2015 Whoville Corporate Citizen of the Year Award for their charitable contributions to and corporate sponsorship of the Whoville Community

Foodbank.

Haverhill moved into the local market in late 2015 by purchasing the assets of Somerset Foods. This corporate merger and acquisition was completed in January 2016. With respect to the issues at hand, Haverhill embarked on a corporate restructuring and downsizing following the economic downturn in this industry in the December 2015. The decision to conduct a reduction in force was a purely economic decision, aimed at reducing production costs and improving profitability. Haverhill sent a letter to all the affected employees when it was determined that a reduction in force was necessary. This letter identified economics and the improved mechanization of the facility as the reasons for the downsizing.

To increase productivity and cut costs, Haverhill conducted an assessment of the management and production staff. Lay off and retention decisions were made by a corporate assessment team utilizing a cost/benefit analysis and a review of production, performance and training records. The corporate assessment team was comprised of Joseph Lucas, Vice President/ Corporate Mergers; Edgar Balfour, Vice President/Corporate Affairs; and James Mordano, Human Resource Administrator. The panel met with each member of the former Somerset management team to assess them pursuant to established criteria. The criteria used were evidence of adaptability to change and commitment to growth within the company. Age played absolutely no role in the reduction in force decision.

In closing, let me assure you that Haverhill Mills did not discriminate against the Charging Parties because of their age. Haverhill has a strict policy that prohibits discrimination on the basis of race, sex, national origin, age, or disability with respect to recruitment, hiring, training, promotion, and other terms and conditions of employment. Two of the Charging Parties, Tug Wolcott and Jonas Sloan accepted a severance package and signed a valid waiver and release. Brian Burns was replaced by a person who was only one year younger than him. Finally, Haverhill retained two of the former Somerset Production Supervisors who were in the protected age group: Edward Killewald, age 60 and Ryan McArthur, age 45. For these reasons, we believe that the charges are completely devoid of merit and should be dismissed. Please contact me if you need any further information.

Sincerely,

Patrick J. McJustice, Esq.

Step 2: On a flip chart, write down with your group, what you learned from the R's position statement?

Step 3: Update the Investigative Plan

The position statement is full of potential leads for this investigation. It identifies R's overall response to the charge and provides us with an opportunity to plan our investigative next step.

The information in the PS should be analyzed and incorporated into the IP. This will assist us in determining what we have, what we still need and help us determine which investigative tool to use to get it.

A PS in a disparate treatment case typically contains the R's "articulated legitimate non-discriminatory reasons" for its actions.

As an Investigator, we are continually assessing, analyzing, evaluating and reassessing evidence to determine which charges we need to investigate further and which charges we do not need to continue to investigate. Remember our earlier discussion on PCHP. We continually apply the principles of PCHP at each phase of an investigation. It is important to reassess charges under PCHP as new information is received in an investigation. Use the PCHP Reassessment Tool in IMS to document this action and any new recommendations you make about the disposition of the charge as a result of your reassessment.

REVIEW OF HAVERHILL MILLS POSITION STATEMENT

Based on your review of the PS, what are R's articulated legitimate non-discriminatory reasons for its actions?

Disparate treatment can be proven by examining comparative evidence and statistical evidence. What follow up would we need?

Given R's assertion that two of the CPs waived their rights to proceed, what should you do and why?

Suppose that the waiver and release meets all the statutory requirements of the OWBPA and two of the CPs accepted the severance and signed the waivers. Is the investigation now barred?

EXERCISE: PCHP ASSESSMENT

As of right now, the CPs have provided plausible and interesting facts to follow up on. R has also articulated several believable reasons for the RIF decision. But, there is no dispute that 2 people retained were in the protected age group. Does this make the case "no cause"?

As the Investigator, what do you do next?

Based on what we have examined so far, how would you assess these charges?

Production Supervisors

We currently know that R discharged four Production Supervisors in the protected age group (PAG) as part of its reduction in force.

The R retained two Production Supervisors who are in their 30s and two who are in the PAG. They did not replace the four discharged Production Supervisors, since this was a reduction in force.

The R further indicates that two of the Production Supervisors who were discharged accepted a severance package and signed a valid waiver and release.

The R has identified some questionable criteria that could be a cover up for age discrimination: "adaptability to change" and "commitment to

growth." These could be viewed as subtle indicators of age bias.

Based on what we have so far, under PCHP these cases have "A" case possibility. If we categorize the cases has As, they will get priority treatment over B cases, and given the potential class implications, the A assessment is more appropriate than a B assessment.

It is important to think through the sequence of your next investigative steps. Our mission is to stop and remedy employment discrimination, but we also must balance this with rationale decision making under PCHP. You are advised to make sure you and your supervisor agree on the assessment of your case.

Plant Manager

R discharged Plant Manager Brian Burns, age 44, along with the four Production Supervisors. Unlike the Production Supervisors, who were not replaced, Burns was replaced by Lincoln Crawford, age 43.

Based on this information, this charge appears to be a C. At this juncture, it does not appear that Burns was discharged due to his age. If only this single charge had been filed against Haverhill, you would conduct a Determination Interview with Burns and submit the case for dismissal.

Given that we have a set of charges against Haverhill alleging age discrimination, we can either separate this charge from the group and recommend closure or wait just a bit longer until we get some additional information on the other four charges. If this is a valid class case, it is possible that Burns was not really replaced by Lincoln Crawford (age 43). Investigation may show that most or all of Burn's duties were not reassigned to Crawford but to someone younger. You will need to follow the process used in your office to make this decision.

Case Strategy Discussion with Supervisor

After reviewing the Haverhill case files, you feel a bit uncertain about what to do next. To get "unstuck" you go to your Supervisor to discuss your assessment and to strategize on your next investigative steps.

You provide your Supervisor with an overview of what is in the case files, using the Briefing Technique mentioned on the Overview of the Charge Process section of this training. You tell your Supervisor what you were thinking of doing next.

Your Supervisor agrees with your recommendation that you contact the CPs to share the information contained in the position statement provided by the R. This will enable you to obtain "rebuttal" evidence and some leads that would help you to better understand this case. This additional information could also help you decide what information you need to request in your RFI.

The two of you also agree that it would be worth your while to prepare a RFI that can be sent, if you are not able to get in immediate contact with the CPs. That way you can have the R working on something, while you follow up on the details of the case. Also, your Supervisor suggests that you draft your RFI in a fashion that will allow you to easily convert it into a subpoena, should the R be uncooperative to your request.

Remember, the EEOC has the authority to subpoena documents, records, testimony and enter onto the premises. It may be helpful to cite the EEOC's legal authority to issue a subpoena in your RFI to a R. It may also be helpful to draft your RFI questions in a precise way that can be easily converted into a subpoena. This will save you valuable time, should you need to resort to the issuance of a subpoena.

Finally, your Supervisor recommends that you wait until you obtain verification of statements made by R in its position statement before closing the Burns charge.

EXERCISE: FOLLOW UP INTERVIEW WITH RALPH GORDON

To better understand the issues in this case and to get rebuttal to R's defenses, you call charging party Ralph Gordon to share the information contained in the position statement and to secure additional information.

Gordon is more than willing to come by and meet with you. He comes in the following morning and gives you this information.

Ralph Gordon Interview - <u>Background Information</u>

My name is Ralph Gordon. I am a 57-year-old male. I was employed by Somerset Foods, a cereal company, for 32 years prior to the takeover by Haverhill Mills.

When I started working for Somerset, I worked the vats in the "cooking and coating" room. We mixed the ingredients where the cereal sweeteners were applied. Of course, this was before a lot of the modern machinery was brought in, which has really streamlined cereal production.

From cooking and coating, I worked my way onto the production floor, working the packaging line. In 1986, I was promoted to Production Supervisor. I had taken business and management courses at the local community college and I had worked hard to earn this chance. Until the takeover by Haverhill, and aside from my annual vacations, I only missed 5 days in 32 years. My job at Somerset was very important to me, and I gave it my all.

Is this kind of background information from Gordon helpful in understanding the issues in this case? Why or why not?

Is this helpful rebuttal information? Why or why not?

Ralph Gordon Interview - <u>The Takeover</u>

In January, Haverhill bought out Somerset. All of us Somerset employees were real worried, because Haverhill was a big corporation and it was well known that they had closed plants when they took over Superior Foods in 2014. There was a big meeting at the plant in late January. Folks from Haverhill's corporate headquarters came out and told us all not to worry, that there was plenty of work and that we should just keep working hard. So that's what I did.

Is Gordon's description of the takeover events helpful in analyzing R's response? Why or why not?

Ralph Gordon Interview - <u>Instances of Alleged Age Discrimination</u>

In April, Joseph Lucas came in from Haverhill to oversee the operation. He was about 35 years old. He began as the Plant Manager, even though Brian Burns, age 44, was still there. As soon as Lucas arrived on the scene, I knew we were in for it. He started all of these special programs, silly things called UPLIFT and SPLASH. He called them training; I called them "rah-rah" sessions.

Lucas walked around the plant and watched all of us "old-timers" work. He was always talking about "energy" and "initiative" and being in the "forefront of a new era" and the health-conscious cereal it was necessary for us to make.

Lucas even introduced a company exercise program. We were all supposed to gather in the Supervisor's locker room for some "morning stretches and aerobics." We were encouraged to join the "Yoga Team" and asked to complete a Wellness Survey. I thought maybe he had eaten one too many granola bars.

Is this information evidence of intent to discriminate based on age? What follow up should be conducted?

Ralph Gordon Interview - <u>Corporate Team Assessments</u>

Over the summer, Lucas had all the employees assessed. We all had to fill out forms and go before a review panel comprised of Lucas, Edgar Balfour, and James Mordano. These guys are fancy suit-wearing "hot-shots." They don't know a thing about making corn sweetener. I'm certain that none of them are over 40.

The panel asked us all about our aspirations and hopes for the future.

They wanted to know whether we would be interested in seminar courses that would enhance our abilities to "accept and facilitate change" and internal training programs which would make us promotable.

I thought it was all a sham. They did not seem serious. They were using it as a cover to claim that they really wanted us, when it was clear they did not. All in all, I found the whole thing humiliating.

What additional information would you have asked Gordon about the assessments?

Ralph Gordon Interview - <u>Comparative Information</u>

To my knowledge, Haverhill didn't hire any Production Supervisors after they discharged the four of us.

Haverhill did keep Ryan McArthur as a Production Supervisor, but you know, he is a real up and comer and he did not really fit in with the rest of us. He may be 45, but he keeps himself in really good physical shape and he looks like he's 30. He hangs with the young ones too, goes to the bars with them, plays on the company softball team, stuff like that.

But I got to hand it to Ryan; he is a really good supervisor, "knows his oats from his rice and his corn," as we like to say on the cereal floor.

Ed Killewald, though, that's another story. Killewald is the other older Production Supervisor that Haverhill kept around. He's just there because his niece is married to Joseph Lucas. He isn't worth a hoot, never has been. But he's a likeable guy, the kind you automatically feel sorry for. I think that's what's kept him around all these years.

As for the Plant Manager, Brian Burns, I must say, he was on his way out before Haverhill even took over. Some of his budget fiascos for Somerset Foods are what led to our takeover by Haverhill to begin with. His replacement, I think his name was Crawford, worked for Haverhill in another state. I don't know where exactly.

How will the information provided by Gordon about McArthur and Killewald affect your analysis of R's position that comparative information defeats the CPs' claims?

Would you ask Gordon about the severance package? Would you ask Gordon whether he was offered one, what it said, whether he had a copy and why he did not sign it?

EXERCISE: DEVELOPING THE REQUEST FOR INFORMATION

What additional evidence do we need from the R? What evidence would you request in an RFI? Why?

Electronic Request for Information on the Potential Class

Given that CPs have alleged a possible class case, we need to follow up to see whether R acted beyond the Production Supervisor position. An easy way to get this information is to request the data in electronic format. This will allow us to ascertain whether we should expand this investigation even further.

This information will assist us in determining whether R engaged in a pattern and practice of age-based discharge. We can also review the materials upon receipt to see whether there is statistical evidence to support a claim of age discrimination.

Sample Electronic RFI Question

Submit an electronic database identifying all individuals employed by R at each of its facilities during the period of [**identify a reasonable timeframe, e.g., July 1, 2015**], to the present, and for each individual, provide:

a. employee identification number;
b. first name;
c. middle name;
d. last name;
e. date of birth;
f. facility name;
g. facility location;
h. date of hire;
i. position(s) held;

j. dates of each position held;
k. date of discharge, if applicable;
l. reason for discharge, if applicable;
m. last known home address;
n. last known telephone numbers;

Definition of Electronic Database

For purposes of this Request for Information, "electronic database" shall mean a native electronic file submitted on a compact disc (CD-ROM) that can be opened and sorted by Microsoft Excel (such as Microsoft Excel Files (".XLS") and comma delimited files (".CSV")) wherein the first row of the database contains the field or variable names of the requested information and each subsequent row of the database shall contain the requested information for each individual identified. Image files (such as PDF or TIF files) and printed copies of the database do not satisfy this request.

Investigation Tip: Remember to request that, if there are codes used (e.g. for location or reason for termination, etc.), R provide a key that defines each code used.

INVESTIGATIVE TOOLS

What investigative tool should we use next to get the information we need in this case?

Who would you interview at the on-site?

What would you want to obtain?

As we discussed, much of what we do on our cases, as Investigators, is done in stages. We must be able to keep a number of investigations going forward, simultaneously. Even though we may be really "into" or excited by a particular issue or charge, we have to make sure that we are using a balanced approach and moving on to another project while we wait for information to assess and analyze in another case file.

With the Haverhill files, we have made great progress today.

RECAP

We reviewed the five case files and decided that the age discharge for the Production Supervisors needed additional investigation.

We created/updated an Investigative Plan.

We reviewed the R's Position Statement and identified specific defenses to test and follow up on.

We shared the Position Statement with the charging party and sought the charging party's response, and evaluated any new information.

We reassessed the charge under PCHP and recorded that in IMS.

We met with our Supervisor and developed an investigative strategy for this small class of charges.

We conducted a follow up interview with Ralph Gordon, one of the discharged Production Supervisors and obtained solid rebuttal evidence – evidence of possible pretext on the part of R.

We also drafted an RFI that will allow us to further test R's asserted defenses.

We included an electronic data request that will allow us the opportunity to see whether this small class can be expanded to include a larger group of class members.

Finally, we began to think about what we would want to examine, who we would need to interview and what we would need to obtain when we conduct an onsite at Haverhill Mills.

Next, we will move on to another charge in our pending inventory.

APPENDIX

Patrick J. McJustice, Esq.
Attorney At Law

April 10

U.S. Equal Employment Opportunity Commission
Whoville District Office
Attn: EEOC Investigator
100 W. Butter Road
Whoville, DI 93748

RE: Charge No(s): 723-2015-01730; 01731; 01732; 01733; 02003
Ralph Gordon; Tug Wolcott; Raynaud Williams; Jonas Sloan and Brian Burns v. Haverhill Mills, Inc.

Dear Investigator:

Haverhill Mills, Inc. ("Haverhill") is in receipt of the above-referenced charges and is providing your agency with this response to the allegations contained therein. My firm has been retained to represent Haverhill in these proceedings. This document constitutes Haverhill's Position Statement. Please direct all future inquiries to me.

Haverhill is providing this information to the EEOC in an effort to be responsive to the allegations contained in the charges. Haverhill categorically denies the allegations of discrimination and is confident that the EEOC will promptly dismiss these charges after reviewing this Position Statement. Haverhill considers this information to be confidential in nature and declares that this information is not to be disclosed to the charging parties, their representatives, or any other parties. Haverhill reserves the right to assert additional defenses and to amend or supplement the information provided in this Position Statement. Haverhill is also willing to participate in the mediation of these charges in an effort to expedite the processing of this matter.

Haverhill is one of the nation's largest cereal and breakfast food companies. Haverhill has one location in this state and seven additional food processing facilities located throughout the Midwest. Haverhill employs 100 people in this state. Haverhill is renowned not only for their quality food products, but also for their philanthropic endeavors and community involvement. Haverhill received the 2012 Whoville Corporate Citizen of the Year Award for their charitable contributions to and corporate sponsorship of the Whoville Community Foodbank.

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Haverhill Mills, Inc.

Haverhill moved into the local market in late 2014 by purchasing the assets of Somerset Foods. This corporate merger and acquisition was completed in January 2015. With respect to the issues at hand, Haverhill embarked on a corporate restructuring and downsizing following the economic downturn in this industry in the December 2014. The decision to conduct a reduction in force was a purely economic decision, aimed at reducing production costs and improving profitability. Haverhill sent a letter to all of the affected employees when it was determined that a reduction in force was necessary. This letter identified economics and the improved mechanization of the facility as the reasons for the downsizing.

In an effort to increase productivity and cut costs, Haverhill conducted an assessment of the management and production staff. Lay off and retention decisions were made by a corporate assessment team utilizing a cost/benefit analysis and a review of production, performance and training records. The corporate assessment team was comprised of Joseph Lucas, Vice President/ Corporate Mergers; Edgar Balfour, Vice President/Corporate Affairs; and James Mordano, Human Resource Administrator. The panel met with each member of the former Somerset management team to assess them pursuant to established criteria. The criteria used were evidence of adaptability to change and commitment to growth within the company. Age played absolutely no role in the reduction in force decision.

In closing, let me assure you that Haverhill Mills did not discriminate against the charging parties because of their age. Haverhill has a strict policy that prohibits discrimination on the basis of race, sex, national origin, age, or disability with respect to recruitment, hiring, training, promotion,

and other terms and conditions of employment. Two of the charging

parties, Tug Wolcott and Jonas Sloan accepted a severance package and signed a valid waiver and release. Brian Burns was replaced by a person who was only one year younger than him. Finally, Haverhill retained two of the former Somerset Production Supervisors who were in the protected age group: Edward Killewald, age 60 and Ryan McArthur, age 45. For these reasons, we believe that the charges are completely devoid of merit and should be dismissed. Please contact me if you need any further information.

Sincerely,

Patrick J. McJustice, Esq.

MODEL LETTER FOR TRANSMITTING POSITION STATEMENTS

[Date]

[Charging Party]
[Address]

[add if applicable]: **By E-mail**

Re: Charge No. [number]

Dear [Charging Party Name]:

Enclosed with this letter is a copy of the Respondent's Position Statement *[add if applicable]:* with non-confidential attachments. **By accepting these documents, you agree that you will only share the contents with persons in a privileged relationship to you, such as a spouse, clergy, or legal, medical or financial advisor.**

This is your opportunity to provide additional information you feel is relevant to support your charge. If you would like to respond to what the Respondent says in its Position Statement, please do so no later than **20 calendar days from the date of this letter.**

There is no specific format required for your response. You may respond in writing or by phone. If you respond in writing, be sure to include your charge number on your correspondence. If you disagree with any of the information the Respondent has submitted, please point out specifically what you believe is incorrect and explain what you believe to have happened. Also, please give us any additional evidence or information that you have not already provided that you believe supports your case. For example, if applicable, identify any additional witnesses, their contact information, and a brief summary of what you think they will say.

Any information you provide will be taken into consideration during the investigation of your charge. We encourage you to contact us promptly with your response. Our address is listed in the letterhead and my email address is _____. My direct telephone number is _____ and I am available [*insert days and times*].

Thank you for your cooperation.

Sincerely,

Investigator

Title 29: Labor
PART 1625—AGE DISCRIMINATION IN EMPLOYMENT ACT
Subpart B—Substantive Regulations

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§1625.22 Waivers of rights and claims under the ADEA.

(a) *Introduction.* (1) Congress amended the ADEA in 1990 to clarify the prohibitions against discrimination on the basis of age. In Title II of OWBPA, Congress addressed waivers of rights and claims under the ADEA, amending section 7 of the ADEA by adding a new subsection (f).

(2) Section 7(f)(1) of the ADEA expressly provides that waivers may be valid and enforceable under the ADEA only if the waiver is "knowing and voluntary". Sections 7(f)(1) and 7(f)(2) of the ADEA set out the minimum requirements for determining whether a waiver is knowing and voluntary.

(3) Other facts and circumstances may bear on the question of whether the waiver is knowing and voluntary, as, for example, if there is a material mistake, omission, or misstatement in the information furnished by the employer to an employee in connection with the waiver.

(4) The rules in this section apply to all waivers of ADEA rights and claims, regardless of whether the employee is employed in the private or public sector, including employment by the United States Government.

(b) *Wording of Waiver Agreements.* (1) Section 7(f)(1)(A) of the ADEA provides, as part of the minimum requirements for a knowing and voluntary waiver, that:

> The waiver is part of an agreement between the individual and the employer that is written in a manner calculated to be understood by such individual, or by the average individual eligible to participate.

(2) The entire waiver agreement must be in writing.

(3) Waiver agreements must be drafted in plain language geared to the level of understanding of the individual party to the agreement or individuals eligible to participate. Employers should take into account such factors as the level of comprehension and education of typical participants. Consideration of these factors usually will require the limitation or elimination of technical jargon and of long, complex sentences.

(4) The waiver agreement must not have the effect of misleading, misinforming, or failing to inform participants and affected individuals. Any advantages or disadvantages described shall be presented without either exaggerating the benefits or minimizing the limitations.

(5) Section 7(f)(1)(H) of the ADEA, relating to exit incentive or other employment termination programs offered to a group or class of employees, also contains a requirement that information be conveyed "in writing in a manner calculated to be understood by the average participant." The same standards applicable to the similar language in section 7(f)(1)(A) of the ADEA apply here as

well.

(6) Section 7(f)(1)(B) of the ADEA provides, as part of the minimum requirements for a knowing and voluntary waiver, that "the waiver specifically refers to rights or claims under this Act." Pursuant to this subsection, the waiver agreement must refer to the Age Discrimination in Employment Act (ADEA) by name in connection with the waiver.

(7) Section 7(f)(1)(E) of the ADEA requires that an individual must be "advised in writing to consult with an attorney prior to executing the agreement."

(c) *Waiver of future rights.* (1) Section 7(f)(1)(C) of the ADEA provides that:

A waiver may not be considered knowing and voluntary unless at a minimum . . . the individual does not waive rights or claims that may arise after the date the waiver is executed.

(2) The waiver of rights or claims that arise following the execution of a waiver is prohibited. However, section 7(f)(1)(C) of the ADEA does not bar, in a waiver that otherwise is consistent with statutory requirements, the enforcement of agreements to perform future employment-related actions such as the employee's agreement to retire or otherwise terminate employment at a future date.

(d) *Consideration.* (1) Section 7(f)(1)(D) of the ADEA states that:

A waiver may not be considered knowing and voluntary unless at a minimum * * * the individual waives rights or claims only in exchange for consideration in addition to anything of value to which the individual already is entitled.

(2) "Consideration in addition" means anything of value in addition to that to which the individual is already entitled in the absence of a waiver.

(3) If a benefit or other thing of value was eliminated in contravention of law or contract, express or implied, the subsequent offer of such benefit or thing of value in connection with a waiver will not constitute "consideration" for purposes of section 7(f)(1) of the ADEA. Whether such elimination as to one employee or group of employees is in contravention of law or contract as to other employees, or to that individual employee at some later time, may vary depending on the facts and circumstances of each case.

(4) An employer is not required to give a person age 40 or older a greater amount of consideration than is given to a person under the age of 40, solely because of that person's membership in the protected class under the ADEA.

(e) *Time periods.* (1) Section 7(f)(1)(F) of the ADEA states that:

A waiver may not be considered knowing and voluntary unless at a minimum * * *

(i) The individual is given a period of at least 21 days within which to consider the agreement; or

(ii) If a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the individual is given a period of at least 45 days within which to consider the agreement.

(2) Section 7(f)(1)(G) of the ADEA states:

> A waiver may not be considered knowing and voluntary unless at a minimum . . . the agreement provides that for a period of at least 7 days following the execution of such agreement, the individual may revoke the agreement, and the agreement shall not become effective or enforceable until the revocation period has expired.

(3) The term "exit incentive or other employment termination program" includes both voluntary and involuntary programs.

(4) The 21 or 45 day period runs from the date of the employer's final offer. Material changes to the final offer restart the running of the 21 or 45 day period; changes made to the final offer that are not material do not restart the running of the 21 or 45 day period. The parties may agree that changes, whether material or immaterial, do not restart the running of the 21 or 45 day period.

(5) The 7 day revocation period cannot be shortened by the parties, by agreement or otherwise.

(6) An employee may sign a release prior to the end of the 21 or 45 day time period, thereby commencing the mandatory 7 day revocation period. This is permissible as long as the employee's decision to accept such shortening of time is knowing and voluntary and is not induced by the employer through fraud, misrepresentation, a threat to withdraw or alter the offer prior to the expiration of the 21 or 45 day time period, or by providing different terms to employees who sign the release prior to the expiration of such time period. However, if an employee signs a release before the expiration of the 21 or 45 day time period, the employer may expedite the processing of the consideration provided in exchange for the waiver.

(f) *Informational requirements.* (1) Introduction. (i) Section 7(f)(1)(H) of the ADEA provides that:

> A waiver may not be considered knowing and voluntary unless at a minimum . . . if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the employer (at the commencement of the period specified in subparagraph (F)) [which provides time periods for employees to consider the waiver] informs the individual in writing in a manner calculated to be understood by the average individual eligible to participate, as to—
>
> (i) Any class, unit, or group of individuals covered by such program, any eligibility factors for such program, and any time limits applicable to such program; and
>
> (ii) The job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program.

(ii) Section 7(f)(1)(H) of the ADEA addresses two principal issues: to whom information must be provided, and what information must be disclosed to such individuals.

(iii)(A) Section 7(f)(1)(H) of the ADEA references two types of "programs" under which employers seeking waivers must make written disclosures: "exit incentive programs" and "other employment termination programs." Usually an "exit incentive program" is a voluntary program offered to a group or class of employees where such employees are offered consideration in

addition to anything of value to which the individuals are already entitled (hereinafter in this section, "additional consideration") in exchange for their decision to resign voluntarily and sign a waiver. Usually "other employment termination program" refers to a group or class of employees who were involuntarily terminated and who are offered additional consideration in return for their decision to sign a waiver.

(B) The question of the existence of a "program" will be decided based upon the facts and circumstances of each case. A "program" exists when an employer offers additional consideration for the signing of a waiver pursuant to an exit incentive or other employment termination (e.g., a reduction in force) to two or more employees. Typically, an involuntary termination program is a standardized formula or package of benefits that is available to two or more employees, while an exit incentive program typically is a standardized formula or package of benefits designed to induce employees to sever their employment voluntarily. In both cases, the terms of the programs generally are not subject to negotiation between the parties.

(C) Regardless of the type of program, the scope of the terms "class," "unit," "group," "job classification," and "organizational unit" is determined by examining the "decisional unit" at issue. (See paragraph (f)(3) of this section, "The Decisional Unit.")

(D) A "program" for purposes of the ADEA need not constitute an "employee benefit plan" for purposes of the Employee Retirement Income Security Act of 1974 (ERISA). An employer may or may not have an ERISA severance plan in connection with its OWBPA program.

(iv) The purpose of the informational requirements is to provide an employee with enough information regarding the program to allow the employee to make an informed choice whether or not to sign a waiver agreement.

(2) To whom must the information be given. The required information must be given to each person in the decisional unit who is asked to sign a waiver agreement.

(3) The decisional unit. (i)(A) The terms "class," "unit," or "group" in section 7(f)(1)(H)(i) of the ADEA and "job classification or organizational unit" in section 7(f)(1)(H)(ii) of the ADEA refer to examples of categories or groupings of employees affected by a program within an employer's particular organizational structure. The terms are not meant to be an exclusive list of characterizations of an employer's organization.

(B) When identifying the scope of the "class, unit, or group," and "job classification or organizational unit," an employer should consider its organizational structure and decision-making process. A "decisional unit" is that portion of the employer's organizational structure from which the employer chose the persons who would be offered consideration for the signing of a waiver and those who would not be offered consideration for the signing of a waiver. The term "decisional unit" has been developed to reflect the process by which an employer chose certain employees for a program and ruled out others from that program.

(ii)(A) The variety of terms used in section 7(f)(1)(H) of the ADEA demonstrates that employers often use differing terminology to describe their organizational structures. When identifying the population of the decisional unit, the employer acts on a case-by-case basis, and thus the determination of the appropriate class, unit, or group, and job classification or organizational unit for purposes of section 7(f)(1)(H) of the ADEA also must be made on a case-by-case basis.

(B) The examples in paragraph (f)(3)(iii), of this section demonstrate that in appropriate cases some subgroup of a facility's work force may be the decisional unit. In other situations, it may be appropriate for the decisional unit to comprise several facilities. However, as the decisional unit is typically no broader than the facility, in general the disclosure need be no broader than the facility. "Facility" as it is used throughout this section generally refers to place or location. However, in some circumstances terms such as "school," "plant," or "complex" may be more appropriate.

(C) Often, when utilizing a program an employer is attempting to reduce its workforce at a particular facility in an effort to eliminate what it deems to be excessive overhead, expenses, or costs from its organization at that facility. If the employer's goal is the reduction of its workforce at a particular facility and that employer undertakes a decision-making process by which certain employees of the facility are selected for a program, and others are not selected for a program, then that facility generally will be the decisional unit for purposes of section 7(f)(1)(H) of the ADEA.

(D) However, if an employer seeks to terminate employees by exclusively considering a particular portion or subgroup of its operations at a specific facility, then that subgroup or portion of the workforce at that facility will be considered the decisional unit.

(E) Likewise, if the employer analyzes its operations at several facilities, specifically considers and compares ages, seniority rosters, or similar factors at differing facilities, and determines to focus its workforce reduction at a particular facility, then by the nature of that employer's decision-making process the decisional unit would include all considered facilities and not just the facility selected for the reductions.

(iii) The following examples are not all-inclusive and are meant only to assist employers and employees in determining the appropriate decisional unit. Involuntary reductions in force typically are structured along one or more of the following lines:

(A) *Facility-wide:* Ten percent of the employees in the Springfield facility will be terminated within the next ten days;

(B) *Division-wide:* Fifteen of the employees in the Computer Division will be terminated in December;

(C) *Department-wide:* One-half of the workers in the Keyboard Department of the Computer Division will be terminated in December;

(D) *Reporting:* Ten percent of the employees who report to the Vice President for Sales, wherever the employees are located, will be terminated immediately;

(E) *Job Category:* Ten percent of all accountants, wherever the employees are located, will be terminated next week.

(iv) In the examples in paragraph (f)(3)(iii) of this section, the decisional units are, respectively:

(A) The Springfield facility;

(B) The Computer Division;

(C) The Keyboard Department;

(D) All employees reporting to the Vice President for Sales; and

(E) All accountants.

(v) While the particular circumstances of each termination program will determine the decisional unit, the following examples also may assist in determining when the decisional unit is other than the entire facility:

(A) A number of small facilities with interrelated functions and employees in a specific geographic area may comprise a single decisional unit;

(B) If a company utilizes personnel for a common function at more than one facility, the decisional unit for that function (i.e., accounting) may be broader than the one facility;

(C) A large facility with several distinct functions may comprise a number of decisional units; for example, if a single facility has distinct internal functions with no employee overlap (i.e., manufacturing, accounting, human resources), and the program is confined to a distinct function, a smaller decisional unit may be appropriate.

(vi)(A) For purposes of this section, higher level review of termination decisions generally will not change the size of the decisional unit unless the reviewing process alters its scope. For example, review by the Human Resources Department to monitor compliance with discrimination laws does not affect the decisional unit. Similarly, when a regional manager in charge of more than one facility reviews the termination decisions regarding one of those facilities, the review does not alter the decisional unit, which remains the one facility under consideration.

(B) However, if the regional manager in the course of review determines that persons in other facilities should also be considered for termination, the decisional unit becomes the population of all facilities considered. Further, if, for example, the regional manager and his three immediate subordinates jointly review the termination decisions, taking into account more than one facility, the decisional unit becomes the populations of all facilities considered.

(vii) This regulatory section is limited to the requirements of section 7(f)(1)(H) and is not intended to affect the scope of discovery or of substantive proceedings in the processing of charges of violation of the ADEA or in litigation involving such charges.

(4) Presentation of information. (i) The information provided must be in writing and must be written in a manner calculated to be understood by the average individual eligible to participate.

(ii) Information regarding ages should be broken down according to the age of each person eligible or selected for the program and each person not eligible or selected for the program. The use of age bands broader than one year (such as "age 20-30") does not satisfy this requirement.

(iii) In a termination of persons in several established grade levels and/or other established subcategories within a job category or job title, the information shall be broken down by grade

level or other subcategory.

(iv) If an employer in its disclosure combines information concerning both voluntary and involuntary terminations, the employer shall present the information in a manner that distinguishes between voluntary and involuntary terminations.

(v) If the terminees are selected from a subset of a decisional unit, the employer must still disclose information for the entire population of the decisional unit. For example, if the employer decides that a 10% RIF in the Accounting Department will come from the accountants whose performance is in the bottom one-third of the Division, the employer still must disclose information for all employees in the Accounting Department, even those who are the highest rated.

(vi) An involuntary termination program in a decisional unit may take place in successive increments over a period of time. Special rules apply to this situation. Specifically, information supplied with regard to the involuntary termination program should be cumulative, so that later terminees are provided ages and job titles or job categories, as appropriate, for all persons in the decisional unit at the beginning of the program and all persons terminated to date. There is no duty to supplement the information given to earlier terminees so long as the disclosure, at the time it is given, conforms to the requirements of this section.

(vii) The following example demonstrates one way in which the required information could be presented to the employees. (This example is not presented as a prototype notification agreement that automatically will comply with the ADEA. Each information disclosure must be structured based upon the individual case, taking into account the corporate structure, the population of the decisional unit, and the requirements of section 7(f)(1)(H) of the ADEA): Example: Y Corporation lost a major construction contract and determined that it must terminate 10% of the employees in the Construction Division. Y decided to offer all terminees $20,000 in severance pay in exchange for a waiver of all rights. The waiver provides the section 7(f)(1)(H) of the ADEA information as follows:

(A) The decisional unit is the Construction Division.

(B) All persons in the Construction Division are eligible for the program. All persons who are being terminated in our November RIF are selected for the program.

(C) All persons who are being offered consideration under a waiver agreement must sign the agreement and return it to the Personnel Office within 45 days after receiving the waiver. Once the signed waiver is returned to the Personnel Office, the employee has 7 days to revoke the waiver agreement.

(D) The following is a listing of the ages and job titles of persons in the Construction Division who were and were not selected for termination and the offer of consideration for signing a waiver:

Job Title	Age	No. Selected	No. not selected
(1) Mechanical Engineers, I	25	21	48
	26	11	73
	63	4	18
	64	3	11
(2) Mechanical Engineers, II	28	3	10
	29	11	17
	Etc., for all ages		
(3) Structural Engineers, I	21	5	8
	Etc., for all ages		
(4) Structural Engineers, II	23	2	4
	Etc., for all ages		
(5) Purchasing Agents	26	10	11
	Etc., for all ages		

(g) *Waivers settling charges and lawsuits.* (1) Section 7(f)(2) of the ADEA provides that:

A waiver in settlement of a charge filed with the Equal Employment Opportunity Commission, or an action filed in court by the individual or the individual's representative, alleging age discrimination of a kind prohibited under section 4 or 15 may not be considered knowing and voluntary unless at a minimum—

(A) Subparagraphs (A) through (E) of paragraph (1) have been met; and

(B) The individual is given a reasonable period of time within which to consider the settlement agreement.

(2) The language in section 7(f)(2) of the ADEA, "discrimination of a kind prohibited under section 4 or 15" refers to allegations of age discrimination of the type prohibited by the ADEA.

(3) The standards set out in paragraphs (b), (c), and (d) of this section for complying with the provisions of section 7(f)(1)(A)-(E) of the ADEA also will apply for purposes of complying with the provisions of section 7(f)(2)(A) of the ADEA.

(4) The term "reasonable time within which to consider the settlement agreement" means reasonable under all the circumstances, including whether the individual is represented by counsel or has the assistance of counsel.

(5) However, while the time periods under section 7(f)(1) of the ADEA do not apply to subsection 7(f)(2) of the ADEA, a waiver agreement under this subsection that provides an employee the time periods specified in section 7(f)(1) of the ADEA will be considered "reasonable" for purposes of section 7(f)(2)(B) of the ADEA.

(6) A waiver agreement in compliance with this section that is in settlement of an EEOC charge does not require the participation or supervision of EEOC.

(h) *Burden of proof.* In any dispute that may arise over whether any of the requirements, conditions, and circumstances set forth in section 7(f) of the ADEA, subparagraph (A), (B), (C), (D), (E), (F), (G), or (H) of paragraph (1), or subparagraph (A) or (B) of paragraph (2), have been met, the party asserting the validity of a waiver shall have the burden of proving in a court of competent jurisdiction that a waiver was knowing and voluntary pursuant to paragraph (1) or (2) of section 7(f) of the ADEA.

(i) *EEOC's enforcement powers.* (1) Section 7(f)(4) of the ADEA states:

No waiver agreement may affect the Commission's rights and responsibilities to enforce [the ADEA]. No waiver may be used to justify interfering with the protected right of an employee to file a charge or participate in an investigation or proceeding conducted by the Commission.

(2) No waiver agreement may include any provision prohibiting any individual from:

(i) Filing a charge or complaint, including a challenge to the validity of the waiver agreement, with EEOC, or

(ii) Participating in any investigation or proceeding conducted by EEOC.

(3) No waiver agreement may include any provision imposing any condition precedent, any penalty, or any other limitation adversely affecting any individual's right to:

(i) File a charge or complaint, including a challenge to the validity of the waiver agreement, with EEOC, or

(ii) Participate in any investigation or proceeding conducted by EEOC.

(j) *Effective date of this section.* (1) This section is effective July 6, 1998.

(2) This section applies to waivers offered by employers on or after the effective date specified in paragraph (j)(1) of this section.

(3) No inference is to be drawn from this section regarding the validity of waivers offered prior to the effective date.

(k) *Statutory authority.* The regulations in this section are legislative regulations issued pursuant to section 9 of the ADEA and Title II of OWBPA.

[63 FR 30628, June 5, 1998, as amended at 79 FR 13547, Mar. 11, 2014]

Leslie Reed v. All Star Finance Company

732-2017-05390

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REED CASE STUDY

INTRODUCTION TO CASE STUDY

Now we are going to interview the charging party in our next case study:

Leslie Reed v. All Star Financial Company

Charging Party has visited the EEOC and has completed the intake questionnaire. She was interviewed by an Investigator and she filed a charge. The case is assigned to you for investigation.

The investigator has called Ms. Reed to interview her about the discrimination charge she filed. Ms. Reed decides to come into the office for the interview.

Exercise Directions: (Allow approximately 3 hours to complete this exercise.)

15 minutes for development of an Investigative Plan.

30 minute for development of an interview plan, tips on investigating harassment claims, preparation and assignment of interview topics, and preparation of detailed questions for interview.

60 minutes for the role play interview.

45 minutes for reporting out and follow up discussion, including the *Reed* amended charge.

INTERVIEW PLAN FOR LESLIE REED

- Background information about her position and duties with All Star Finance Company.
- Describe relationship with Supervisor, Marvin Winters.
- Describe incidents of alleged harassment by Winters.
- Describe working relationship with co-workers.
- Who are co-workers?
- Were there any other females subjected the same conduct?
- When did she read harassment policy? What did she learn?
- Describe incidents of harassment by co-workers.
- What did she do? Did she report harassment? To whom? What did she say? What was she told? Did incidents stop?
- Why does she believe her gender played a role in the actions of her supervisor and co-workers?
- How has the harassment affected her?

TIPS FOR INVESTIGATING HARASSMENT CHARGES

The nature of the harassment allegations requires Investigators to employ a wide range of skills and techniques to determine whether the conduct complained of meets the standards for harassment. Investigators should consider the following when investigating charges of harassment.

Proof of a harassment charge requires **explicit and detailed information** and descriptions of the offensive conduct. Conclusory descriptions (e.g., "I was subjected to unwelcome sexual advances") may be appropriate when drafting a charge. However, your interview notes or an affidavit must contain the explicit details of the alleged harassment. Investigators must

put a witness at ease to elicit this type of information while being persistent about documenting the allegations in detail.

Be sensitive to the nature of the allegations without being judgmental or overly sympathetic. Do not minimize the emotional effect of the conduct on the charging party even if you would not be so affected. Use the words used by the charging party (or other witness).

Do not gloss over details of explicit sexual acts or other egregious conduct because you or the witness are uncomfortable talking about the incidents. Explore if there are other employees who have been subjected to similar conduct.

Credibility of the victim and the alleged harasser can determine the outcome of your investigation. Because many incidents of harassment occur only between the victim and the harasser, there usually are no eye witnesses to the incidents. However, there are other kinds of corroborative evidence that can be obtained:

- Observations of the victim's demeanor before or after the incident of harassment.

  Example: A witness observed the charging party leaving the harasser's office in tears and with her clothing and hair in disarray, but does not know what was said or done in the office.

- Other employees who worked with or for the alleged harasser. Try to obtain the names, addresses, and telephone numbers of present and past employees who may be able to confirm that the alleged harasser engaged in a pattern or practice of conduct.
- Past disciplinary records of the harasser can provide evidence as to the past conduct of the harasser **and** whether the employer took corrective actions on previous complaints of harassment and how effective they were.
- Credibility of the alleged victim(s) of harassment **cannot** be determined by age, physical appearance, or personal hygiene. Do not assume that a physically unattractive person cannot be harassed.
- Be aware that poor management techniques or skills are not harassment. On the other hand, an individual who disparages others because of race, sex, religion, etc., could create an unlawful, hostile working environment for which an employer may be liable.

Learning Objectives:

- Dealing with charging party's attorney during interviews and during investigation;
- Dealing with new allegations/claims raised during the course of the investigation.

BACKGROUND: The Investigator who has been assigned to investigate this charge of discrimination is interviewing Ms. Reed to collect evidence about the harassment charge. This is the Investigator's first interview with the charging party.

The interview will take place in a "round robin" format with each table assigned a topic for interviewing Ms. Reed. One of the Instructor's will role play Ms. Reed. The first table should select a spokesperson who will introduce him/herself and begin the interview. Each table should be permitted to ask questions about its assigned topic for about 10-15 minutes per table. If time permits, after all tables have completed their rounds, volunteers may ask additional questions. Ms. Reed is nervous about being interviewed and asked her attorney to attend the interview. The attorney is aggressive and tries several times to take control of the interview.

It is important that the Leslie Reed role player emphasize the gender-based comments, even if the participants do not ask questions about all of the incidents.

PROFILE OF LESLIE REED

Leslie Reed is a project specialist in the Communications Department of All Star Finance Company. The Communications Department is responsible for the design and content of All Star Finance Company's publications, including brochures, employee newsletters, press releases, speeches and public service announcements. Also, the department is responsible for the development and design of all marketing materials.

Reed was hired in March, 2012, by Marvin Winters, Communications Department Director, as a project specialist. Prior to that, she worked for an advertising firm in Washington, D.C. Reed's job involves drafting the employee newsletter, speeches and press releases. She is also supposed

to assist with the department's marketing responsibilities. All Star issues monthly press releases publicizing its services, special offers, and community activities.

Reed was assigned to share a work area under an air vent. The Communications Department had previously used some of the space for storage, although all the files had been moved by the time Reed started work. She shares the work space with another employee, Roger Meany, the other project specialist in the Communications Department, who was hired in July, 2008. Meany has an extensive background in marketing.

Meany made it clear to Reed that he resented sharing work space with her. He also told her repeatedly that she should not try to get in his way or interfere with his marketing responsibilities. Meany told Reed that he believed his work was the heart and soul of the company's work, and has stated on occasion that females have not excelled in marketing.

A couple of females who work in the marketing department were also subjected to derogatory comments by Meany. He would constantly say stupid women shouldn't work in marketing and that they should be home caring for their kids. Winters ignored them when they complained.

Shortly after Meany was hired in 2016, Reed attended the department's quarterly luncheon. Frequently, at these luncheons, a speaker was invited to talk about a particular subject. At that luncheon, Reed arranged for a female speaker from a Fortune 500 company to speak on innovative marketing strategies. The speaker was very good. After the luncheon, Reed heard some of her co-workers and Winters comment that the luncheon had been a waste of time. Meany had commented that he could have found a better speaker. Reed was upset by their comments.

According to Reed, Winters is very critical of her work. He frequently required her to rewrite most of the correspondence she drafted. The only assignments he seemed not to care about were speeches Reed wrote for Valerie Simon. He told her that she was "too sensitive" to be in a communications job, and that if she couldn't handle the stress, she should stay at home with her children. Winters also made derogatory comments about Valerie Simon, the CEO of All Star Finance Company. He frequently referred to Simon as "chief bitch" and "the broad in charge."

Last August, Winters assigned Reed and Meany a joint project to write a report about All Star Finance Company's accomplishments. While working on this project, Meany was very critical of Reed's writing style and

demanded that she rewrite several sections of the report. Meany also made derogatory comments about women and even stated on several occasions that the company's financial problems were due to Valerie Simon's lack of leadership and inability to take risks. He said that a male CEO would be able to take the bold and innovative steps the company needs to improve. According to Reed, when she complained about Meany, Winters commented that she just didn't understand how to write a report.

Reed was very upset about Winters' actions regarding the accomplishments report. Reed has asthma and the stress caused her to begin to experience more severe symptoms. Some offices down the hallway from her office were being renovated. Reed noticed that the dust generated from the construction work also caused her asthma to worsen. Reed took sick leave during the fall, and in early winter she went to see her allergist.

In November and December, 2016, Reed experienced several asthma attacks.

Initially, Winters approved Reeds requests for sick leave to see her doctor without question. In early December, after the fifth request, Winters began to ask her why she needed to see her doctor so often. Reed just replied that she wasn't feeling well. On one occasion, in December, he asked Reed if she was really in therapy to learn how to deal with all the female problems women had. Reed was shocked and very upset by these questions and told Winters that she did not appreciate his questions.

Due to stress, Reed took two weeks off during the latter part of January.

While Reed was on leave, she received a copy of All Star's sexual harassment policy, which she had never received in the past. She contacted EEOC and decided to file a discrimination charge.

When Reed returned to work in February, Meany had stopped speaking directly to Reed. Reed heard Meany and Winters joking about women always needing to see their doctors and being hypochondriacs. Reed heard Winters say that he thought women's "female problems" were just in their heads and they really needed to see a shrink who could straighten them out.

While she was off work in January, some of Reed's work was reassigned to Meany. During February, Meany blew up at her because he had to work

on a "stupid women's issues" speech for Valerie Simon. Reed was stunned by Meany's actions and tried immediately to see Winters. When Reed finally met with Winters later that week, he gave her a counseling memorandum regarding her attendance. Reed burst into tears when she was given the counseling memorandum. Upset by her crying, Winters later withdrew the memorandum.

At the end of February, Reed met with her doctor. She told her doctor about her work. She believed that her worsening asthma symptoms were related to her deteriorating work conditions, both stress and air quality. Her doctor suggested that she request a move to a different area so that she didn't have to work under the air vent.

Reed has had asthma since early childhood. It affects her ability to breathe. She has been instructed by her doctors to avoid crowds, cigarette smoke, people wearing perfume, and outdoor activities. She must avoid being active at night, remain indoors during windy conditions and cannot be in enclosed spaces with cleaning agents. A large variety of materials can trigger an asthma attack, and such an episode renders her completely unable to function. Reed uses several different medications to control her symptoms, but she still experiences symptoms such as chest tightness, wheezing, coughing and shortness of breath most of the time.

Reed was recently prescribed a new medication, Ventolin, which she takes twice a day, and when she experiences extreme shortness of breath. It improves her breathing during an attack.

On March 1, she informed Winters of her asthma and asked Winters if she could move to a different work space to avoid the dust coming from the air vent and the construction down the hallway. Winters told her no without any other discussion.

Since April 1, Reed has been off work because Winters has refused to move her to a different work space. Reed knows of available space in the Finance Department down on another floor.

Reed is very frustrated and thinks that Winters should be removed as a supervisor because of his poor communication skills and lack of sensitivity. Reed is very upset because Winters has made sexist comments and has refused to instruct Meany from making similar comments. She does not understand how Winters has been allowed to remain in his position given the provisions of the company's sexual harassment policies.

Questioning Techniques:

- **What did you think of the Investigator's handling of the attorney?**
- **What techniques were particularly effective? Why?**
- **What techniques were not effective? Why?**
- **What other techniques would you have used in this situation?**

ROLE OF THE CHARGING PARTY'S ATTORNEY DURING AN INVESTIGATION

In most cases, an attorney representing a charging party will not have direct knowledge of the facts and circumstances surrounding the claim. Therefore, the attorney is unable to provide evidence relevant to the claim. The attorney may not speak to the charging party when the Investigator is seeking evidence relevant to the charge. However, the attorney may consult with the charging party and may provide advice and assistance in the investigative process.

Generally an Investigator will not involve a charging party's attorney until a written statement of representation has been received.

TIPS FOR HANDLING DIFFICULT ATTORNEYS

- Before commencing the interview, explain that your role is to gather facts and evidence. Do not allow the attorney to control the interview.
- Difficult attorneys may represent either the charging party or the respondent. Investigators should take appropriate steps, regardless of the party represented.
- Deflate the attorney's outbursts.
  - Acknowledge concerns;
  - Agree with him/her wherever appropriate;
  - Express your understanding of his/her concerns;
  - Remind the attorney of his/her limited role.

INFORMATION LEARNED FROM CHARGING PARTY INTERVIEW

All Star Financial Company has a sexual harassment policy.

Reed described several incidents which she described as gender harassment by Meany:

- Meany resented sharing work space with her;
- Comments that she should try not to get in his way or interfere with his marketing responsibilities and that females have not excelled in marketing.
- Criticism of female speaker who spoke at a quarterly luncheon.
- Demands that she rewrite sections of accomplishment report and criticism of writing style.
- Blame for the company's financial problems on Valerie Simon and comment that a male CEO would be able to take the bold and innovative steps the company needed to improve.
- After she returned to work in February, Meany stopped speaking directly to her.
- In February, Meany blew up at her because he had to work on a "stupid women's issues" speech for Valerie.
- Joked with Winters about women always needing to see their doctors and being hypochondriacs.

Reed described harassment by Winters:

- Comments that quarterly luncheon had been a waste of time.
- Criticisms of work performance.
- Derogatory comments about Valerie Simon.
- Comment that she was too sensitive and that if she couldn't handle stress, she should stay at home with her children.

- Asked if she was really in therapy to learn how to deal with all the female problems.

- Demanded that she rewrite most written work including press releases, and only assignments he did not care about, especially speeches written for Valerie Simon.

- Issued her a counseling memorandum regarding her attendance.

Reed described other females who were subjected to harassment:

- Two other females, Ana and Deborah, were subjected to derogatory comments by Meany. Winters ignored their complaints.

Reed's responses to incidents of harassment:

- Told Winters she didn't appreciate his comment about whether she had to see a doctor for "female problems."

- Complained to Winters about Meany's comments.

- Burst into tears when given the counseling memorandum.

Reed has provided evidence of emotional distress:

- Worsening asthma for which she has had to seek medical attention.

- Cried when given the counseling memorandum.

- Upset at gender based comments.

Reed has provided information to support an allegation of denial of reasonable accommodation.

- Reed has had asthma since early childhood which limits her ability to breathe.

- Reed has experienced several asthma attacks over a two-month period in late 2008.

- She has been instructed to avoid crowds, cigarette smoke, people wearing perfume, and outdoor activities.

- She must avoid being active at night, remain indoors during windy conditions, and cannot be in enclosed spaces with cleaning agents.

- A large variety of materials can trigger an asthma attack, and such an episode renders her completely unable to function.

- Reed uses several medications (i.e., mitigating measure) to control her symptoms, but she still experiences symptoms such as chest tightness, wheezing, coughing and shortness of breath most of the time. If she experiences such symptoms on the medication, then when you ask Reed about her symptoms without the medication, presumably they are much worse.

- Reed requested a reasonable accommodation – that she be able to move to a different work space because of her asthma.

- Winters denied her request for a reasonable accommodation without any discussion.

- Reed has been off work since April 1st because of denial of her request.

ANALYSIS
GENDER HARRASSMENT CLAIM
UPDATE INVESTIGATIVE PLAN

What type of case is this?

- This is a general harassment case based on hostile work environment.

What are the elements of proof in a harassment case based on

hostile work environment?

Conduct is unwelcome

- In Reed's case, as well as, the other females, it is clear that the alleged harassing conduct was unwelcome.

Conduct is Based on Charging Party's Protected Status

- Reed's supervisor and a co-worker allegedly subjected her to comments related to her gender. Reed's supervisor also subjected other females to comments related to their sex.

Conduct Results in a Tangible Employment Action or Creates a Hostile Work Environment

- Reed and the other females state the comments occurred regularly and were sufficiently severe and pervasive to interfere with her work and created a hostile environment (using the reasonable person standard.)

- It's enough that the derogatory comments made it harder for Reed to do her job. She need not show psychological injury.

- The facts here show frequent comments on the basis of gender.

BASIS EXISTS FOR HOLDING THE EMPLOYER LIABLE

All Star Finance Company would be liable for the harassment Winters knew (based on the complaints of Reed and the other females to Winters and to Meany himself) and/or should have known (based on Winters observations) of the harassment and failed to take immediate and appropriate corrective behavior.

All Star also would be liable for hostile environment harassment by Winters, a supervisor, unless it can approve the following affirmative defense:

- that it exercised reasonable care to prevent and correct promptly any harassing behavior; and

- that the employee reasonably failed to take advantage of any preventative or corrective opportunities provided by the employer to avoid harm otherwise.

In this case, Reed did not receive notice of the policy until January, 2017. This, along with Winters behavior, indicates that All Star did not exercise reasonable care to prevent and correct harassing behavior.

NEXT STEPS

Now that we have received information from Leslie Reed that indicates it is more than likely than not that Reed and other females were discriminated against because of her gender, what are our next steps?

- Prepare interview plans and conduct interviews with Marvin Winters and Roger Meany.

ANALYSIS: DISABILITY CLAIM

GENERAL TOPICS THAT SHOULD BE ADDRESSED IN THE INVESTIGATIVE PLAN

Does Leslie Reed meet the definition of a "disability?"

Definition of a Disability:

There are three possible definitions of a "disability" under the ADA. The three definitions are:

- a physical or mental impairment that substantially limits one or more major life activities (including a major body function);
- a record of such an impairment;
- being regarded as having such an impairment.

A charging party must **only meet one** of the three definitions in order to meet the first element of a claim under the ADA.

However a charging party does <u>not</u> need to be an individual with a disability in order to prevail on a claim of an improper disability-related inquiry or medical examination, or a claim of disclosure of confidential medical information. Those provisions of the ADA apply to all applicants and employees, not just to individuals with disabilities. In addition, the ADA protects applicants and employees who face discrimination because of their relationship or association with a person with a disability (e.g., spouse, child).

Is Leslie Reed "Qualified?"

The ADA defines a "qualified" individual with a disability as someone who:

- satisfies the requisite skills, experience, education, and other job related requirements of the position; and
- can perform the essential functions of the position with or without a reasonable accommodation.

REASONABLE ACCOMMODATION

An employer's refusal to make a reasonable accommodation to the known physical or mental limitations of an otherwise qualified individual with a disability constitutes discrimination under the ADA unless the employer can show undue hardship. (Remember who only meets the "regarded as" definition of a disability is not entitled to a reasonable accommodation.)

While many of you have a basic knowledge/understanding of asthma, you will most likely encounter many impairments you know nothing about. Even in situations where an Investigator is familiar with an impairment, such as asthma, it is important not to allow one's assumptions to dictate the determination as to whether or not the charging party has a disability. Charging party's testimony, medical records, and physician statements will be the best evidence for determining whether an individual has a substantially limiting impairment (or a record of one) as defined by the ADA. The internet is a useful tool for finding out more about these conditions and for helping to plan investigations and interviews. This information should suggest possible major life activities (including major bodily functions) to explore with the charging party, how the impairment may be substantially limiting and mitigating measures that might be prescribed.

Does Leslie Reed have an impairment that substantially limits a major life activity?

Has she been diagnosed with a particular medical condition?

- *Reed has had asthma since early childhood.*

How does asthma affect her everyday life? Breathing? Walking? Sleeping? Other major life activities? At home? At work?

- *Reed's asthma impairs her ability to breathe. It probably also affects her respiratory function, which is one of the major bodily functions.*

Are there things she cannot do because of her asthma? Are there things that are very difficult to do because of her asthma?

- *Reed must avoid crowds, cigarette smoke, people wearing perfume, and outdoor activities. She must also avoid being active at night, remain indoors during windy conditions and cannot be in enclosed spaces with cleaning agents.*

When was the last time she experienced an asthma attack?

- *Reed experienced several asthma attacks during November and*

  December.

Has her condition gotten better or worse over time?

- *From her statements, we know that Reed's condition has worsened as her attacks are more severe and frequent.*

Has she sought treatment for the condition?

- *From her statements, we know that Reed has seen a doctor.*
- *We need copies of any medical records or information from her doctor that would corroborate her responses.*

Does Reed use any mitigating measures? If yes, how do they affect or improve performance of a major life activity? Put another way, how would the major life activity be impacted if Reed did not use the mitigating measures?

- *Yes. Reed takes medication for her asthma. However, all of the medications must be ignored in assessing whether Reed has a disability, so questions about what she experienced before taking any medication (or if she forgets to use medication) presumably would indicate even more severe breathing difficulties than she experiences with the medications.*
- *Reed's testimony is that she still experiences serious symptoms even when taking the medications.*

Is Reed substantially limited in a major life activity without the use of mitigating measures?

- *Without the medication, Reed is substantially limited in her ability to breathe. Her medications only slightly improve her ability to breathe and she still experiences symptoms most of the time. Reed must avoid crowds, cigarette smoke, people wearing perfumes, and outdoor activities. She also must avoid being active at night, remain indoors during windy conditions and cannot be in enclosed spaces with cleaning agents.*

Is Reed an individual with a disability under the first prong of the definition?

- *Yes. Reed is substantially limited in her ability to breathe (and probably in her respiratory function as well) when the medications she uses for her asthma are disregarded.*

- *As noted above, her asthma is difficult to control even with medications, and she is frequently symptomatic. A variety of settings and conditions can cause Reed to experience chest tightness, wheezing, cough and shortness of breath, symptoms that evidence is sure to show would be even worse without the medications.*

Can Leslie Reed perform the "Essential Functions" of her position?

What are the functions of the job of Project Specialist in the Communications Department?

- *As a Project Specialist, Reed is responsible for writing the employee newsletter, press releases and speeches.*

Can Reed perform the essential functions of the Project Specialist position with or without accommodations?

- *Reed is able to perform the essential functions of her position. However, there is a question whether she can continue to do so without a reasonable accommodation, and we don't yet have enough information to know if a reasonable accommodation is available.*

Reasonable Accommodation

Did Reed inform her employer of her disability and need for a reasonable accommodation?

- *Yes. Reed informed Winters of her disability and need for a reasonable accommodation.*

Has respondent provided Reed with an accommodation?

- *No. Winters denied Reed's request for a reasonable accommodation.*

Did respondent otherwise engage in an interactive process to provide Reed with a reasonable accommodation?

- *No. After Winters denied Reed's request, neither he nor the employer further discussed Reed's request with her.*

Is there any accommodation that the company could have made which would have enabled her to perform her duties as a Project Specialist?

- *More information is required. At this point, we do not know if respondent could have provided Reed with a reasonable accommodation. Reed believes there was space available in another department on another floor.*

During the investigation, it is important to determine, whether based on medical or other evidence, if Reed, in fact, needed the accommodation she requested, and if so, whether respondent could have actually provided Reed with a reasonable accommodation (either the one she requested, or an alternative).

Is Reed entitled to a reasonable accommodation?

- Reed is entitled to a reasonable accommodation because the evidence appears to demonstrate that she has a disability and has a need for an accommodation because of her disability.

Do we need to consider whether Reed should have been moved to a different work area as a reasonable accommodation?

- If All Star Finance Company is not able to address the issues (dust from the air vent and construction down the hallway) that are exacerbating Reed's symptoms, then she should be moved to a different work area as a reasonable accommodation unless doing so would cause an undue hardship. Remember that prior to making a cause determination; the evidence must indicate that the company could have provided Reed with an accommodation.

This concludes the discussion of the evidence provided by Reed regarding her disability claim.

INTERVIEW WITH MARVIN WINTERS, DIRECTOR OFFICE OF REGULATORY REVIEW

Exercise Directions: Allow 1 hour 45 minutes to complete the exercise.
Each table will prepare an outline for the interview of Marvin Winters, Communications Director. Allow 20 minutes to review the case file and prepare an interview plan and for role players to read the Profile of Marvin Winters.
Once the interview plan is completed, participants at each table will ask questions, round-robin style, of their Marvin Winters.

The participants will have a total of 45 minutes to conduct their interview with Marvin Winters, and 30 minutes to report out and discuss what we learned.

We are now going to conduct an interview with Marvin Winters, Director of the Communications Department.

As you know from your interview with Leslie Reed, Marvin Winters has been identified as one of the alleged harassers and is Leslie Reed's Supervisor. You should consider the evidence presented by Leslie Reed regarding her disability claim in preparing for the interview.

PROFILE OF MARVIN WINTERS

Role Player Note: Marvin Winters is evasive and tries to lay blame elsewhere rather than assume any responsibility for his own actions.

When interviewed by the Investigator, Mr. Winters is very talkative, and tends to embellish his responses with extraneous and unnecessary comments. He displays a false friendly manner, and appears overly willing to answer the questions and provide information. However, in reality, he attempts to sidestep the questions and to get the investigator off track.

Marvin Winters has been employed by All Star Finance Company for 10 years and has been the Director of the Communications Department for 7 years. He is 18 months from retirement. He has been particularly unhappy that Valerie Simon, a woman, is the CEO of All Star Finance Company.

Winters hired Leslie Reed into the Project Specialist position in 2012. He did so because Valerie Simon had been encouraging Managers to bring diversity to the company. He assigned Ms. Reed the responsibilities of drafting the employee newsletter, speeches, and press releases. However, Roger Meany is assigned the most important work of the department, the development and design of all marketing materials.

With controlled questioning efforts, Winters addresses the incidents of harassment reported by Reed. He attempts to deflect any allegations of gender bias by offering legitimate reasons for his conduct. He thought the luncheon for which Reed secured a female speaker was a waste of time because of a huge deadline he had, not because of the speaker or the topic. He claims he called Valerie Simon the "chief bitch" and other derogatory terms because of strong personality differences they have and disagreements over the direction of the company.

Winters doesn't recall any other employees complaining about Meany.

In response to a specific inquiry about the incidents involving Reed, Winters states that she often seemed confused and "out of her league" with several assignments. He often had to rewrite her work products. Winters claims that Reed's poor performance and attendance forced him to reassign the duty of drafting press releases to the other project specialist, Roger Meany. Winters did not critique or comment on speeches Reed wrote for Valerie Simon because he did not consider them important and believed Valerie Simon could do her own rewrites. According to Winters, Meany was the one who made most of the sexist comments about Reed. Winters goes on to embellish his answer about the innate challenges and stresses that come with working in the communications and marketing business for a large financial company. Winters states that to excel in this area, a person must be aggressive, outgoing, and

knowledgeable on the issues that affect large businesses. Winters believes that Reed lacks these qualities.

With respect to the sick leave, Winters stated that Reed, "appeared to be a real nice lady" but that she seemed "too delicate" for the demanding work performed by the Communications Department. Winters acknowledges that Reed told him about the severity of her asthmatic condition at the time she requested a move to a different work space. Winters states that he did not respond to her request for a new work space because there was no other work space to which Reed could be moved. He had already checked with Human Resources in the spring to see if she could be transferred to a different department because of the numerous complaints made by Meany. Human Resources was unable to find a vacancy for Reed. On the advice of Human Resources, however, he did give Reed a counseling memorandum about her extensive sick leave. Reed burst into tears when he gave her the memorandum, so Winters took it back. He threw it away. Reed's response just confirmed his opinion that she was not up to the job in the Communications Department.

If confronted with Reed's statements that there was space available in the Finance Department on another floor, Winters says that would have been perfect if she could have been assigned to a different department, but there were no vacancies that he knew of. The company does not place employees wherever they want all over the building; they are assigned to work space in their own department. Anyway, the construction was moving to the floor where the Finance Department is located shortly.

In response to the direct questions about Meany, Winters states that he believed the problems between Meany and Reed were just bad personality conflict and he told them both to "just get over it." He denies that he believes Reed's complaints about Meany were complaints about harassment. Winters states that he read the sexual harassment policy and nothing Meany said to Reed was sexual in nature. Because of that, Winters tried to keep their working relationship civil.

Winters volunteers that he thinks something will need to be done to help him out because Meany is threatening to quit unless Winters takes actions to improve Reed's attendance and work performance. Because Winters does not believe that Reed can handle demanding work, he stopped assigning her the press releases and gave them all to Meany to do.

Winters then looks at his watch and tells you he needs to leave for a meeting.

INFORMATION LEARNED FROM MARVIN WINTERS INTERVIEW

Assessing the Reliability of Marvin Winters Testimony

How reliable is Marvin Winters testimony?

What is the basis for your evaluation?

Is Marvin Winters testimony consistent with other testimony? (e.g., with his own testimony, with the testimony of Leslie Reed?)

Is it plausible?

Does Marvin Winters have any underlying interest, bias, or motive in this case? If so, what is it? How would you document it?

Is it plausible All Star Finance Company could not have accommodated Reed's request to move to a different office?

If you intend to conduct additional interviews, who would you interview and what would you ask?

Overall, how would you assess the reliability of Winters testimony?

What information did Mr. Winters provide regarding All Star Finance Company?

What information did he provide concerning the Leslie Reed harassment allegation?

What information did he provide regarding the Leslie Reed disability allegation?

Answers should include:

- Corroborates Reed's testimony about derogatory comments about Valerie Simon;
- Corroborates Reed's testimony about problems with Meany;
- Denied engaging in any harassing conduct himself;
- Appears not to understand that harassing conduct can be gender-based without being sexual in nature;
- Read the agency's sexual harassment policy;
- Corroborates that Reed informed him of her disability when she requested a move to a different work space;
- Acknowledges that he denied Reed's request for a reasonable accommodation.

What else do you need to know?

How will you get this information?

If you intend to make a written request, what would you ask for?

If you intend to make additional interviews, who would you interview and what would you ask?

END OF MODULE

Leslie Reed Case Study Materials

- Intake Questionnaire
- Intake Investigator's Notes
- Charge (Form 5)
- All Star Finance Sexual Harassment Policy
- Investigative Plan
- Leslie Reed Interview Statement
- Amended Charge (Form 5)
- Amended Investigative Plan
- Internet Information on Asthma
- Marvin Winter's Profile for Role Play
- Marvin Winters Interview Statement
- Leslie Reed Pre-Conciliation Interview Statement
- Conciliation Role Plays
- Harassment Theories of Liability Flow Chart

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Thank you for using the EEOC Assessment System. The information you gave us indicates that your situation may be covered by the laws we enforce. If you want to file a charge, you can start the process by filling out the Intake Questionnaire, signing it, and either bringing it or mailing it to the EEOC office listed below right away. If you live within 50 miles of the EEOC office listed below, we recommend that you bring the completed questionnaire with you to this office to discuss your situation.

EEOC Washington Field Office
131 M Street, N.E.
Suite 4NW02F
Washington, DC 20507

If you would like to bring the questionnaire to us in person instead of mailing it to us, please click http://www.eeoc.gov/field/index.cfm to find out the office hours of the EEOC office closest to you. If you would like to fax the questionnaire to us, please click http://www.eeoc.gov/field/index.cfm to find out the fax number of the office nearest to you.

You should be aware that filing a charge can take up to two hours. If you find that you are having difficulty completing the questionnaire on your own, you may call the number below for assistance.

Please be sure to:

- Answer all questions as completely as possible.
- Include the location where you work(ed) or applied.
- Complete all pages and sign the last page.
- Attach additional pages if you need more space to complete your responses.

You can find out more information about the laws we enforce and our charge-filing procedures on our website at www.eeoc.gov.

If you want to file a charge about job discrimination, there are time limits to file the charge. In many States that limit is 300 days from the date you knew about the harm or negative job action, but in other States it is 180 days. To protect your rights, it is important that you fill out the questionnaire, sign it, and bring it or send it to us right away.

Filling out and bringing us or sending us this questionnaire does not mean that you have filed a charge. This questionnaire will help us look at your situation and figure out if you are covered by the laws we enforce. If you live within 50 miles of the office listed above, we recommend that you bring the completed questionnaire to us to discuss your situation. If you mail the completed questionnaire to us, someone from the EEOC should contact you by mail or by phone within 30 days. If you don't hear from us in 30 days, please call us at 1-800-669-4000.

Sincerely,

U.S. Equal Employment Opportunity Commission

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
INTAKE QUESTIONNAIRE

Please immediately complete the entire form and return it to the U.S. Equal Employment Opportunity Commission ("EEOC"). **REMEMBER**, a charge of employment discrimination must be filed within the time limits imposed by law, generally within 180 days or in some places 300 days of the alleged discrimination. Upon receipt, this form will be reviewed to determine EEOC coverage. **Answer all questions as completely as possible, and attach additional pages if needed to complete your response(s). If you do not know the answer to a question, answer by stating "not known." If a question is not applicable, write "n/a." Please Print.**

1. Personal Information

Last Name: Reed First Name: Leslie MI: A.

Street or Mailing Address: 2801 Olive Grove Way Apt Or Unit #:

City: Fairview County: Charles State: MD ZIP: 20644

Phone Numbers: Home: (301) 555-1544 Work: (703) 555-2211

Cell: (301) 555-7177 Email Address: rad@yahoo.com

Date of Birth: November 23, 1963 Sex: Male ☐ Female ☒ Do You Have a Disability? ☐ Yes ☒ No

Please answer each of the next three questions. i. Are you Hispanic or Latino? ☐ Yes ☒ No

ii. What is your Race? Please choose all that apply. ☐ American Indian or Alaska Native ☐ Asian ☒ White ☒ Black or African American ☐ Native Hawaiian or Other Pacific Islander

iii. What is your National Origin (country of origin or ancestry)? American

Please Provide The Name Of A Person We Can Contact If We Are Unable To Reach You:

Name: M.E.Pierce Relationship: Attorney

Address: 1100 Pennsylvania Ave, NW City: Washington State: DC Zip Code: 20005

Home Phone: ( ) Other Phone: (202) 555-1645

2. I believe that I was discriminated against by the following organization(s): (Check those that apply)

☒ Employer ☐ Union ☐ Employment Agency ☐ Other (Please Specify)

Organization Contact Information (If the organization is an employer, provide the address where you actually worked. If you work from home, check here ☐ and provide the address of the office to which you reported.) **If more than one employer is involved, attach additional sheets.**

Organization Name: All Star Finance Company

Address: 2518 Grover Cleveland Parkway, Suite 400 County: Fairfax

City: Alexandria State: VA Zip: 22399 Phone: (703) 555-2200

Type of Business: Finance Job Location if different from Org. Address: same

Human Resources Director or Owner Name: Phone:

Number of Employees in the Organization at All Locations: Please Check (√) One

☐ Fewer Than 15 ☐ 15 - 100 ☐ 101 - 200 ☐ 201 - 500 ☒ More than 500

3. Your Employment Data (Complete as many items as you can) **Are you a Federal Employee?** ☐ Yes ☒ No

Date Hired: March 2012 Job Title At Hire: Project Specialist

Pay Rate When Hired: $52,000/yr Last or Current Pay Rate: $64,000/yr

Job Title at Time of Alleged Discrimination: Project Specialist Date Quit/Discharged: NA

Name and Title of Immediate Supervisor: Marvin Winters, Director of Communications Department

If Job Applicant, Date You Applied for Job _____ Job Title Applied For _____

4. What is the reason (basis) for your claim of employment discrimination?

FOR EXAMPLE, if you feel that you were treated worse than someone else because of race, you should check the box next to Race. *If you feel you were treated worse for several reasons, such as your sex, religion and national origin, you should check all that apply. If you complained about discrimination, participated in someone else's complaint, or filed a charge of discrimination, and a negative action was threatened or taken, you should check the box next to* Retaliation.

☐ Race ☒ Sex ☐ Age ☐ Disability ☐ National Origin ☐ Religion ☐ Retaliation ☐ Pregnancy ☐ Color (typically a difference in skin shade within the same race) ☐ Genetic Information; choose which type(s) of genetic information is involved:

☐ i. genetic testing ☐ ii. family medical history ☐ iii. genetic services (genetic services means counseling, education or testing)

If you checked color, religion or national origin, please specify: _____

If you checked genetic information, how did the employer obtain the genetic information? _____

_____

Other reason (basis) for discrimination (Explain). _____

5. What happened to you that you believe was discriminatory? Include the date(s) of harm, the action(s), and the name(s) and title(s) of the person(s) who you believe discriminated against you. **Please attach additional pages if needed.**

(Example: 10/02/06 - Discharged by Mr. John Soto, Production Supervisor)

A) Date: Still Happening Action: Harassment

_____

Name and Title of Person(s) Responsible: Marvin Winters (supevisor) and Roger Meany (co-worker-Project Specialist)

B) Date: Action:

_____

Name and Title of Person(s) Responsible: _____

6. Why do you believe these actions were discriminatory? Please attach additional pages if needed.

I'm harassed by my supervisor and a male co-worker. They say negative things to me and make demeaning statements about women that are offensive to me. I'm harassed about my performance and attendance. I'm stressed out because of this and have had to take some leave. My supervisor has criticized me for calling in sick. They don't like me.

7. What reason(s) were given to you for the acts you consider discriminatory? By whom? His or Her Job Title?

8. Describe who was in the same or similar situation as you and how they were treated. For example, who else applied for the same job you did, who else had the same attendance record, or who else had the same performance? Provide the race, sex, age, national origin, religion, or disability of these individuals, if known, and if it relates to your claim of discrimination. For example, if your complaint alleges race discrimination, provide the race of each person; if it alleges sex discrimination, provide the sex of each person; and so on. Use additional sheets if needed.

Of the persons in the same or similar situation as you, who was treated *better* than you?

A. Full Name	Race, sex, age, national origin, religion or disability	Job Title
Description of Treatment		
B. Full Name	Race, sex, age, national origin, religion or disability	Job Title
Description of Treatment		

Of the persons in the same or similar situation as you, who was treated *worse* than you?

A. Full Name	Race, sex, age, national origin, religion or disability	Job Title

Description of Treatment

B. Full Name	Race, sex, age, national origin, religion or disability	Job Title

Description of Treatment

Of the persons in the same or similar situation as you, who was treated the *same* as you?

A. Full Name	Race, sex, age, national origin, religion or disability	Job Title
Deborah Cox	White, female	Marketing Assistant

Description of Treatment

B. Full Name	Race, sex, age, national origin, religion or disability	Job Title
Ana Hill	White, female	Marketing Assistant

Description of Treatment negative statements about women

Answer questions 9-12 only if you are claiming discrimination based on disability. If not, skip to question 13. Please tell us if you have more than one disability. Please add additional pages if needed.

9. Please check all that apply:

- ☐ Yes, I have a disability
- ☐ I do not have a disability now but I did have one
- ☐ No disability but the organization treats me as if I am disabled

10. What is the disability that you believe is the reason for the adverse action taken against you? Does this disability prevent or limit you from doing anything? (e.g., lifting, sleeping, breathing, walking, caring for yourself, working, etc.).

11. Do you use medications, medical equipment or anything else to lessen or eliminate the symptoms of your disability?

Yes ☐ **No** ☐

If "Yes," what medication, medical equipment or other assistance do you use?

12. Did you ask your employer for any changes or assistance to do your job because of your disability?

Yes ☐ **No** ☐

If "YES", when did you ask? _____ How did you ask (verbally or in writing)? _____

Who did you ask? (Provide full name and job title of person)

Describe the changes or assistance that you asked for:

How did your employer respond to your request?

13. Are there any witnesses to the alleged discriminatory incidents? If yes, please identify them below and tell us what they will say. (Please attach additional pages if needed to complete your response)

A. Full Name	Job Title	Address & Phone Number

What do you believe this person will tell us?

B. Full Name	Job Title	Address & Phone Number

What do you believe this person will tell us?

14. Have you filed a charge previously in this matter with EEOC or another agency? Yes ☐ No ☒

15. If you have filed a complaint with another agency, provide name of agency and date of filing:

16. Have you sought help about this situation from a union, an attorney, or any other source? Yes ☐ No ☒
Provide name of organization, name of person you spoke with and date of contact. Results, if any?

Please check one of the boxes below to tell us what you would like us to do with the information you are providing on this questionnaire. If you would like to file a charge of job discrimination, you must do so either within 180 days from the day you knew about the discrimination, or within 300 days from the day you knew about the discrimination if the employer is located in a place where a state or local government agency enforces laws similar to the EEOC's laws. **If you do not file a charge of discrimination within the time limits, you will lose your rights. If you would like more information before filing a charge or you have concerns about EEOC's notifying the employer, union, or employment agency about your charge, you may wish to check Box 1. If you want to file a charge, you should check Box 2.**

Box 1 ☐ I want to talk to an EEOC employee before deciding whether to file a charge. I understand that by checking this box, I have not filed a charge with the EEOC. **I also understand that I could lose my rights if I do not file a charge in time.**

Box 2 ☒ I want to file a charge of discrimination, and I authorize the EEOC to look into the discrimination I described above. I understand that **the EEOC must give the employer, union, or employment agency that I accuse of discrimination information about the charge, including my name.** I also understand that the EEOC can only accept charges of job discrimination based on race, color, religion, sex, national origin, disability, age, genetic information, or retaliation for opposing discrimination.

/s/ Leslie A. Reed — **Signature**

February 20, 2017 — **Today's Date**

PRIVACY ACT STATEMENT: This form is covered by the Privacy Act of 1974: Public Law 93-579. Authority for requesting personal data and the uses thereof are:

1. **FORM NUMBER/TITLE/DATE.** EEOC Intake Questionnaire (9/20/08).
2. **AUTHORITY.** 42 U.S.C. § 2000e-5(b), 29 U.S.C. § 211, 29 U.S.C. § 626, 42 U.S.C. 12117(a), 42 USC §2000ff-6.
3. **PRINCIPAL PURPOSE.** The purpose of this questionnaire is to solicit information about claims of employment discrimination, determine whether the EEOC has jurisdiction over those claims, and provide charge filing counseling, as appropriate. Consistent with 29 CFR 1601.12(b) and 29 CFR 1626.8(c), this questionnaire may serve as a charge if it meets the elements of a charge.
4. **ROUTINE USES.** EEOC may disclose information from this form to other state, local and federal agencies as appropriate or necessary to carry out the Commission's functions, or if EEOC becomes aware of a civil or criminal law violation. EEOC may also disclose information to respondents in litigation, to congressional offices in response to inquiries from parties to the charge, to disciplinary committees investigating complaints against attorneys representing the parties to the charge, or to federal agencies inquiring about hiring or security clearance matters
5. **WHETHER DISCLOSURE IS MANDATORY OR VOLUNTARY AND EFFECT ON INDIVIDUAL FOR NOT PROVIDING INFORMATION.** Providing of this information is voluntary but the failure to do so may hamper the Commission's investigation of a charge. It is not mandatory that this form be used to provide the requested information.

Investigator Intake Notes
2/20/2017

CP - female
hired by R in March 2012 as a Project Specialist
job duties: writes newsletter, speeches and press releases
Prior to 3/12 - worked for Advertising Firm

-CP says that she is being harassed by Marvin Winters and Roger Meany. Winters is her supervisor and the Director of the Communications Department. Meany is also a Project Specialist and was hired in July 2016. Meany handles marketing responsibilities.

-took leave because of stress
-received a copy of R's sexual harassment policy. Believes that Winters and Meany dislike females. Says she's being subjected to sexual harassment. Meany told her when he was hired that she shouldn't get in his way. He criticized the speaker that she arranged to speak at the quarterly luncheon (July 2016). Constantly makes derogatory comments about women - females have not excelled in marketing and negative comments about the CEO. The CEO is female, Valerie Simon. Two other women have been subjected to Meany's derogatory comments about women.

-Winters is always critical of her work
-Winters requires her to rewrite correspondence and also makes derogatory comments about females. Winters refers to CEO as "chief bitch" and "the broad in charge." He questioned her about her medical leave (December 2016) - asked her if she were in therapy to deal with female problems. Ignored her complaint about Meany.

-Is experiencing extreme stress due to work situation which has affected her health.
-believes that Winters and Meany are in violation of R's sexual harassment policy.
-demands that Winter and Meany apologize and are disciplined. Would like compensation for harassment.

EEOC Form 5 (5/01)

CHARGE OF DISCRIMINATION

This form is affected by the Privacy Act of 1974. See enclosed Privacy Act Statement and other information before completing this form.

Charge Presented To: Agency(ies) Charge No(s):

- [ ] FEPA
- [X] EEOC — 723-2017-05390

and EEOC

State or local Agency, if any

Name (Indicate Mr., Ms., Mrs.)	Home Phone (Incl. Area Code)	Date of Birth
Ms. Leslie Reed	**(301) 555-1544**	

Street Address	City, State and ZIP Code
2801 Olive Way	**Fairview, MD 20644**

Named is the Employer, Labor Organization, Employment Agency, Apprenticeship Committee, or State or Local Government Agency That I Believe Discriminated Against Me or Others. (*If more than two, list under PARTICULARS below.*)

Name	No. Employees, Members	Phone No. (Include Area Code)
All Star Finance Company	**500+**	**703-555-2200**

Street Address	City, State and ZIP Code
2518 Grover Cleveland Parkway	**Alexandria, VA 22399**

Name	No. Employees, Members	Phone No. (Include Area Code)

Street Address	City, State and ZIP Code

DISCRIMINATION BASED ON (*Check appropriate box(es).*)

- [ ] RACE
- [ ] COLOR
- [X] SEX
- [ ] RELIGION
- [ ] NATIONAL ORIGIN
- [ ] RETALIATION
- [ ] AGE
- [ ] DISABILITY
- [ ] OTHER (*Specify below.*)

DATE(S) DISCRIMINATION TOOK PLACE

Earliest	Latest
07-15-2016	**02-20-2017**

- [X] CONTINUING ACTION

THE PARTICULARS ARE (*If additional paper is needed, attach extra sheet(s)*):

I was hired by the All Star Finance Company in March 2012 as a Project Specialist in the Communications Department.

Since July 2016, I have been continually harassed by the male Project Specialist and the male Communications Department Director, who is my supervisor. They constantly make derogatory remarks about women. My supervisor constantly criticizes my work performance.

I believe that I have been discriminated against on the basis of my sex, female, in violation of Title VII of the Civil Rights Act of 1964, as amended. I also believe that females as a class have been subjected to harassment due to their sex, female.

I want this charge filed with both the EEOC and the State or local Agency, if any. I will advise the agencies if I change my address or phone number and I will cooperate fully with them in the processing of my charge in accordance with their procedures.

I declare under penalty of perjury that the above is true and correct.

2/20/2017
Date

/s/ *Leslie A. Reed*
Charging Party Signature

NOTARY – *When necessary for State and Local Agency Requirements*

I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.
SIGNATURE OF COMPLAINANT

SUBSCRIBED AND SWORN TO BEFORE ME THIS DATE
(*month, day, year*)

PRIVACY ACT STATEMENT: Under the Privacy Act of 1974, Pub. Law 93-579, authority to request personal data and its uses are:

1. **FORM NUMBER/TITLE/DATE.** EEOC Form 5, Charge of Discrimination (5/01).

2. **AUTHORITY.** 42 U.S.C. 2000e-5(b), 29 U.S.C. 211, 29 U.S.C. 626, 42 U.S.C. 12117.

3. **PRINCIPAL PURPOSES.** The purposes of a charge, taken on this form or otherwise reduced to writing (whether later recorded on this form or not) are, as applicable under the EEOC anti-discrimination statutes (EEOC statutes), to preserve private suit rights under the EEOC statutes, to invoke the EEOC's jurisdiction and, where dual-filing or referral arrangements exist, to begin state or local proceedings.

4. **ROUTINE USES.** This form is used to provide facts that may establish the existence of matters covered by the EEOC statutes (and as applicable, other federal, state or local laws). Information given will be used by staff to guide its mediation and investigation efforts and, as applicable, to determine, conciliate and litigate claims of unlawful discrimination. This form may be presented to or disclosed to other federal, state or local agencies as appropriate or necessary in carrying out EEOC's functions. A copy of this charge will ordinarily be sent to the respondent organization against which the charge is made.

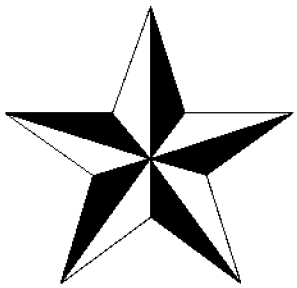
5. **WHETHER DISCLOSURE IS MANDATORY; EFFECT OF NOT GIVING INFORMATION.** Charges must be reduced to writing and should identify the charging and responding parties and the actions or policies complained of. Without a written charge, EEOC will ordinarily not act on the complaint. Charges under Title VII or the ADA must be sworn to or affirmed (either by using this form or by presenting a notarized statement or unsworn declaration under penalty of perjury); charges under the ADEA should ordinarily be signed. Charges may be clarified or amplified later by amendment. It is not mandatory that this form be used to make a charge.

NOTICE OF RIGHT TO REQUEST SUBSTANTIAL WEIGHT REVIEW

Charges filed at a state or local Fair Employment Practices Agency (FEPA) that dual-files charges with EEOC will ordinarily be handled first by the FEPA. Some charges filed at EEOC may also be first handled by a FEPA under worksharing agreements. You will be told which agency will handle your charge. When the FEPA is the first to handle the charge, it will notify you of its final resolution of the matter. Then, if you wish EEOC to give Substantial Weight Review to the FEPA's final findings, you must ask us in writing to do so within 15 days of your receipt of its findings. Otherwise, we will ordinarily adopt the FEPA's finding and close our file on the charge.

NOTICE OF NON-RETALIATION REQUIREMENTS

Please **notify** EEOC or the state or local agency where you filed your charge **if retaliation is taken against you or others** who oppose discrimination or cooperate in any investigation or lawsuit concerning this charge. Under Section 704(a) of Title VII, Section 4(d) of the ADEA, and Section 503(a) of the ADA, it is unlawful for an *employer* to discriminate against present or former employees or job applicants, for an *employment agency* to discriminate against anyone, or for a *union* to discriminate against its members or membership applicants, because they have opposed any practice made unlawful by the statutes, or because they have made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under the laws. The Equal Pay Act has similar provisions and Section 503(b) of the ADA prohibits coercion, intimidation, threats or interference with anyone for exercising or enjoying, or aiding or encouraging others in their exercise or enjoyment of, rights under the Act.



All Star Finance Company

Sexual Harassment Policy

ALL STAR FINANCE COMPANY
"Protecting America's Businesses for a Better Tomorrow"
2518 Grover Cleveland Parkway
Alexandria, Virginia 22399

DIRECTIVE: PREVENTION AND ELIMINATION OF SEXUAL HARASSMENT IN THE WORKPLACE

PURPOSE: This Directive assures that the All Star Finance Company is taking all feasible steps to prevent sexual harassment from occurring and to correct sexual harassment that does occur before it becomes severe or pervasive.

EFFECTIVE DATE: January 1, 2012

ORIGINATOR: Human Resources Department

AUTHORITY: Title VII of the Civil Rights Act of 1964, as amended

POLICY:

The All Star Finance Company has a zero tolerance for sexual harassment. It is the policy of the All Star Finance Company to maintain a work environment that is free from sexual harassment and from retaliation based on opposition to discrimination or participation in discrimination complaint proceedings.

In addition, the All Star Finance Company will not tolerate any retaliation against any employee for reporting sexual harassment under this or any other policy or procedure, or for assisting any inquiry about such a report.

Definition of Sexual Harassment: For the purpose of this Directive, sexual harassment is defined as any unwelcome verbal or physical conduct of a sexual nature when:

- The conduct can reasonably be considered to adversely affect the work environment, or

- An employment decision affecting the employee is based on the employee's acceptance or rejection of such conduct.

This definition is broader than the applicable legal definitions and is based on the All Star Finance Company's goal of eliminating sexual harassment from the workplace.

Enforcement of this Policy: All of All Star Finance Company staff are responsible for implementing the anti-harassment policy and for cooperating fully in its enforcement.

- Employees MUST NOT engage in sexually harassing conduct.

- Employees who are subjected to sexual harassment should promptly utilize the procedures in this Directive to bring the matter to the attention of management. All employees must cooperate with any inquiry or investigation.

- Supervisors and other management officials must act promptly and effectively to prevent

harassment from occurring in the workplace and to correct any harassment that does occur.

Report and Inquiry Procedure:

- Any employee who believes that he or she has been the subject of harassment in violation of this policy may report the matter to a supervisor or management official in his or her office or to the Human Resources Department. All information will be maintained on a confidential basis to the greatest extent possible.

- Employees who know of harassing conduct directed at others may also report the harassment to a supervisor or other management official in their office or to the Human Resources Department.

- A supervisor or other management official who receives a report of harassment shall immediately:

    - take action to stop any harassing conduct; and immediately
    - report the incident to the Human Resources Director who will be responsible for conducting an investigation into the matter.

- Employees who are found in violation of the sexual harassment policy will be subjected to disciplinary action, up to and including termination.

INQUIRIES: Any person wanting further information about this Directive may contact the Human Resources Department at 703-366-5500.

DISTRIBUTION: This Directive shall be distributed to all employees upon issuance and annually thereafter. It shall also be distributed to new employees as part of their orientation on their first day of work.

Valerie Simon
Valerie Simon
CEO

Investigative Plan – Leslie Reed v. All Star Finance

EEOC Charge No. 723-2017-05390
Issue: Harassment
Basis: Gender (female)
Theory: Harassment

Statute:
Basis:
Issue:
SEP Category:
PCHP Assessment:

MODELS OF PROOF REQUIREMENTS:

Are the Prima Facie Elements (*Basic Elements Present*)?

What is R's Legitimate Non-DiscriminatoryReason?

How will we *Test R's Defenses* for Pretext?

What we Know	**What we Need** How will we get it?
Employer has sexual harassment policy	• Copy of the sexual harassment policy - RFI • Details on the specifics of the harassment - who, what, when, where, etc. - Interview with charging party • Are there witnesses to the “stupid broad” statement? - Interviews with charging party and any identified witnesses • When and how often did the comments occur? - Interviews with charging party and her co-workers • Did charging party complain of the harassment? - Interview with charging party

Statement
Leslie Reed

1. My name is Leslie Reed. I am female.
2. I am a Project Specialist in the Communications Department of All Star Finance Company. The Communications Department is responsible for the design and content of All Star's publications including brochures, employee newsletter, press releases, speeches and public service announcements. Also, the department is responsible for the development and design of all marketing materials.
3. I was hired in March 2012 by Marvin Winters, the Communications Director. Prior to March 2012, I worked for an advertising firm in Washington, D.C.
4. My job duties in the Communications Department involve writing the employee newsletter, speeches, and press releases. Whenever required, I am also supposed to assist with the department's marketing responsibilities. The company issues monthly press releases publicizing its services, special offers and community activities.
5. I work in an area that had been used for storage. My desk is under an air vent. I share this space with Roger Meany, the other Project Specialist. Roger is primarily assigned all of the Communication Department's marketing responsibilities.

6. Roger has been rude to me since he started in July 2016. He told me that he resented sharing the work space with me. He also told me several times I should not try to get in his way or interfere with his marketing activities. Roger believes that his work is of primary importance to the department and has stated, on occasion, that females have not excelled in marketing.

7. In July 2016, I organized the Communications Department's quarterly luncheon. I had arranged for a female speaker from a Fortune 500 company to speak on innovative marketing strategies. The speaker was very good. After the luncheon, I heard Marvin Winters and Roger Meany comment that the luncheon had been a waste of time. Roger commented that he could have found a better speaker.

8. Last fall, Roger and I were asked to write a report about the accomplishments of our department. While working on this project, Roger was very critical of my writing style. I was forced to rewrite various sections of the report. He would make derogatory comments about women and even stated on several occasions that our company's financial problems were due to Valerie Simon's lack of leadership and inability to take risks. He said that a male CEO would be able to take the bold and innovative steps our company needs to improve.

9. There are two female assistants, Deborah and I, who work in the Communications department with Roger and I. They have also been demeaned by Roger. He repeatedly tells them women should not be in marketing and that they should be at home taking care of their children. They both tried to complain to Mr. Winters, but he ignored them.

11. I complained to Mr. Winters about Roger. However, Mr. Winters told me that I just didn't understand how to write a report.

12. Mr. Winters has always been very critical of my work. I was required to constantly rewrite correspondence that I drafted such as the employee newsletter, speeches and press releases. The only assignments Mr. Winters did not criticize or require me to rewrite were speeches I wrote for Valerie Simon. Mr. Winters told me that I was "too sensitive" to be in a communications job and that if I couldn't handle the stress, I should stay at home with my children.

13. I was very upset about how Mr. Winters and Roger Meany treated me. I have asthma and the stress caused me to begin to experience more severe symptoms. In November and December 2016, I had several severe asthma attacks. Due to my poor health, I had to take time off from work. I was out of work for two weeks in January 2017. My doctor recently prescribed me a new medication called Ventolin which I take twice daily. It has slightly improved my breathing.

14. Initially, Mr. Winters approved my requests for sick leave without question.

After the fifth request in early December 2016, however, Mr. Winters started questioning why I had to see my doctor so often. I told him that I had not been feeling well. He asked me if I was really in therapy to learn how to deal with all the female problems women had. I was shocked and very upset by this question. I told Mr. Winters that I did not appreciate his question.

13. Some offices down the hallway from my office were being renovated. The dust generated from the construction work caused my asthma to become worse.

14. Mr. Winters also made derogatory comments about Valerie Simon, CEO of All Star Finance Company. He frequently refers to Ms. Simon as "chief bitch" and "the broad in charge."

15. Due to the stress, I took two weeks of medical leave in January 2017. When I returned, Roger stopped speaking to me. I heard Mr. Winters and Roger joking about women always needing to see their doctors and being hypochondriacs. I heard Mr. Winters say that he thought women's "female problems" were just in their heads and they really just needed to see a shrink who could straighten them out.

16. While I was on sick leave in January 2015, some of my work was reassigned to Roger. This month (February, 2017) Roger blew up at me because he'd had to work on a "stupid women's issues" speech for Valerie Simon. I was stunned by Roger's actions and tried immediately to see Mr. Winters.

17. I met with Mr. Winters later that same week. Instead of listening to my concerns about Roger, Mr. Winters gave me a counseling memorandum about my attendance. I burst into tears when given this memorandum. Mr. Winters withdrew the memorandum. I do not have a copy of it.

18. I have had asthma since early childhood. It affects my ability to breathe. I have been instructed by my doctors to avoid crowds, cigarette smoke, people wearing perfume, and outdoor activities. I also must avoid being active at night, remain indoors during windy conditions and cannot be in enclosed spaces with cleaning agents. A large variety of materials can trigger an asthma attack and such an episode renders me completely unable to function.

19. Most of the time when I have an asthma attack, whether at work or at home, I experience chest tightness, wheezing, cough and shortness of breath. My doctors have told me that my condition is not curable.

20. I use several different medications to control my symptoms, but even with the medications I experience symptoms most of the time.

21. I used to have constant asthma attacks throughout the year when I was a child, but now they usually only occur several times a year except when I experience stress. Due to the stress I have experienced while working for All Star Finance Company, the asthma attacks have become more severe and frequent. During November and December 2016, I had several asthma attacks.

22. My work area is dusty and right under an air vent. I specifically asked my Supervisor, Marvin Winters, for a transfer to a different work space on March 1, 2017. He refused without providing any explanation.

23. My job duties include writing press releases, speeches and the employee newsletter.

24. I have always been able to perform my job duties, even when my asthma symptoms were very bad. I have not requested a transfer to a different job, only to be moved to better work space.

25. I have filed for workers compensation and been on leave since April 1, 2015, because of management's refusal to provide me with new office space.

26. I believe that Marvin Winters should be removed as a supervisor because of his poor communications skills and lack of sensitivity. I have been very upset by his sexist comments and his refusal to instruct Roger Meany to refrain from making similar comments. I do not understand how Mr. Winters has been allowed to remain in his position given the provisions of the sexual harassment policy.

EEOC Form 5 (5/01)

CHARGE OF DISCRIMINATION

This form is affected by the Privacy Act of 1974. See enclosed Privacy Act Statement and other information before completing this form.

Charge Presented To:	Agency(ies) Charge No(s):
[ ] FEPA	**Amended**
[X] EEOC	**723-2017-05390**

and EEOC

State or local Agency, if any

Name *(Indicate Mr., Ms., Mrs.)*	Home Phone *(Incl. Area Code)*	Date of Birth
Ms. Leslie Reed	**(301) 555-1544**	

Street Address	City, State and ZIP Code
2801 Olive Way	**Fairview, MD 20644**

Named is the Employer, Labor Organization, Employment Agency, Apprenticeship Committee, or State or Local Government Agency That I Believe Discriminated Against Me or Others. (*If more than two, list under PARTICULARS below.*)

Name	No. Employees, Members	Phone No. *(Include Area Code)*
All Star Finance Company	**500+**	**703-555-2200**

Street Address	City, State and ZIP Code
2518 Grover Cleveland Parkway	**Alexandria, VA 22399**

Name	No. Employees, Members	Phone No. *(Include Area Code)*

Street Address	City, State and ZIP Code

DISCRIMINATION BASED ON *(Check appropriate box(es).)*

[ ] RACE [ ] COLOR [X] SEX [ ] RELIGION [ ] NATIONAL ORIGIN
[ ] RETALIATION [ ] AGE [X] DISABILITY [ ] OTHER *(Specify below.)*

DATE(S) DISCRIMINATION TOOK PLACE

Earliest	Latest
07-15-2016	**04-18-2017**

[X] CONTINUING ACTION

THE PARTICULARS ARE *(If additional paper is needed, attach extra sheet(s)):*

I was hired by the All Star Finance Company in March 2012 as a Project Specialist in the Communications Department.

Since July 2016, I have been continually harassed and subjected to a hostile work environment by the male Project Specialist and the male Communications Department Director, who is my supervisor. They constantly make derogatory remarks about women. My supervisor constantly criticizes my work performance.

On March 1, 2016, I requested a reasonable accommodation for my disability which was denied by my Supervisor. I have been on leave since April 1, 2017.

I believe that I have been discriminated against on the basis of my sex, female, in violation of Title VII of the Civil Rights Act of 1964, as amended, and my disability in violation the Americans with Disabilities Act of 1990, as amended. I also believe that females as a class have been subjected to harassment in violation of Title VII.

I want this charge filed with both the EEOC and the State or local Agency, if any. I will advise the agencies if I change my address or phone number and I will cooperate fully with them in the processing of my charge in accordance with their procedures.

I declare under penalty of perjury that the above is true and correct.

04/18/2017
Date

Charging Party Signature

NOTARY – *When necessary for State and Local Agency Requirements*

I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.
SIGNATURE OF COMPLAINANT

SUBSCRIBED AND SWORN TO BEFORE ME THIS DATE
(*month, day, year*)

PRIVACY ACT STATEMENT: Under the Privacy Act of 1974, Pub. Law 93-579, authority to request personal data and its uses are:

1. **FORM NUMBER/TITLE/DATE.** EEOC Form 5, Charge of Discrimination (5/01).

2. **AUTHORITY.** 42 U.S.C. 2000e-5(b), 29 U.S.C. 211, 29 U.S.C. 626, 42 U.S.C. 12117.

3. **PRINCIPAL PURPOSES.** The purposes of a charge, taken on this form or otherwise reduced to writing (whether later recorded on this form or not) are, as applicable under the EEOC anti-discrimination statutes (EEOC statutes), to preserve private suit rights under the EEOC statutes, to invoke the EEOC's jurisdiction and, where dual-filing or referral arrangements exist, to begin state or local proceedings.

4. **ROUTINE USES.** This form is used to provide facts that may establish the existence of matters covered by the EEOC statutes (and as applicable, other federal, state or local laws). Information given will be used by staff to guide its mediation and investigation efforts and, as applicable, to determine, conciliate and litigate claims of unlawful discrimination. This form may be presented to or disclosed to other federal, state or local agencies as appropriate or necessary in carrying out EEOC's functions. A copy of this charge will ordinarily be sent to the respondent organization against which the charge is made.

5. **WHETHER DISCLOSURE IS MANDATORY; EFFECT OF NOT GIVING INFORMATION.** Charges must be reduced to writing and should identify the charging and responding parties and the actions or policies complained of. Without a written charge, EEOC will ordinarily not act on the complaint. Charges under Title VII or the ADA must be sworn to or affirmed (either by using this form or by presenting a notarized statement or unsworn declaration under penalty of perjury); charges under the ADEA should ordinarily be signed. Charges may be clarified or amplified later by amendment. It is not mandatory that this form be used to make a charge.

NOTICE OF RIGHT TO REQUEST SUBSTANTIAL WEIGHT REVIEW

Charges filed at a state or local Fair Employment Practices Agency (FEPA) that dual-files charges with EEOC will ordinarily be handled first by the FEPA. Some charges filed at EEOC may also be first handled by a FEPA under worksharing agreements. You will be told which agency will handle your charge. When the FEPA is the first to handle the charge, it will notify you of its final resolution of the matter. Then, if you wish EEOC to give Substantial Weight Review to the FEPA's final findings, you must ask us in writing to do so within 15 days of your receipt of its findings. Otherwise, we will ordinarily adopt the FEPA's finding and close our file on the charge.

NOTICE OF NON-RETALIATION REQUIREMENTS

Please **notify** EEOC or the state or local agency where you filed your charge **if retaliation is taken against you or others** who oppose discrimination or cooperate in any investigation or lawsuit concerning this charge. Under Section 704(a) of Title VII, Section 4(d) of the ADEA, and Section 503(a) of the ADA, it is unlawful for an *employer* to discriminate against present or former employees or job applicants, for an *employment agency* to discriminate against anyone, or for a *union* to discriminate against its members or membership applicants, because they have opposed any practice made unlawful by the statutes, or because they have made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under the laws. The Equal Pay Act has similar provisions and Section 503(b) of the ADA prohibits coercion, intimidation, threats or interference with anyone for exercising or enjoying, or aiding or encouraging others in their exercise or enjoyment of, rights under the Act.

Investigative Plan - Reed case

EEOC Charge No.723-2017-05390 **amended**
Issue(s): Harassment, Reasonable Accommodation
Basis (es): Gender (female), Disability
Theory(ies): Harassment, Reasonable Accommodation

SEP Category:
PCHP **Reassessment:**

MODELS OF PROOF REQUIREMENTS:

Are the Prima Facie Elements (*Basic Elements Present*)?

What is R's Legitimate Non-DiscriminatoryReason?

How will we *Test R's Defenses* for Pretext?

What we Know	**What we Need** How will we get it?
Employer has sexual harassment policy Reed requested a reasonable accommodation	• Copy of the sexual harassment policy - RFI • Details on the specifics of the harassment with respect to CP, other females- who, what, when, where, etc. - Interview with CP, other females • Are there witnesses to the "stupid broad" statement? - Interviews with CP and any identified witnesses • When and how often did the comments occur? - Interviews with CP and co-workers • Did CP complain of the harassment? - Interview with CP • Does CP have a medical impairment that substantially limits a major life activity? – Interview CP, plus Medical records or information from her doctor • Can CP perform the essential functions of her position with or without a reasonable accommodation? CP, Winters • Did CP request a reasonable accommodation? -Interviews with CP and Winters • Could R have provided CP with a reasonable accommodation? - Interviews with relevant management officials and tour of work place

PROFILE OF MARVIN WINTERS

Role Player Note: Marvin Winters is evasive and tries to lay blame elsewhere rather than assume any responsibility for his own actions. When interviewed by the Investigator, Mr. Winters is very talkative, and tends to embellish his responses with extraneous and unnecessary comments. He displays a false friendly manner and appears overly willing to answer the questions and provide information. However, in reality, he attempts to sidestep the questions and to get the Investigator off track.

Marvin Winters has been employed by All Star Finance Company for 10 years and has been the Director of the Communications Department for 7 years. He is 18 months from retirement. He has been particularly unhappy that Valerie Simon, a woman, is the CEO of All Star Finance Company.

Winters hired Leslie Reed into the Project Specialist position in March 2012. He did so because Valerie Simon had been encouraging Managers to bring diversity to the company. He assigned Ms. Reed the responsibilities of drafting the employee newsletter, speeches, and press releases. However, Roger Meany is assigned the most important work of the department, the development and design of all marketing materials.

With controlled questioning efforts, Winters addresses the incidents of harassment reported by Reed. He attempts to deflect any allegations of gender bias by offering legitimate reasons for his conduct. He thought the luncheon for which Reed secured a female speaker was a waste of time because of a huge deadline he had, not because of the speaker or the topic. He claims he called Valerie Simon the "chief bitch" and other derogatory terms because of strong personality differences they have and disagreements over the direction of the company.

In response to a specific inquiry about the incidents involving Reed, Winters states that she often seemed confused and "out of her league" with several assignments. He often had to rewrite her work products. Winters claims that Reed's poor performance and attendance forced him to reassign the duty of drafting press releases to the other Project Specialist, Roger Meany. Winters did not critique or comment on speeches Reed wrote for Valerie Simon because he did not consider them important and believed Valerie Simon could do her own rewrites. According to Winters, Meany was the one who made most of the sexist comments about Reed. Winters goes on to embellish his answer about the innate challenges and stresses that come with working in the communications and marketing business for a large financial company. Winters states that to

excel in this area, a person must be aggressive, outgoing, and knowledgeable on the issues that affect large businesses. Winters believes that Reed lacks these qualities.

With respect to the sick leave, Winters states that Reed, "appeared to be a real nice lady," but that she seemed "too delicate" for the demanding work performed by the Communications Department. Winters acknowledges that Reed told him about the severity of her asthmatic condition at the time she requested a move to a different work space in March 2015. Winters states that he did not respond to her request for a new work space because there was no other work space to which Reed could be moved. He had already checked with Human Resources in the spring to see if she could be transferred to a different department because of the numerous complaints made by Meany. Human Resources was unable to find a vacancy for Reed. On the advice of Human Resources, however, he did give Reed a counseling memorandum about her extensive sick leave. Reed burst into tears when he gave her the memorandum, so Winters took it back. He threw it away. Reed's response just confirmed his opinion that she was not up to the job in the Communications Department.

If confronted with Reed's statements that there was space available in the Finance Department on another floor, Winters says that would have been perfect if she could have been assigned to a different department, but there were no vacancies that he knew of. The company does not place employees wherever they want all over the building; they are assigned to work space in their own department. Anyway, the construction was moving to the floor where the Finance Department is located shortly.

In response to direct questions about Meany, Winters states that he believed the problems between Meany and Reed were just a bad personality conflict and he told them both "to just get over it." He denies that he believes Reed's complaints or the other alleged complaints by the other females regarding Meany were complaints about harassment. Winters states that he read the sexual harassment policy and nothing Meany said about Reed was sexual in nature. Because of that, Winters tried to keep their working relationship civil.

Winters volunteers that he thinks something will have to be done to help him out because Meany is threatening to quit unless Winters takes action to improve Reed's attendance and work performance. Because Winters does not believe that Reed can handle demanding work, he stopped assigning her the press releases and gave them all to Meany to do.

Winters then looks at his watch and tells you he needs to leave for a meeting.

Statement
MARVIN WINTERS

1. My name is Marvin Winters. I have been employed by All Star Finance Company for 10 years and have been the Director of the Communications Department for 7 years.
2. I hired Leslie Reed into the Project Specialist position in March 2012.
3. I have not sexually harassed Leslie Reed in any manner.
4. My comment that the quarterly luncheon was a waste of time was based on the fact that I had a very important deadline to meet and did not want to take time out from the project I was working on. The project was for Valerie Simon, the CEO of All Star Finance Company.
5. I have strong disagreements with Valerie Simon over the direction of the company. In a fit of anger, I may have referred to her by a derogatory term such as "chief bitch." These comments were not based on Ms. Simon's sex in any way.
6. Leslie Reed was not an outstanding performer in the Project Specialist job. She often seemed confused and was out of her league on several assignments. As a result of her poor performance, I assigned the majority of the department's marketing responsibilities, as well as other duties to Roger Meany, who is the other Project Specialist. I hired Roger in July 2016. Recently, I had to assign Roger to write press releases while Leslie

was on leave. I have had to spend an inordinate amount of time rewriting and reviewing Leslie's work, which was not very good.

7. Roger sometimes made disrespectful comments about Reed. I believe the problems between Roger and Leslie were just a personality conflict. I do not believe that Leslie's complaints about Roger were complaints about harassment.

8. The work in the Communications Department is very demanding and not everyone can do the job. I believe that to be good in public relations and communications a person must be aggressive, outgoing, and knowledgeable on the issues that affect large financial institutions.

9. Leslie was often out sick. Leslie first told me she had asthma in March 2017. I'm sorry she has asthma, but her excessive use of leave caused me to contact the Human Resources office to see what I could do about it. I asked Human Resources if Leslie could be transferred to a different division because of the numerous complaints made by Roger. There was apparently no vacancy where Leslie could be transferred.

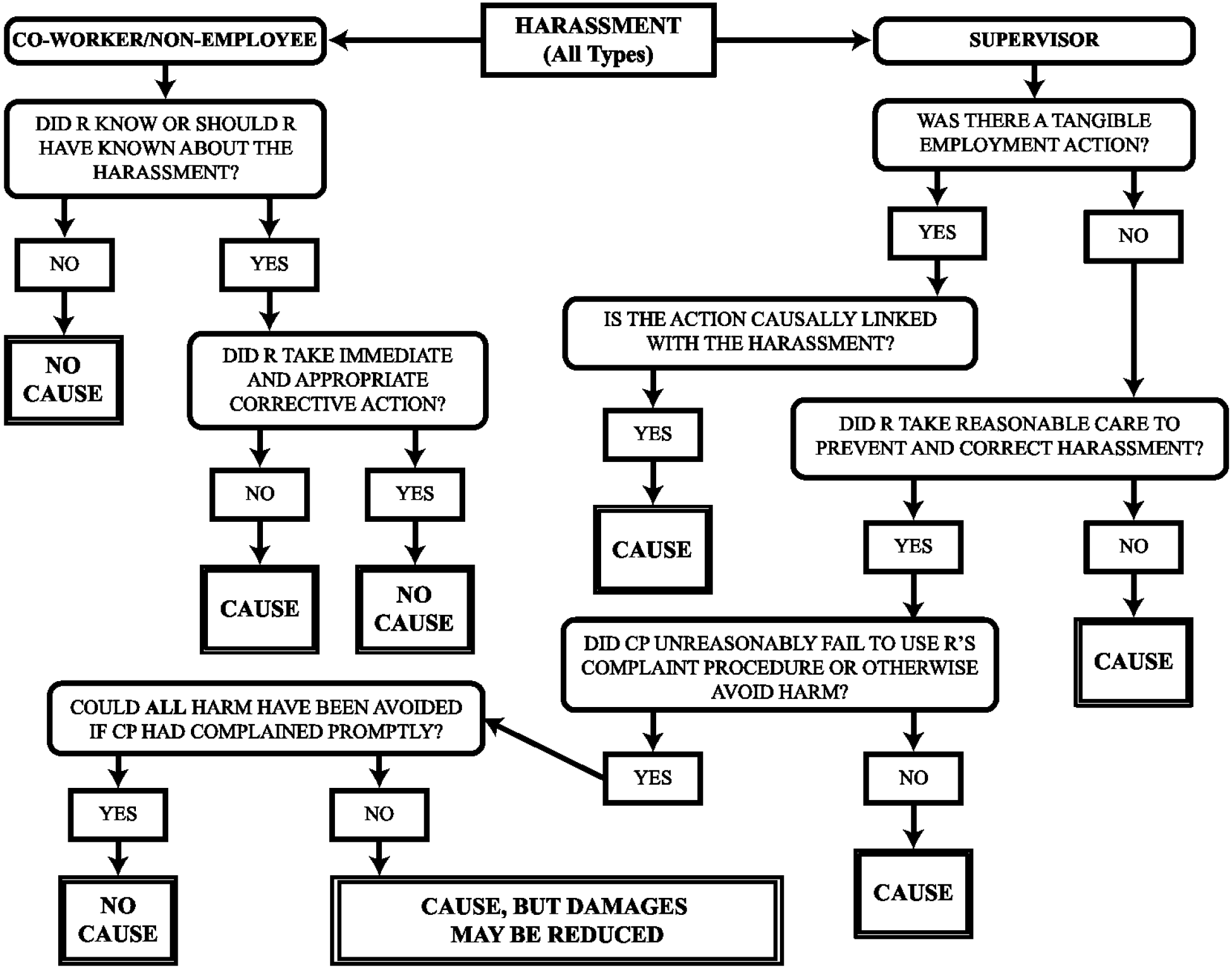
10. On the advice of Human Resources, I gave Leslie an informal counseling memorandum about her excessive use of leave. However, Leslie cried when I gave it to her, so I withdrew it. I do not have a copy because I destroyed it.

11. I did not transfer Leslie to a different work space because there was no other work space to which she could be moved.

12. I have read the company's sexual harassment policy. Leslie nor any one else ever complained that the things Roger said were sexual in nature. Because of that, I tried to keep their working relationship civil.

Statement
Leslie Reed
(Pre-Conciliation Interview)

1. I have been off work since April 1, 2017,
2. Mr. Winters has never told me any specifics about what was wrong with my written assignments. I don't know why he thought they had to be rewritten. I have never been asked to rewrite the speeches I wrote for Valerie Simon.
3. I am requesting $600,000 in compensatory damages for the claims I filed. My attorney's fees to date are about $5,000.
4. I am angry about the way Marvin Winters has treated me. Mr. Winters should either retire or be removed from supervisory duties. A letter of apology is not good enough. I no longer want to work under Mr. Winters. I would like to be transferred to a different job.


HARASSMENT
(All Types)
CO-WORKER/NON-EMPLOYEE
SUPERVISOR
DID R KNOW OR SHOULD R HAVE KNOWN ABOUT THE HARASSMENT?
NO
YES
NO CAUSE
DID R TAKE IMMEDIATE AND APPROPRIATE CORRECTIVE ACTION?
NO
YES
CAUSE
NO CAUSE
WAS THERE A TANGIBLE EMPLOYMENT ACTION?
YES
NO
IS THE ACTION CAUSALLY LINKED WITH THE HARASSMENT?
YES
CAUSE
DID R TAKE REASONABLE CARE TO PREVENT AND CORRECT HARASSMENT?
YES
NO
CAUSE
DID CP UNREASONABLY FAIL TO USE R'S COMPLAINT PROCEDURE OR OTHERWISE AVOID HARM?
YES
NO
CAUSE
COULD ALL HARM HAVE BEEN AVOIDED IF CP HAD COMPLAINED PROMPTLY?
YES
NO
NO CAUSE
CAUSE, BUT DAMAGES MAY BE REDUCED

HARASSMENT DISCRIMINATION- THEORIES OF LIABILITY

Harassment

Harassment in the workplace can be an egregious form of discrimination. While most people tend to think of harassment as sexual in nature, harassment is any unwelcome verbal or physical conduct that is based on one of the protected bases covered by the EEOC when:

Harassment

The conduct is severe or pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile, or abusive.

Harassment

Federal law does not prohibit: isolated incidents that are not extremely serious, offhand comments or simple teasing. The conduct must be sufficiently frequent or severe to create a hostile work environment and the employer is automatically liable if the hostile work environment results in a tangible employment action.

Harassment

We know that the harasser can be the victim's supervisor, another managerial official or a co-worker. The harasser, however, may also be an agent of the employer or a non-employee.

Elements of a Harassment Claim

- Unwelcome
- Based on a protected category
- Objectively Offensive
- Subjectively Offensive
- Basis for Liability

Elements of a Harassment Claim

There must be a legal basis for holding the employer liable for the harassment.

Before we discuss liability, let's briefly discuss the cases and Commission policies that guide us in harassment cases.

Meritor Savings Bank v. Vinson

(Decided June 1986)

The Supreme Court held that a claim of "hostile environment" sexual harassment is a form of sex discrimination that is actionable under Title VII. "The language of Title VII is not limited to 'economic' or 'tangible' discrimination. Equal Employment Opportunity Commission Guidelines fully support the view that sexual harassment leading to non-economic injury can violate Title VII."

Harris v. Forklift

(Decided November 1993)

Subjectively Hostile v. Objectively Hostile

"While there is no precise test, the Court held that all circumstances should be evaluated. Such conditions include the frequency of the conduct, its severity, whether it was physically threatening or was merely an offensive comment, and whether it unreasonably interfered with an employee's work performance."

Best Quote from Harris' Decision

"But Title VII comes into play before the harassing conduct leads to a nervous breakdown. A discriminatorily abusive work environment, even one that does not seriously affect employees' psychological well being, can and often will detract from an employee's job performance, discourage employees from remaining on the job, or keep them from advancing in their careers. Moreover, even without regard to these tangible effects, the very fact that the discriminatory conduct was so severe or pervasive that it created a work environment abusive to employees because of their race, gender, religion or national origin, offends Title VII's broad rule of workplace equality." *Justice Sandra Day O'Connor*

Hostile Work Environment

- Title VII "bars conduct that would seriously affect a reasonable person's psychological well being, but the statute is not limited to such conduct. So long as the environment would reasonably be perceived, and is perceived, as hostile or abusive…, there is no need for it also to be psychologically injurious."

Theories of Liability

1. Strict Liability/Alter Ego
2. Harassment by Supervisor
   A. Tangible Employment Action
   B. The Faragher and Ellerth defense.
3. Co-Worker Harassment
4. Non Employees and Third Parties

Strict Liability

An employer is **ALWAYS** liable for harassment by an "alter ego."

- Automatic
- Sufficiently High Ranking
- Examples: President, Owner, Partner, Corporate Officer

Who is a Supervisor: *Vance v Ball State University*

(Decided June 2013)

- **Facts:** Marietta Vance, an African-American employee in university's catering department alleged racial harassment by another employee, Saundra Davis. Vance complained Davis "gave her a hard time at work by glaring at her, slamming pots and pans and intimidating her;" she was "left alone in the kitchen with Davis, who smiled at her;" Davis "blocked" her on an elevator and "stood there with her cart smiling;" and "often gave her 'weird' looks." Conduct persisted despite BSU's corrective action.
- Supreme Court: **"An employer may be vicariously liable for an employee's unlawful harassment only when the employer has empowered that employee to take tangible employment actions against the victim."**

Empowered to take TEA? = SUPERVISOR

- An employee IS a supervisor ONLY if the employer has authorized him or her to take **TANGIBLE EMPLOYMENT ACTIONS** against the target of the harassment, i.e., to "effect a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."
- May be subject to "ministerial approval," such as other's signature.
- SCOTUS rejects past EEOC guidance stating that the term supervisor included persons who controlled daily activities.
- Need to know job duties, chain of command, and authority of key personnel. Must know the scope of the harasser's authority to take **tangible employment actions**, including against THIS CP.

Supervisor? Yes. Then:

- Step One: Was there a tangible employment action?
- If yes, LIABLE.
- No defense when the harassment involves a tangible employment action.

But if there's no TEA?

- Supervisor? Yes.
- Tangible Employment Action? No.
- If no, then consider Faragher/Ellerth defense.

Vicarious Liability for Supervisor Harassment

- Vicarious liability is liability *without proof* the employer knew or should have known.
- No tangible employment action.
- Burden is on the employer.
- *Faragher/ Ellerth* Affirmative Defense.

Faragher/Ellerth : the Facts

Faragher v. City of Boca Raton

Beth Ann Faragher worked part time and summers as a life guard while attending college. Out of approximately 50 lifeguards, 6 were women. Two immediate supervisors engaged in offensive uninvited touching and lewd comments. One supervisor threatened, "Date me or clean toilets." City had a policy, but never distributed to the lifeguards or their supervisors.

Burlington Industries, Inc. v. Ellerth

Kimberly Ellerth quit her job after 15 months as a salesperson. She alleged that she was subjected to sexual harassment by a mid level supervisor who had the authority to hire/fire with approval. She rejected repeated advances, however, she never suffered a negative job action and was even once promoted. She filed a lawsuit alleging that she was subjected to a hostile work environment and constructively discharged.

Employers have an incentive to prevent harassment

"Although Title VII seeks 'to make persons whole for injuries suffered on account of unlawful employment discrimination,' its primary objective, like that of any statute meant to influence primary conduct, is not to provide redress but to avoid harm…

It would therefore implement clear statutory policy and complement the Government's Title VII enforcement efforts to recognize the employer's affirmative obligation to prevent violations and give credit here to employers who make reasonable efforts to discharge their duty. Indeed, a theory of vicarious liability for misuse of supervisory power would be at odds with the statutory policy if it failed to provide employers with some such incentive."

Faragher, 524 U.S. at 805-806.

Faragher/Ellerth Defense

Absent a tangible employment action, an Employer can avoid liability for supervisor harassment if it can prove the answer to both questions is YES.

1. Did the employer exercise reasonable care to prevent AND correct the harassment?

2. Can the employer prove that the employee UNREASONABLY failed to utilize available complaint procedures or otherwise avoid harm?

Remember: to prevail under the *Faragher/ Ellerth* defense, an employer must show not only that it fulfilled its responsibility, but *also* that the employee failed to fulfill hers.

Step One: Did employer exercise reasonable care to PREVENT harassment?

- ✓ Did employer establish, communicate and implement an **adequate** anti-harassment policy and complaint procedure?
- ✓ "Not every policy eliminates liability; generic policies that offer no specific complaint procedure may be insufficient to satisfy the *Faragher/Ellerth* defense." *Boh Bros.*, 731 F.3d at 463.
- ✓ **Possible considerations:**
  - ✓ Coverage for **this** type of harassment (e.g., mentions sex but not race).
  - ✓ Multiple avenues of reporting and allows bypass of supervisor.
  - ✓ Allows informal reports.
  - ✓ Confidential reporting.
  - ✓ Effectively communicated for THIS workplace (e.g., language, education, job environment).
  - ✓ Extent of training on policy and procedure.

Step One, cont'd: Did employer exercise reasonable care to CORRECT harassment?

When employer received reports of harassment, did employer adequately investigate?

- ✓ Prompt action – within days
- ✓ Which witnesses were interviewed
- ✓ Other evidence available

Did employer take immediate and appropriate corrective action?

- ✓ Redistribute policy
- ✓ Reminder regarding management reporting duty
- ✓ Counsel, warn, or suspend accused
- ✓ Inform complainant of investigation findings or resulting actions
- ✓ Subsequent monitoring even where evidence is inconclusive
- ✓ Subsequent training

Step Two: Can employer prove employee UNREASONABLY failed to mitigate harm?

- The employer must show not only that its workers did not take advantage of the employer's complaint procedures, but that their failure to do so was "unreasonable."
- But is it unreasonable if,
  - CP did not understand policy or never knew the procedure
  - Complained to the wrong person
  - Denied access to the right person
  - CP believed complaints were futile or company turns a blind eye
  - CP or complaining co-worker experience retaliation.
  - Threats of physical harm.

Negligence Theory and Harassment by Co-Workers

- "With respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action." EEOC Guidelines, 29 CFR 1604.11 (d)

Liability for Non Supervisor Harassment

If harasser is not a "Supervisor," the basis for liability will depend on a two step analysis.

1. **First, look for Knowledge:** Did the employer (its agents or supervisors) know or should it have known of the conduct?
2. **If YES, then look at the Response**: Did the employer take immediate and appropriate corrective action?

Establishing Knowledge

- Did employee report the conduct, even if she did not follow the precise complaint procedures?
- Did someone else report conduct on employee's behalf?
- Was the employer aware of previous accusations against this harasser?
- If so, consider severity, extent, timing, and similarity of earlier conduct.
- "Everyone knows" only works if **"Management knows."**

Determining Whether Response was Immediate and Appropriate

- How much time elapsed between notice and remedial action?
- What remedial options were available vs what employer actually did -- training, counseling, verbal or written discipline, reprimands to personnel files, reassignment or demotion, termination.
- Could the conduct have been prevented?
- Even if not a "supervisor," what authority DID this harasser have?
- Did actions taken stop the harassment?
- If the conduct stops as a result of the remedial measures, the employer may be protected from liability, even if the victim would have preferred another measure.

Harassment by Non Employees/Third Parties

- **Third-party harassment happens when the harassment is committed not by another employee, but by an outsider.**
- **Examples: clients, customers, vendors, independent contractors, and employees or contractors of a different company (for example, a security guard who is responsible for an office building where the company does business, maintenance and repair personnel who regularly come on company property, or caterers who work company events).**

Non Employee/Third Party Harassment

1. The employer will be liable for harassment by non-employees over whom it has **control** (e.g., independent contractors or customers on the premises).
2. If it knew, or should have known about the harassment, the employer may be liable.
3. If the employer failed to take prompt and appropriate corrective action, (AND it had control and knew or should have known), then the employer may be held liable.

An Effective Anti-Harassment Policy

It should be written and well disseminated

Protect against retaliation

Define workplace harassment, and include all prohibited bases (e.g., race, sex, religion, disability, age, etc.)

Effective Anti-Harassment Policy (continued)

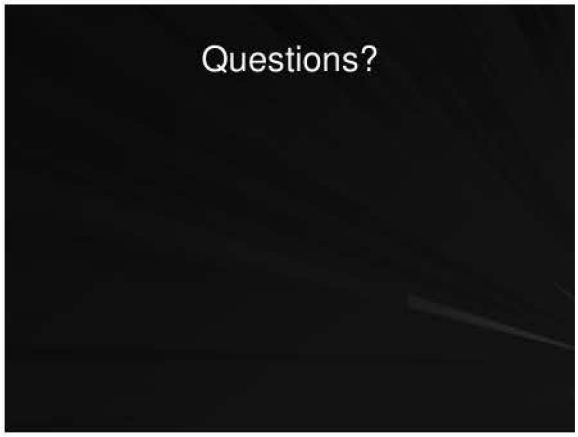
Should cover harassment by anyone in the workplace- supervisors, co-workers, or non employees

It should encourage employees to report harassment before it becomes severe or pervasive

Anti-Harassment Policy (continued)

Create multiple impartial paths to complain about harassment, including a path outside the supervisory chain of command

The Policy should also express that the employer does not permit harassing conduct by anyone in the workplace and it is their policy to maintain a work environment free from harassing conduct


Questions?

Negotiating Settlement/Conciliation

NEGOTIATING SETTLEMENT/CONCILIATION

TABLE OF CONTENTS

REMEDIES AND RELIEF

All of the statutes enforced by EEOC provide for relief when discrimination is found. However, the statutes do not require a finding of discrimination to pursue a voluntary agreement to such relief. In fact, Section 7(d) of the ADEA prescribes that settlement be attempted on ADEA charges within sixty (60) days after the filing of the charge.

The EEOC currently pursues voluntary settlement through three avenues:

(1) Mediation (which generally occurs shortly after the charge is filed);

(2) Settlement (which can occur any time prior to a determination); and

(3) Conciliation (which occurs only after a reasonable cause finding).

We will discuss each of these three avenues in greater detail in this session.

Mediation

Mediation is a voluntary process, which means both parties, the charging party and respondent, must agree to it. A case can be scheduled for mediation at any time in the process, but **mediation is generally held shortly after a charge is filed.**

The goal of mediation is to resolve the issues between the parties early. This means that if the issues are resolved during the mediation process, there is no further investigation. The parties agree to a confidential resolution and the charge is considered to be resolved.

Settlement

The term "settlement" is typically used to describe a negotiated settlement agreement that resolves a charge before the agency has made a finding of "cause" or before it has determined that the charge should be dismissed.

This includes mediated "settlements." Settlement can occur **at any time** before a reasonable cause finding is made.
The EEOC has recognized the importance of settlement as an enforcement tool and believes that it is an option that should be encouraged by working closely with both charging parties and respondents.

Conciliation

Conciliation occurs **after the EEOC issues a determination that there is reasonable cause** to believe one or more of the statutes have been violated. After a cause finding, the EEOC attempts to secure relief for the charging party(ies) and class member(s) through voluntary means.[1]

When the EEOC makes a finding of discrimination under Title VII, the ADEA, the ADA, or GINA, the role of the EEOC changes from that of a neutral party to that of an advocate for the public interest in eliminating discrimination. After a cause finding is made, by law, the EEOC must attempt to "conciliate" the charge and show that it has informed the respondent of the basis for its finding.

Mach Mining

The Supreme Court decision in *Mach Mining, LLC v. EEOC*, 135 S.Ct. 1645 (2015) clarifies the extent to which our conciliation efforts under Title VII are subject to judicial review. Former Chair Yang issued a memo on June 1, 2015 describing the steps all field staff engaged in conciliation efforts should undertake as forth in the *Mach Mining* Decision:

1. The LOD must inform the Respondent about the specific allegations upon which we are issuing a finding of reasonable cause that discrimination occurred, and the LOD must describe which employees (or class of employees) have been affected by the discrimination.

2. Careful consideration should be given to the description of the nature and scope of the unlawful practice(s) and to the description of the affected individuals or group(s). The LOD should identify the

[1] *See* EEOC Compliance Manual Volume 1, Section 60-66, for additional guidance on conciliation agreements.

statute(s) Respondent has violated and identify the basis and issue of the violation(s), e.g., "Respondent A violated Title VII by failing to hire Charging Party X on the basis of her sex, female." When cause is found on behalf of a group of aggrieved individuals, the LOD should identify the group aggrieved by reference to their protected group status, e.g., "Charging Party and other female applicants." The LOD should further describe the group of aggrieved individuals by describing the temporal and geographical scope of the cause finding and the jobs at issue, e.g., "Respondent A failed to hire, because of their sex, a group of qualified female applicants who applied to work as managers in any of Respondent's stores located in Texas from 2012 to the present."

3. We must also show that we gave the employer "a chance to discuss and rectify a specified discriminatory practice." As is our practice, all cause LODs should invite the Respondent to engage in conciliation discussions regarding how the discrimination alleged could be rectified.

4. Since Title VII, GINA, the ADA, and the ADEA require that conciliation be offered to the respondent before suit is filed (for other than preliminary injunctive relief), it is important that there is proper maintenance of charge file and that the charge file adequately document conciliation efforts.

The *Mach Mining* decision does not limit the efforts or steps that Investigators should take to conduct effective conciliations.[2]

ADVANTAGES OF PURSUING VOLUNTARY SETTLEMENT

Pursuing voluntary settlement has three primary objectives:

- To promote the goals of deterring and eradicating discrimination;
- To obtain meaningful relief for charging parties and/or class members; and

[2] *See* the June 1, 2015 memo that was issued to all field offices titled, "Mach Mining Decision and Conciliation Efforts."

- To provide incentives for respondents to correct inequities and extend equal employment opportunities.

Keep these objectives in mind; voluntary settlement involves a **balancing of the interests** of the parties and the EEOC.

Another important point to remember is that **settlement means compromise**. Each party has to give -- and no party gets everything s/he wants.

However, EEOC investigators should **not** compromise their enforcement goals either to achieve rapid settlements or to reduce the pending inventory of charges. Thus, workload considerations should not lead you to urge charging parties to settle for significantly less than the relief to which they appear to be entitled.

At the same time, the EEOC should not seek more relief in settlement than it would seek in court. Among other reasons, that would operate as a **disincentive** for respondents to settle.

A critical component of settlement is the **"fully informed" charging party.** It is imperative that charging parties be fully informed of their rights and obligations throughout the settlement process.

ASSESSMENT OF ADVANTAGES

When assessing whether settlement through any of the three avenues is suitable, the interests of the affected parties must be taken into consideration. To make that assessment, it is important to understand the advantages of settlement to all parties, including the EEOC.

What are some advantages of settlement for the charging party?

- "Bird in hand" vs. "Pie in the sky"

  Charging parties will sometimes prefer or have a compelling need to settle sooner for less rather than wait long-term for the possibility of a greater remedy.

  Even if charging parties are willing to wait for the conclusion of the investigation, there is no guarantee that they will prevail. This is a factor charging parties may need to consider when a reasonably

acceptable offer to settle is made by the respondent. Likewise, there is no guarantee that a charging party will prevail in court, regardless of the EEOC's determination. Assessing the risks of turning down a settlement offer requires a fully informed charging party and avoidance of any appearance of coercion or "arm twisting" by the investigator.

- Quick resolution, get on with life

  Charging parties may need to leave their bad experiences behind in order to move on with their personal life and goals. To the extent a settlement agreement allows for the healing of wounds and reconciliation between charging party and respondent, it allows charging parties to start again and move on without yesterday's baggage. This may be especially relevant to the charging party who is still employed by the respondent.

- No out of pocket expenses, no attorney fees

  A settlement made directly between the charging party and the respondent eliminates the middle man and avoids the costs of employing an attorney. Attorney's fees can consume a substantial portion of the compensation in any settlement. It is not the role of the EEOC investigator to discourage charging parties from retaining an attorney. Again, this is a judgment call for the fully informed charging party.

What are some advantages of settlement for the respondent?

- Quick resolution cuts down on investment of time, money, and management manpower

  Some respondents will weigh the cost of responding to a charge of employment discrimination against the cost of settlement just as they would any other aspect of their business. In many cases, if it makes business sense, respondents will welcome and seriously respond to a reasonable offer to settle.

  While businesses may take into consideration the cost of investigation and potential litigation, it is not the EEOC's role to leverage the threat of such costs to extract a settlement where respondent does not otherwise see the advantage of negotiation.

- Weigh expense of settlement vs. protracted legal fees

  As is the case with the charging party, respondent can circumvent the middle man and save legal fees if a settlement can be reached early and without attorney involvement. As mentioned in reference to the charging party above, it is not the role of the EEOC to discourage respondent from retaining an attorney.

- Regardless of the finding, charging party will receive the RTS

  Even if the EEOC does not find cause, charging party will receive a Notice of Right to Sue that allows him/her to take the issue to court and cause respondent to incur costs in preparing its defense, including legal fees, court costs, and possibly unwanted publicity.

- Settlement closes the door on court action

  The terms of a settlement agreement generally preclude the continuation of the dispute into court, curtailing monetary and emotional costs. (This may not be true in cases involving class allegations or policies affecting numbers of employees, etc.)

- It makes good business sense

  Good employment practices (including providing a discrimination-free workplace) make for a more productive workforce which makes for increased profits.

- Willingness to resolve charge in the interest of workplace harmony

  It is in respondent's best interest to resolve workplace conflicts. A harmonious workplace is a more productive workplace and it is sometimes better to resolve differences without regard to who was right and who was wrong to get the "presses rolling again."

- No admission of fault in settlement **before** a finding

  This can be of special concern to businesses that are highly visible to the public and therefore very image conscious.

What are some advantages of settlement for the Commission?

As the third party at the negotiating table, there are also advantages for the EEOC in acquiring negotiated settlements.

- Quick resolution allows for more timely processing of other charges

  While the EEOC should not settle for the sole purpose of reducing its caseload, settlement does offer the opportunity to resolve cases quickly to the mutual satisfaction of all parties. Charging party and respondent communities will be better served by the resolution of those cases the EEOC might not otherwise get to without a prolonged wait.

- Settlement is a vehicle for both elimination of discriminatory practices and meaningful restoration of lost entitlement

  As the caretaker of the public trust and interest in employment discrimination cases, the EEOC will, to some degree, achieve through negotiated settlement those things it would otherwise achieve only after time and resource consuming investigation and litigation.

- Both parties to dispute leave somewhat happy

  From the "customer service" perspective, the EEOC serves both parties well when assisting them in reaching agreement and even reconciliation. Remember, however, the EEOC protects the public interest and must not compromise that trust for the sake of "getting a settlement."

- Reduced workload through settlement allows for more time for full investigations of other cases

EEOC investigators, supervisors, and attorneys can devote more time and energy to other charges.

SUMMARY

As you can see, there are many potential advantages of negotiated settlement to all parties. The key for the Investigator is to balance the interests of the parties against the public interest as the third party at the negotiation table. You are the one who will assure that settlement does not become the end, but the means to the end of accomplishing our enforcement goals.

TYPES OF RELIEF

Providing relief for victims of discrimination and eliminating the practices which were the source of that discrimination are the ultimate goals of anti-discrimination legislation. Victims of discrimination are entitled to recovery of losses that resulted from the unlawful employment practice. These losses may be **monetary or non-monetary.**

Monetary Relief

1. Back Pay

Back pay is the amount of income the charging party would have earned if there had been no discrimination. Back pay reflects all forms of compensation including total earnings, the value of fringe benefits, overtime, bonuses, shift differentials, premium pay, etc. Pay increases during the back pay period are also included. Victims of discrimination are also entitled to interest on the back pay they would have earned.

In a failure to hire case, a good basis for computation of the amount charging party would have earned is the earned income of the person who got the job instead of the charging party. In a termination case, the charging party's actual pay is the basis for computing what s/he lost as a result of the discrimination. W-2 forms are a good source of income information. Union contracts are a good source for bargaining unit salary scales.

There are no maximum dollar limitations on the amount of back pay that can be recovered, but there are timing rules about when the "back pay period" can begin. Back pay is generally calculated from the date of the discriminatory act until the date of the rightful placement, or the date the charging party's interim earnings exceed the lost pay.

Under the EPA, you may go back **for two years from the date of settlement** of the charge to correct the underpayment, or three years if the violation is willful. Under Title VII, GINA and the ADA, back pay liability may not begin more than **two years before the charge was filed.** Under the ADEA, there is no express time limitation on when back pay can begin. However, in most circumstances, back pay liability under any of the federal

EEO statutes will be limited to the filing period (180 or 300 days) since discrete acts generally will not be separately actionable if they occurred outside the filing period.

The statutes require that a charging party attempt to mitigate the damages to which s/he might be entitled. The duty to mitigate means that s/he must actively seek other comparable employment. Mitigating damages are amounts that charging party earned or **could** have earned with reasonable diligence. Respondents have the right to raise the issue of mitigation and require charging parties to provide evidence of their efforts to seek other employment. The amount that can be established that a charging party could have earned with reasonable diligence is subtracted from the amount of back pay due.[3] It is EEOC's position that unemployment compensation should not be regarded as interim earnings under Title VII, EPA, the ADEA, GINA, or the ADA.

2. Interest

Interest on back pay normally should be provided under all statutes. Where liquidated damages are received for EPA or ADEA violations (see discussion below in this section), some courts deny interest on the ground that the liquidated damages substitute for interest in accounting for the delay in payment. There is stronger support for denial of interest in EPA cases, because liquidated damages under that statute – which are mandatory unless the employer makes "good faith" and "reasonable belief" showings -- are considered compensatory. Under the ADEA, however, liquidated damages are considered punitive – there is a willfulness requirement for their recovery – and thus awarding interest on the back pay doesn't result in "double recovery" for the delay in payment. Where the Charging Party receives liquidated damages as part of the resolution, the legal unit should be consulted regarding the availability of interest on back pay received.

Interest should be calculated on the amount of back pay plus benefits minus mitigation. In most EEOC cases, interest is calculated on a monthly basis except when the back pay period is very long. In those cases, quarterly calculations are appropriate. Interest usually is compounded monthly or quarterly, consistent with the period for which the back pay is

[3] The income that could have been earned while still holding the position at issue ("moonlighting wages") should not be subtracted from back pay.

calculated. EEOC generally relies on the interest rates established by the Internal Revenue Service for calculating interest on unpaid taxes (26 U.S.C. § 6621), the rate that many courts also have adopted. Courts and governments in some jurisdictions specify different interest rates that should be used in calculating back pay and compounding. Investigators should check with their legal unit to determine if rates other than the IRS rates are mandated in their jurisdiction. The IRS rates, which are updated quarterly, are included in the PAYCALC section of the EEOSTAT software, which is available to all EEOC employees. PAYCALC conducts all the required interest calculations after the appropriate data is entered.

3. **Front Pay**

Front pay is compensation provided when the position to which charging party is entitled to is not available. Front pay also may be awarded when the relationship between the employer and the charging party has deteriorated to the point where it would not be in either party's interest to place the charging party in the position. The charging party should be paid as if s/he had the job s/he is entitled to until placed into the job or for some other negotiated period of time.

4. **Benefits**

Benefits include a wide variety of non-wage and salary compensation that Charging Party would have earned while working for Respondent. The most common of these benefits are vacation and leave time, if not otherwise included in the back pay. Others are employer contributions to insurance and retirement plans plus bonuses, stock purchase plans, and profit sharing. The value of benefits that would result in Charging Party saving money on income taxes, such as paying for a health savings account and employee portion of health insurance premium with pretax dollars, can also be calculated and included among employee benefits.

5. **Compensatory Damages (Title VII, GINA and ADA; only for retaliation under ADEA and EPA)**

Compensatory damages include damages for past pecuniary loss (out-of-pocket losses), future pecuniary loss (projected future out-of-pocket loss), and nonpecuniary harm (emotional distress).

a. **Past pecuniary losses** - include moving expenses, job

search expenses, medical expenses, psychiatric expenses, physical therapy expenses, and other quantifiable expenses that are **incurred as a result of the discriminatory conduct.**

b. **Future pecuniary losses** - include the same expenses listed above, if these losses are likely to continue after settlement, conciliation, or the conclusion of litigation.

c. **Nonpecuniary harm** - damages are available for the intangible injuries of emotional harm such as emotional pain, suffering, inconvenience, mental anguish, and loss of enjoyment of life. The existence, nature, and severity of emotional distress **must be established**. However, it's not necessary to have **medical** evidence in order to establish emotional distress. It can be shown through the testimony of others who corroborate the charging party's claim. Other nonpecuniary harm could include injury to professional standing, injury to character and reputation, injury to credit standing, loss of health, etc., that are incurred as a result of the discriminatory conduct.

In calculating nonpecuniary damages, you need to focus on the **severity of the harm** and the **length of time that the charging party has suffered** from the harm. If necessary, the amount should be determined in consultation with your supervisor or any available legal counsel.

Examples of Questions for Investigators to Ask Charging Party to Determine Existence, Nature, and Severity of Emotional Distress Caused By Discrimination:

- What emotional symptoms have you suffered as a result of the discrimination?
- How often do you suffer from these symptoms?
- How has it made you feel?
- Have your close relationships changed (with spouse, children, etc.)?
- Have you experienced irritability? anxiety? depression? ulcers? headaches? sleeplessness? appetite changes?

- Have you seen a health care provider about these symptoms? (e.g., doctor? Licensed clinical social worker? Psychologist? Psychiatrist?)

- Have you been prescribed any medication or other treatment(s) for these symptoms?

- Have you talked to anyone else about the way you are feeling (e.g., pastor, close friend, family member, and/or co-worker?)

- Have you ever experienced these symptoms before? When?

6. **Punitive Damages (Title VII, GINA and ADA; only for retaliation under ADEA and EPA)**

Punitive damages are awarded to punish the respondent and to deter future discriminatory conduct. Punitive damages are available only where the respondent acted with "**malice or with reckless indifference** to the federally protected rights of an aggrieved individual."

Punitive damages are **not available against a state or local government**, a government agency, or a political subdivision.

A number of factors have been used by courts to determine whether the respondent acted with malice or reckless indifference to the charging party's federally protected rights -- and, if so, to calculate the appropriate amount of punitive damages.

The factors considered by courts include the following. This list is **non-exclusive** -- and other relevant factors may also be considered.

- The degree of egregiousness and nature of the respondent's conduct. Conduct which is shocking or offensive is egregious. Evidence of egregious behavior always establishes malice or reckless indifference. However, egregious conduct is not always necessary to justify a punitive damages award.

- The nature, extent, and severity of the harm to the charging party.

- The duration of the discriminatory conduct. (Evidence that the respondent tolerated the discriminatory conduct over a period of time could show reckless indifference.)

- The existence and frequency of similar past discriminatory conduct by the respondent.

- Evidence that the respondent planned and/or attempted to conceal or cover-up the discriminatory practices or conduct.

- The respondent's action after it was informed of discrimination. (An employer who has notice of discriminatory conduct and fails to take action could incur substantial punitive damages.)

- Threats of or deliberate retaliatory action against a charging party for complaints to management or for filing a charge.

- The likelihood that the respondent will discriminate in the future.

- The financial position of the respondent. (Punitive damages should "sting," but not "kill" the respondent.)

In *Kolstad v. American Dental Association*, 527 U.S. 526, 545 (1999), the Supreme Court held that, for the purpose of awarding punitive damages, an employer is not automatically liable for the discriminatory conduct of managers acting within the scope of their employment, when a manager's decisions are contrary to the employer's good faith efforts to comply with Title VII.

In general, the punitive damages award should be high enough to accomplish the dual objective of punishing the respondent and deterring future discriminatory conduct.

Compensatory and punitive damages are **not available for**:

- adverse impact claims challenging the disparate effect of neutral employment practices;

- certain ADA reasonable accommodation cases where the respondent can prove that notwithstanding the violation, it made a good faith effort to accommodate.

Damages Limits

There are monetary caps on damages which apply to federal EEO claims. The caps are based on employer size. The caps are:

15 - 100 employees	**$ 50,000**
101 - 200 employees	**$ 100,000**
201 - 500 employees	**$ 200,000**
Over 500 employees	**$ 300,000**

The caps apply to the total combined amount of future pecuniary loss (not including front pay), nonpecuniary loss (intangible harm or pain and suffering), and punitive damages.

The caps **do not apply** to some forms of relief:

- past pecuniary loss (out-of-pocket losses that occurred prior to the date of the resolution of the claim);
- relief that is authorized under § 706(g) of Title VII, i.e., back pay, interest on back pay, or front pay; or
- any other monetary relief available under Title VII, the ADA or GINA
- compensatory or punitive damages for ADEA or EPA retaliation claims

7. **Liquidated Damages (ADEA and EPA only)**

This is an amount equal to the back pay due the charging party when the violation is found to be willful and in reckless disregard of the statutes.

Liquidated damages are **mandatory for a violation of the EPA,** unless the employer can prove that it acted in "good faith" and reasonably believed that its actions did not violate the EPA. The employee in an ADEA case has the burden to prove a willful violation to be entitled to liquidated damages.

Note that, although a sex-based equal pay allegation may also be filed under Title VII, a charging party may not receive double recovery. The smaller damage award would be offset against the larger award. For example, EPA liquidated damages would offset the amount of damages

available for the Title VII claim.

8. Taxes

Back pay and compensatory damages are taxable. Taxes on back pay and the employee's share of social security and Medicare contributions should be withheld and paid by the employer. The employer may not deduct its share of social security and Medicare contributions from the award. Compensatory damages are also taxable, but withholding by the employer is not required.

9. Attorney's Fees

Reasonable attorneys' fees and costs are available to **prevailing** charging parties.

Non-Monetary Relief

1. **Specific Injunctive Relief** (e.g., promotion or reinstatement)

   Settlements and conciliation agreements executed during the administrative processing of charges are in effect "contracts" – i.e., agreements between the Commission and the Respondent that can be enforced in court if violated. (EEOC files a few suits each year for breaches of administrative settlements, which include mediation agreements.) As discussed in this section of the manual, administrative resolutions should include Targeted Equitable Relief (TER), which refers to non-monetary remedies specific to the aggrieved individuals and to provisions addressing the Respondent's future conduct in order to prevent similar violations from recurring.

   TER requiring or prohibiting certain future conduct by the employer is intended to provide in administrative resolutions what is termed "injunctive relief" in lawsuits. (The term "equitable" comes from former "courts of equity," which once had the exclusive power to issue injunctions. These separate courts no longer exist, and all courts have the authority to grant injunctive relief, but such relief is still often referred to as "equitable.") The difference between injunctive relief ordered by a court and targeted equitable relief in an administrative resolution, is that an employer's violation of an injunction constitutes "contempt of court," which exposes the

employer to sanctions such as fines, and can even result in incarceration until the injunction is complied with. Violation of an administrative resolution, on the other hand, is considered a "breach of contract," which can result in similar affirmative remedies – such as elimination of a discriminatory test or policy – but without the sanctions.

Courts will only enforce injunctions that a narrowly tailored to the violations at issue in the suit. (Most injunctions obtained by EEOC are contained in consent decrees, in which the injunction language is negotiated by the parties.) This is because a party must have clear notice of what conduct might subject it to contempt of court. Although possible contempt is not an issue in administrative resolutions, it is still very important that any provision directed at a Respondent's future conduct be drafted as specifically as possible, both so that the Respondent will be clear about its obligations under the resolution, and so that the provision can be effectively enforced in court if violated.

2. **Seniority Adjustments**

In situations where seniority is used in making employment decisions, charging party should be given seniority from the date when the charging party would have received the position, but for the discrimination.

3. **Training**

If the charging party is disadvantaged by discrimination, special training might be needed so that the charging party can hold the job under fair and equal conditions.

4. **Expungement of Records**

Any references related to the discriminatory incident(s), including the filing of a discrimination charge, should be stricken from the respondent's record(s), so as not to prejudice the charging party's employment opportunities.

5. **Letter of Recommendation/References**

If the charging party is not going back to a job with the respondent, a

letter of reference, or the content of any oral or written reference, may be part of the relief. Revealing that the charging party brought a discrimination claim is prohibited.

6. **Protection From Retaliation**

Protection from retaliation should be secured by any or all the following, as is appropriate:

- Any agreement should contain a provision protecting the charging party (and other class members) from retaliation; and/or
- A notice to all respondent supervisors that retaliatory action by them is grounds for disciplinary action; and/or
- Transfer of the charging party's supervisor, so that the charging party is less likely to be the subject of retaliation; or
- Transfer of the charging party to a different supervisor, so that the charging party is less likely to be the subject of retaliation. Transfer of the charging party should be voluntary. Otherwise, the transfer itself could constitute retaliation.

7. **Correction of Discriminatory Policy**

Elimination or correction of discriminatory policies is necessary to avoid a continuation of discriminatory practices. In some cases, new policies may have to be created. For example, a policy concerning reasonable accommodation may be developed as part of the relief in a disability case.

8. **Reporting Requirements**

Respondent should be required to submit reports and/or allow the EEOC inspection to ensure adherence to the provisions of the agreement.

Targeted Equitable Relief

Many of the types of relief discussed above can be "classified" as targeted equitable relief (TER). The agency's Strategic Plan defines TER as any non-monetary and non-generic relief (other than the posting of notices in

the workplace about the case and its resolution), which explicitly addresses the discriminatory employment practices at issue in the case, and which provides remedies to the aggrieved individuals or prevents similar violations in the future.

Targeted equitable relief (TER) categories include the monetary benefits fields of New Hire, Promotion and Reinstatement/Recall (note: TER is the action associated with the Benefit, not the monetary value of the benefit). Non-monetary benefit categories of TER include: Policy Change; Training/Apprenticeship; Religious Accommodation; Seniority; Job Referral; Union Membership; Reasonable Accommodation; and Other Non-Monetary Benefits. The types of other non-monetary benefits includes: procedural/practice change, external monitoring and other action associated with the benefits.

Relief identified as TER is captured in IMS when charges are resolved through settlements, including Mediation Agreements, withdrawal with benefits and conciliations. It is also captured for "legal resolutions" such as consent decrees and settlements reached after suit is filed.

Be Creative and Flexible

While you need to be well grounded in the remedies available under the different statutes, it's just as important to **be creative and flexible** in your approach to remedies. So don't limit yourselves -- where appropriate, consider remedies that aren't explicitly set out in the statutes.

For example, where a charging party would be entitled to reinstatement but doesn't want to work for the respondent, consider having the respondent agree to help the charging party find work elsewhere. Or where a charging party was denied training necessary to a promotion, consider having the respondent pay the tuition and other costs of an outside educational course.

In one settlement, where the charging party did not want to return to work for the respondent, a travel company, the respondent agreed to pay for the changing party's honeymoon as part of the settlement.

The main point to remember here is that settlement is an art -- not a science. There is **no one right answer**. In the final analysis, a settlement reflects the parties' **best judgment** about what appropriate relief would be in any given case.

SETTLEMENT OPTIONS

When you are involved in a settlement/conciliation discussion, you are attempting to find common ground between the charging party's interests, the respondent's interests, and the Commission's interests. Room for negotiating depends upon the following factors.

No single factor is determinative. All these factors must be considered together in order to determine what is appropriate in a particular charge.

Type of case

The first factor to consider is the type of case involved. What is the alleged unlawful conduct? As a general rule, the more egregious the conduct, the greater the relief you would want to try to obtain.

Another consideration would be what are the "stakes". Is it a small claim involving minimal individual relief? Or is it a high-profile case with potential class implications? Where the stakes are higher, the incentive is greater to continue the investigation and seek fuller relief.

Processing Stage

Another factor to consider in gauging suitable relief is the stage of processing of the charge. Generally, the earlier the stage, the more limited the relief may be and still be considered appropriate to the charge. Similarly, the longer it may be before a charge is investigated, the more attractive early settlement may be to a charging party.

Remember, though, that these are guidelines, not rigid rules. If a charge comes in with strong facts and even stronger evidence of egregious discrimination with wide impact and high visibility -- the fact that the charge is barely in the door won't, by itself, outweigh all other considerations. So even though this charge is at the most preliminary stage of processing, an early settlement for limited relief would **not** be appropriate.

Difficulty in Processing

Difficulty in processing is another factor to consider in weighing relief. Even in comparatively strong cases, if difficulties are expected in the

investigation or litigation, or if the case will require more resources, these may be reasons to lean toward earlier settlement for lesser relief.

A number of different factors may influence your assessment of difficulties in processing. These include:

- threshold or jurisdictional issues that, even though likely to be resolved in the charging party's favor, must be addressed before reaching the merits;
- the respondent's financial condition (How solvent is the respondent? Is it on the verge of filing bankruptcy proceedings?);
- credibility problems with key witnesses;
- unavailability of witnesses or documentary evidence;
- the respondent's being located overseas or being immune from subpoena power (for example, under a treaty or international agreement to which the United States is a party).

DETERMINING POSSIBLE RELIEF IN THE LESLIE REED CASE

EXERCISE: INTERVIEW WITH LESLIE REED

Armed with this information, you are now going to interview Leslie Reed to review the evidence, explain the settlement options and determine what relief she is seeking to resolve the case. Based upon your interview, answer the following questions.

Back Pay

Would Reed be eligible for back pay? Why or why not?

Yes. If she has been on unpaid leave since April 1 due to respondent not having provided her with a reasonable accommodation.

Compensatory Damages

Would Reed be eligible for compensatory damages? Why or why not?

Yes. She has provided some evidence that she may have had out-of-pocket expenses and/or suffered emotional losses. She has not been provided with a reasonable accommodation and her asthma has worsened because of stress. She has been upset by Roger Meany's and Marvin Winters' conduct.

Non-monetary Relief

What are some examples of non-monetary relief available to Reed?

- Injunctive relief (i.e., cessation of the harassment)
- Move to a new work space away from the air vent and construction
- Training for managers on harassment and the ADA
- Development of policy and procedures for handling requests for reasonable accommodation
- Protection from retaliation
- Correction of discriminatory practice
- Posting of a notice

Settlement Option

Should we pursue negotiated settlement or conciliation?

NEGOTIATING SETTLEMENT/CONCILIATION

For purposes of this section, we will use the term "settle" generically - that is, to mean settling at any stage of the charge process, including during conciliation.

The ability to negotiate a remedy or relief for discrimination in the workplace is an important skill for an EEOC Investigator. Becoming a successful negotiator and learning the art of effective negotiation is one that will take time and experience to develop. There are no hard and fast

rules to follow, and no ready-made formulas that will map out your actions. **Negotiation requires flexibility, creativity, and imagination.** It requires you to go with the flow, to read people, to listen carefully, and to take calculated risks.

We will discuss some basic principles to use in negotiations. However, you will have to make recommendations or decisions on your cases based on the individual characteristics of the case - the nature of the case, and the parties involved (i.e., charging party and his/her attorney, the company representatives and their attorney, etc.).

Planning

The first thing to remember about settling a charge is that it is a "negotiation" - a give and take process. How you prepare for the negotiation, including your discussions with both the charging party and respondent can have a significant impact on whether you are successful in obtaining relief appropriate to the case.

It is not enough to simply mail a letter with settlement demands and a date for the respondent to submit a counter-proposal. You should also, at a minimum, make a call to the respondent to invite them to settle and discuss why it is in their interest to settle. Your energy, creativity, and activity will often make the difference between a successful or unsuccessful settlement.

Similarly, you will want to discuss with charging party or his/her counsel, what their expectations are. If a charging party is demanding an unrealistic amount for damages, or unreasonable conditions of settlement, a frank discussion on the strengths and weaknesses of the case, and the likelihood that they may get nothing if they set unreasonable requirements, can be a productive reality check.
A recalcitrant respondent can often be brought to the negotiation table if you fully explain the evidence and rationale for the EEOC's findings. In addition, discussing the "good will" they show by attempting to voluntarily resolve the dispute, and the opportunity that the process gives them to assess their exposure may also help them recognize the benefits of negotiation.

NEGOTIATING - A THREE STEP PROCESS

No matter what the facts, at any given time, there is an "amount" that the

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workload and devoting resources to cases where the law has been violated and settlement is not possible.

We have said that you need to look at the relief that may be obtainable in your case before you determine what your settlement position is going to be.

Remember, under federal statutes, the sum of punitive damages as well as non-pecuniary and future pecuniary compensatory damages may not exceed certain caps enacted by the Civil Rights Act of 1991. However, these caps do not apply to damages for retaliation under the ADEA and the EPA.

The EEOC's authorizing statute uses caps to limit remedies. Once you obtain this information, you can begin to calculate the maximum value of your case.

Step 2: Determining Your Bottom Line

After you have estimated the ultimate value of your case or the relief you may obtain if you prevailed in court, the next step is to determine what you would accept to resolve the case at this point in time.

For a variety of reasons, EEOC may agree to resolve a case for something less than the ultimate value of the case. There are many factors that may cause us to discount the ultimate value of the case.

What are some factors that may cause you to discount the ultimate value of a case?

- the relative strength/weakness of the case
- the processing stage of the case (early vs. late)
- the importance of the case as an enforcement vehicle, where appropriate.
- the alternative if the case does not settle (i.e., where appropriate, whether the EEOC and/or the charging party will bring suit)

Step 3: Determining Your Settlement Position

After you determined your bottom line, you have to determine what negotiation strategy you will use to get the employer to agree to your bottom line – or hopefully better.

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to make you uncomfortable. Some might put their head in their hands. They hope that if they don't say anything, you will make the next move. Don't let their lack of immediate response or their silence or pause after you make a proposal or counter-proposal, draw you into filling the silence by adjusting your proposal. Wait it out.

Similarly, some negotiators will feign outrage at your proposal to intimidate you. They might react by shouting that your proposal is completely preposterous or some other strong language. Again, don't be intimidated by this behavior, and wait for their counter proposal. Or at most, acknowledge their outrage but continue with something like "I see that you aren't happy with our proposal. Do you have a counter proposal for us?"

Do not prematurely offer any concessions.

In other words, don't bid against yourself. By making needless concessions, you forfeit the chance to trade these concessions for valuable concessions by the adversary later on.

OTHER SETTLEMENT CONSIDERATIONS

Settlement Authority

EEOC policy authorizes the District Director to issue Letters of Determination finding cause and to resolve these cause findings by entering into conciliation agreements. The District Director has settlement authority until s/he determines that conciliation has failed. After the investigator (and trial attorney in a SA case) has outlined the conciliation objectives and strategy, s/he should contact the appropriate supervisors and managers for their advice and approval before making the proposal to the respondent.

The Opening Bid

Studies show those who prepare for negotiations and have rational support for their initial ambitious demands tend to achieve higher settlements than those who make lower initial demands. **This occurs only when their initial high-end demands are, in fact, reasonable and warranted by a fair assessment of the damages**.

then the Respondent asks for one more thing. This tactic can be very costly. Be careful not to be pulled into giving up something for nothing, in return when the other side nibbles.

When to Walk Away

To get your best agreement, you have to be willing to walk away with no agreement. This is not as easy as it sounds. When you get close to an agreement, it is tempting to devalue provisions you were committed to up front but have not obtained. This isn't always wrong, but it takes courage to turn down significant relief based on your pre-negotiation determination that the case is worth more.

During the bargaining session, don't be pressured into deciding important matters too quickly. Take whatever time is necessary to make hard decisions even if others are impatient.

The Rush to Reach Agreement

Many times one of the parties to the negotiation will state that s/he is pressed for time as leverage to force you to agree to a less than ideal settlement. Do not fall for this trap. You have as much right to establish the timetable as they do. Do not hesitate to tell them that you need whatever time is necessary. If they do not agree, do not be afraid to walk away. A good way to respond is: "If I have to answer you now, the answer is no. If I have time to consider your offer, the answer may be yes."

"This is my best offer"

Sometimes a party to the negotiations will say that the last offer is "his best offer." If you're confronted by this approach, consider saying, "You may think this is the most you can offer, but I know that I can't accept it. Let's see if there are any other options."

You can also make a counteroffer and ask, "What's wrong with my approach?" In allowing them to justify their last offer, there is a chance that they will reveal information about their underlying interests. This gives you the opportunity to modify your last offer to better meet at least some of their interests without compromising your own.

Splitting the Difference

Many deals are struck by agreeing to settle for the midpoint between the parties' final monetary offer and counter offer. This is called "splitting the difference." Be mindful of this approach even if the "split the difference" amount is within your settlement zone. If you routinely fall into a trap of agreeing to "split the difference," you may not obtain the maximum resolution you could have. On the other hand, if both sides have exchanged several proposals and made concessions, and are relatively close to agreement, splitting the difference may be a sensible way to reach agreement.

Do Not Prematurely Offer Any Concessions

Remember do not bid against yourself. By making needless concessions, you forfeit the chance to trade these concessions for valuable concessions by the Respondent later on.

When to Break Off Negotiations

One of the parties may not be bargaining in good faith. This may be apparent from the onset of negotiation just by considering the members of the negotiating team. For example, it may be apparent that the opponent has only very limited settlement authority, and they can't explain why those with settlement authority are not present. This may suggest bad faith. Sometimes it is appropriate to refuse to negotiate unless key officials are present along with their lawyers.

Other indicators of bad faith include:

- incessant efforts by the other side to gather information regarding the identity of EEOC's witnesses and other evidence
- unrealistic counter offers
- the employer's representatives are evasive about the degree of their settlement authority or they won't agree to reasonable time frames for meeting

One way to test a party's sincerity is to gain agreement to work on seemingly easy issues first and then see whether the party is willing to make reasonable concessions. If not, you may be wasting your time and it will be best to resume the investigation, or if post determination, fail the conciliation.

EXERCISE: Developing the Negotiation Strategy for the *Reed* Case

You have issued the cause finding on Leslie Reed's charge of discrimination on the basis of sex and disability. You have arranged to meet with the All Star Finance Company's attorney to discuss conciliation. In preparation for the meeting, you need to determine the following:

- the ultimate value of Reed's case
- your bottom line
- your opening offer
- to what extent you will disclose to respondent the factors that support your calculation of your opening offer
- what information you will not release under any circumstance to respondent at this stage
- what information you want to try to obtain from respondent (not necessarily more about their defenses, but rather information that has a direct impact on the negotiation, such as whether they have any insurance that would pay all or part of a settlement, whether respondent's lawyer was selected by the insurance company, or whether or not the respondent is engaged in any talks to sell the company, etc.)
- what additional information or documentation you need from the charging party or the other class members

Write your final calculations on the flip chart and be prepared to discuss how you arrived at each figure and your negotiation strategy, including how you determined what, if any, information to disclose.

Discussion of Exercise:

What factors went into the calculation of the ultimate value?

Would Leslie Reed or the other class members be eligible for

compensatory damages? Why or why not?

What are some examples of non-monetary relief available?

Did Reed provide evidence regarding other remedies she is seeking?

Is removing Winters as a supervisor an appropriate remedy?

Do we know what relief the other class members are seeking?

QUALITY PRACTICES FOR EFFECTIVE CONCILIATIONS

The Commission issued the Quality Enforcement Practices (QEP) in September 2015 to provide guidance and practical support on the appropriate investigation and conciliation of charges. EEOC has a strong commitment to resolving charges through conciliation as such resolutions are one of the most effective means for bringing employers into compliance with the statutes the agency enforces. Effective conciliation depends on the efforts of all involved to attempt to remedy and eliminate the alleged discrimination. Successful conciliations ensure that unlawful employment practices are resolved more quickly, thus conserving the agency's and the parties' resources. Conciliation agreements also serve an important role in improving workplace policies and preventing discrimination from occurring.

The QEP sets forth four steps that the EEOC should follow in conciliation a charge of discrimination:

1. EEOC invites the respondent to participate in conciliation efforts.

- Letter of Determination invites the respondent to engage in conciliation efforts in order to eliminate the alleged unlawful employment practices and reach a just resolution of the matter.
- The conciliation request is based on the findings of the investigation and informs the parties of the relief sought.

- The conciliation request provides the respondent with a reasonable amount of time to respond to EEOC's conciliation proposal or to submit its conciliation proposal.

2. The conciliation request seeks meaningful relief for the victims of discrimination and seeks to remedy the discriminatory practices.

- The conciliation request provides meaningful remedies to the aggrieved individuals.
- The relief sought in conciliation explicitly addresses the discriminatory employment practices at issue in the case.
- The request typically seeks targeted, equitable relief in order to prevent similar violations in the future.

3. EEOC considers offers made by the respondent.

- Staff considers offers made by the respondent in a timely fashion.
- When the agency determines that further conciliation efforts would be futile or non-productive, the agency notifies the charging party and respondent in writing.

4. EEOC attempts to secure a resolution acceptable to the agency.

- Staff timely communicates with the charging party and the respondent (or their representatives) as the conciliation warrants.
- Communications between the EEOC and the parties are clear and respectful to facilitate productive efforts in conciliation toward a resolution acceptable to the EEOC and the parties.

Factors to Consider Before Failing Conciliation

Before conciliation efforts fail, Charging Party and Respondent should realize that:

If conciliation fails, charges filed against private employers will be referred to the Commission's legal unit, who will decide whether to litigate the violations in court. (This procedure also applies to age and equal pay charges against public employers.)

If conciliation fails, charges filed against public employers will be referred to the U. S. Department of Justice, who will decide whether to litigate. (This

procedure does not apply to age and equal pay charges against public employers.)

A lawsuit takes an average of at least two years to be heard in court and some may take much longer. How long it takes depends upon the jurisdiction and type of case.

Additional costs may be incurred, including attorney fees, court fees, time, and administrative resources.

Either party may lose in court.

Respondent should also consider:

The next step is to wait and find out if the Charging Party or the Commission (or Justice Department) files suit;

Charging Party or the Commission may decide to search for additional harmed members, witnesses, evidence, etc.;

Additional legal expenses will be incurred if the case is litigated;

Adverse publicity often accompanies the filing of a law suit;

The conciliation process allows Respondent to work out a remedy that will suit its business interests, rather than a possible court directed remedy.

Charging Party should also consider that through conciliation:

Charging Party can avoid additional legal expenses, and the possibility that the Commission will not pursue the case if conciliation fails;

The emotional cost to the Charging Party and loved ones because of a lengthy prosecution cannot be measured;

Charging Party gets a remedy now and not down the road when litigation may resolve.

The EEOC should consider:

Litigation Vehicle – will legal litigate?
- Strategic significance
- Broad deterrent impact
- Large Class
- Development of the law
- EEOC Presence important

Charging Party represented?

Agreement on the public interest provisions?

Relief designed to remedy past discrimination
Policy change
Relief to prevent similar violations in the future
Is the relief offered the best we can obtain and better than leaving the Charging Party without a remedy?

Maintenance of the charge file and Documentation

Title VII, GINA, the ADA, and the ADEA require that conciliation efforts be made before suit is filed (for other than preliminary injunctive relief). So it is important that the charge file adequately document conciliation efforts.

Investigators must document all communications (whether oral or written) that they have with the parties during the conciliation process. This documentation should include the date and method (e.g., telephone, e-mail, letter, face-to-face meeting) of the conciliation efforts and identify by name and title the representative with whom the investigator communicated.

- *What, if any, documentation about why conciliation failed should be retained in the charge file?*

If conciliation fails, the file should also contain a statement of the reasons for failing conciliation. In cases in which conciliation is unsuccessful, all documentation about why conciliation failed and a copy of the signed letter failing conciliation must be in the charge file. The QEP requires that when the EEOC "determines that further conciliation efforts would be futile or non-productive, the agency notifies the charging party and respondent in writing." We do not need to include our specific reasoning for conciliation

failure; however, we do need to communicate in writing that conciliation has failed.

If those key documents are not in the file, it could affect any later litigation brought on the charge. The employer could claim that the Commission did not comply with its duty to conciliate, where appropriate. If a lawsuit is filed, and the trial court decides that conciliation efforts were inadequate, it may order that we reopen and resume settlement efforts. If this should occur, anyone should be able to resume our conciliation efforts based upon the well documented conciliation file.

- *Which practices are in place to ensure compliance with statutory non-disclosure expectations regarding conciliation?*

It is a good practice to place all conciliation material in a separate section of the charge file devoted to conciliation. EEOC Compliance Manual indicates that conciliation documents should be placed on the left side of the charge file. Another option is to create a separate file for all conciliation documents. This conciliation section will contain any correspondence or other documentation from the charging party and his/her legal representative regarding his/her settlement objectives and his/her monetary valuation of the claim as well as internal memoranda and work product concerning preparation for conciliation.

These documents should be placed in the conciliation section of the paper file or upload into IMS as soon as they are received even if this is well before cause is issued in the case.

- *What measures are taken to ensure confidentiality of conciliation and settlement information?*

Discussions of settlement and conciliation are considered confidential and are often not subject to disclosure. This is another reason why these records should be kept separate from other file documents.

EXERCISE: Conciliating the *Reed* Case

Exercise Directions. Total time: 1 hour and 20 minutes.

1) Give each table 15 minutes to quickly flip chart their conciliation proposal, including the monetary relief they calculated in Exercise 1, and non-monetary relief they think their agency should pursue.

2) Allow 45 minutes for each table to role play the conciliation/negotiation of Leslie Reed's charge. The roles should be:

- **EEOC Investigator**
- **Respondent representative**
- **Respondent lawyer (optional if too few at table)**
- **Charging party**
- **Charging party lawyer (optional if too few at table)**

3) If Instructors believe it would enhance the exercise, they may assign individuals at each table to play specific roles. Otherwise, the groups at each table can decide among themselves) At the end of the negotiation role-play, take about 20 minutes to lead a discussion on how the negotiation unfolded. The following topics should be among those covered.

- **What went right; what went wrong?**
- **What could the parties (Investigator, CP, R, CP Counsel, R Counsel) have done differently?**
- **Were the settlement demands reasonable, justifiable?**
- **Did the personalities of the parties get in the way?**
- **What are some strategies for conciliating a class case when you have identified all of the class members?**
- **What are some strategies for conciliating a class case when you have not identified all of the class members or believe there may be additional class members at the time of conciliation? Be sure to discuss provisions in conciliation agreements for class members who have not yet been identified.**

ROLE PLAY INFORMATION FOR CONCILIATION CONFERENCE

Sandy Sloper – Charging Party Attorney
REED CASE CONCILIATION -- Role Play

- Insists that the investigator talk only to him/her and not the charging party.
- Grandstands for the charging party – If we take this to court it's a sure winner in front of a jury.
- Tries to argue case law with the respondent attorney.
- Very verbose, tries to dominate the conversation, and goes off on tangents about unrelated issues, stories, cases.
- Ignores investigator's direction and tries to take over meeting, arguing with respondent attorney.
- Real interest is his/her attorney fees.
- Wants to be the EEO trainer for employer at a very high fee.

If the investigator satisfactory deals with these issues, allow the conciliation to go forward. We would like the investigator to have the experience of conciliating the case.

Leslie Reed – Charging Party
REED CASE CONCILIATION – Role Play

- Thinks she is entitled to $1,000,000, after talking to her attorney.
- Get's a little emotional, and expresses her "hurt feelings".
- As the investigator negotiates and makes any concession – asks "Whose side are you on anyway?" Believes the investigator is biased and in "cahoots" with respondent. How much are they paying you?
- Insists that that agreement require the Vice President to meet with her weekly and give her an update on any changes affecting Roger Meany and Marvin Winters, and any other EEO complaints.
- Also insists that the harasser write an apology to her for publication in the company's newsletter. She wants any complaint addressed immediately, and by the Vice President.

If the investigator satisfactorily deals with these issues, allow the conciliation to go forward. We would like the investigator to have the experience of conciliating the case.

Bradley/Brenda Pitterman – Respondent Attorney
REED CASE CONCILIATION – Role Play

- Insists that the investigator speak only to him/her, and not the client.
- "Grandstands" for the client. Tries to show expertise by arguing case law that relief being sought is not supported by national/state/local precedents. Also claims repeatedly that claimant would lose in court.
- Interrupts investigator during explanations, until investigator takes control.
- Agrees to some terms of the agreement, but other terms are not acceptable.
- Initial monetary amount is a very low nuisance value.
- Once close to settlement, tries to get EEOC to make other major concessions "This is my best offer, take it or leave it!" Wants a full release by CP, including for future claims and all other non-EEOC claims. Also wants a confidentiality clause for charging party, and if CP violates confidentiality, she must return all money.

If the investigator satisfactorily deals with these issues, allow the conciliation to go forward. We would like the investigator to have the experience of conciliating the case.

Sam Starsky – Vice President, Respondent Representative
REED CASE CONCILIATION – Role Play

- Continues to argue the merits of the charge.
- Supports the management team regardless – I know them and they would never do what they are accused of.
- Demands to know names of witnesses and what they said; wants to see a copy of the file.
- Believes that the Commission is being unfair to the company, that the investigator was biased from the start to find a violation.
- When s/he learns of monetary request becomes very loud and stands up, shouts that the amount is preposterous! That charging party is only interested in getting money and fabricated this "story".
- As conciliator provides reasonable explanations, becomes more subdued. Non-verbal language of crossing legs and arms.
- Allows the negotiation to go forward after reasonable explanations offered by the investigator. Defers to respondent attorney regarding amounts.
- If settlement terms agreed to, before final agreement, demands a non-negotiable requirement that CP waive all future claims against the company. Refuses to allow any posting of notice.

If the investigator satisfactorily deals with these issues, allow the conciliation to go forward. We would like the investigator to have the experience of conciliating the case.

DRAFTING AN AGREEMENT

Basic Settlement Terms

Negotiated Settlements and Conciliation Agreements focus on obtaining agreements that provide monetary damages for the harmed individuals and secure Targeted Equitable Relief to remedy discriminatory practices, bring about improvements in employment policies and practices and prevent future violations.

Under the Commission's "Priority Charge Handling Procedures," the suggested settlement terms for agreements to which the EEOC is a party are set out in the model agreements in Sections 15 and 63 of Volume I of the EEOC Compliance Manual. EEOC Compliance ManualVolume 1, Section 65, sets forth the requirements for a Conciliation Agreement.

As a general rule, a settlement agreement should include the following:

- a statement that the charging party agrees not to sue with respect to the charge;
- a detailed statement of the relief respondent agrees to provide and when it will be provided;
- a statement that respondent will report to the EEOC its satisfaction of each of the obligations set forth in the agreement;
- a statement that the agreement may be enforced in court and may be used as evidence in any proceeding alleging breach of the agreement;
- for ADEA cases, charging party acknowledges having been advised to consult an attorney and given reasonable time to consider the agreement before signing; and
- a statement that EEOC agrees to terminate its investigation, but does not waive or limit its right to investigate or seek relief in any other charge against respondent.

These are the "basic" settlement terms. Although agreements need to be tailored to fit the individual case and include tailored specific relief to

remedy the alleged discrimination, a few other terms are so central to the EEOC's enforcement mission that the EEOC believes they should be addressed in every agreement.

These "additional terms" are provisions to ensure that --

- the **unlawful** (or allegedly unlawful) **practice has ceased**,
- there will be **full prospective compliance** by respondent, and
- the EEOC is authorized to investigate compliance with the agreement.

These additional terms further the EEOC's enforcement goal of eradicating discrimination. Again, see Sections 15, 63? and 65 of Volume I of the Compliance Manual for Model Agreements.

Prohibited Settlement Terms

Settlement terms to which the Commission **will not** be a party fall into a few basic categories. The EEOC **will not** sign agreements that:

- appear to sanction or approve personnel practices that were not investigated;
- contain **prospective** waivers (that is, waivers of charging parties' rights to file charges or sue based on **future** discrimination);
- contain "general releases" by **non-parties** to the charge (for example, the charging party's spouse); or
- contain **unlawful provisions**.

"General Releases"

The EEOC generally should **not** be a party to a settlement agreement with across-the-board waivers of rights to file charges or sue under laws not enforced by the EEOC. However, where the charging party has been advised to consult with his/her attorney, and insists s/he still wishes to sign such a release, the EEOC could agree to sign an agreement containing the primary settlement terms where the objectionable general release

terms are addressed in a separate addendum to which the EEOC would not be a party.

Agreements in the Absence of the Charging Party

EEOC's Compliance Manual, Volume 1, Section 63 discusses **conciliation agreements without charging party approval and signature.** You may wish to review that section -- but, in essence, such agreements are possible in Title VII, GINA, and ADA charges and in concurrent cases where:

- the charging party cannot be located;
- where there has been a no cause finding relating to the charging party, but cause as to other persons or issues affecting other persons.

Another possibility would be where the charging party in a pattern or practice case is holding out for more relief and acceptable relief has been negotiated as to the others persons or issues affecting other persons.

Special care has to be taken to preserve the charging party's rights if proceeding with an agreement without the charging party. Cases involving this issue should be discussed with your supervisor and/or your office's legal unit.

Breached Agreements

Our settlement agreements are enforceable contracts. To assure they are enforceable if respondent breaches an agreement, all the provisions should be as unambiguous as possible. **All provisions MUST be in writing.**

If a charging party contacts you saying his/her employer has breached an agreement to which we are all parties, i.e., the charging party, the respondent and the EEOC, contact your legal unit for advice on how to proceed. Typical options include bringing action to enforce the agreement or having the charging party file a new charge of retaliation.

Appendix

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SUMMARY OF STATUTES EEOC ENFORCES

GINA

Full name:
Genetic Information Non-Discrimination Act of 2008

Citation:
42 U.S.C. §§ 2000ff et seq;
42 U.S.C. § 1981a

Applies to:
Employers (15+ employees),
FEB agencies, S&L gov't, Executive Office of the President,
US House & Senate

Protects:
Employees and applicants

Against
discrimination
based on:
Genetic Information (pre manifestation)

In:
Hiring, firing, promotion,
pay, other terms/conditions of
employment (e.g., harassment),
failing to refer or train

Charge filing
requirements:
EEOC needs timely charge;
Charge within 180/300 days;
Private suit within 90 days of
Right to Sue notice

Relief:
Backpay, front pay, injunctive
relief, affirmative relief
(e.g., reinstatement,
and punitive damages

SUMMARY OF STATUTES EEOC ENFORCES

	Title VII + Civil Rights Act	**ADA + Civil Rights Act**	**ADEA**	**EPA**
Full name:	Title VII of the Civil Rights Act of 1964; Civil Rights Act of 1991	Title I of the Americans with Disabilities Act; Civil Rights Act of 1991	Age Discrimination In Employment Act	Equal Pay Act
Citation:	42 U.S.C. §§ 2000e-2000e-17; 42 U.S.C. § 1981a	42 U.S.C. §§ 12101-12102, 12111-12117, 12203-12208; 42 U.S.C. § 1981a	29 U.S.C. §§ 621-634	29 U.S.C. §§ 206(d)
Applies to:	Employers (15+ employees), unions, employment agencies, joint labor-management committees	Employers (15+ employees), unions, employment agencies, joint labor-management committees	Employers (20+ employees), unions, employment agencies	Employers, unions
Protects:	Employees and applicants	Employees and applicants with disabilities, others for specific claims (e.g., medical inquiries)	Employees and applicants age 40 and older	Employees
Against discrimination based on:	Race, color, sex, religion, national origin, pregnancy; Opposing discrimination, participating in enforcement proceedings, filing charges	Disability, association with persons with disabilities; Opposing discrimination, participating in enforcement proceedings, filing charges	Age; Opposing discrimination, participating in enforcement proceedings, filing charges	Sex; Participating in enforcement proceedings, filing charges
In:	Hiring, firing, promotion, pay, other terms/conditions of employment (e.g., harassment), failing to refer or train, failing to reasonably accommodate (religion)	Hiring, firing, promotion, pay, other terms/conditions of employment (e.g., harassment), failing to refer or train, failing to reasonably accommodate, Also bans some medical-related inquiries and disclosures	Hiring, firing, promotion, benefits, other terms/ conditions of employment (e.g., harassment), failing to refer or train	Pay and benefits
Charge filing requirements:	EEOC needs timely charge; Charge within 180/300 days; Private suit within 90 days of Right to Sue notice	EEOC needs timely charge; Charge within 180/300 days; Private suit within 90 days of Right to Sue notice	EEOC does not need charge; Charge within 180/300 days; Private suit 60+ days after filing charge or within 90 days of Right to Sue notice	EEOC does not need charge; No charge needed for private suit, suit filed within 2 (or 3, if willful) years of discrimination
Relief:	Backpay, front pay, injunctive relief, affirmative relief (e.g., reinstatement, accommodation), compensatory and punitive damages	Backpay, front pay, injunctive relief, affirmative relief (e.g., reinstatement, accommodation), compensatory and punitive damages	Backpay, liquidated damages, front pay, injunctive relief, affirmative relief (e.g., reinstatement)	Backpay, liquidated damages, front pay, injunctive relief, affirmative relief (e.g., (e.g., reinstatement)

REMEDIES AND RELIEF

Voluntary Relief

- Mediation
- Settlement
- Conciliation

Mach Mining Basic Requirements

1. Inform the employer about the specific allegation
2. Try to engage the employer in some form of discussion
3. Describe what the employer has done &
4. Identify which employees have suffered as a result

Types of Relief

- Monetary
- Non-Monetary / TER

4

Monetary Relief Overview

Goal = "Making whole" the complainant

5

Monetary Relief

- Back Pay + Interest
- Front Pay
- Benefits
- Compensatory Damages
- Punitive Damages
- Liquidated Damages
- Attorney's Fees

6

Know Your Statute

*uncapped compensatory and punitive damages are available for ADEA and EPA retaliation claims

7

Non-Monetary Relief / TER Overview

8

Non-Monetary Relief / TER

- Specific Injunctive Relief
- Seniority Adjustments
- Training
- Expunge Records
- References
- Non-Retaliation
- Policy Correction
- Reporting Requirements

9

To TER Or Not To TER?

10

To - Targeted Equitable Relief

- Monetary Benefit * Categories
  - New Hire
  - Promotion
  - Reinstatement/ Recall

*Note—TER is the action associated with the Benefit, not the monetary value of the Benefit

- Non-Monetary Benefit Categories
  - Policy Change
  - Training/ Apprenticeship
  - Religious Accommodation
  - Seniority
  - Job Referral
  - Union Membership
  - Reasonable Accommodation
  - Other Non-Monetary Benefits

11

Other Non-Monetary Benefits

(examples)

- **Procedural/Practice Change** – includes creation of or changes to existing Respondent procedures or practices designed to deter future discrimination
- **External Monitoring**—includes provisions for monitoring of employer action by EEOC or other entity
- **Other Benefit (TER)**—includes non-monetary benefits that specifically address issues alleged in the charge

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To Not -Targeted Equitable Relief

- Monetary Benefit Categories
  - Restored Pay/Back Pay
  - Fringe Benefits
  - Other Monetary(Projected)
  - Other Monetary (Actual)
  - Compensatory Damages
  - Punitive Damages
  - Attorney's Fees
- Non-Monetary Benefit Categories
  - EEO Notices
  - Other Non-TER Benefits
  - Training Not Specific to the Issues in the Charge

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Other Non-TER Benefits

(examples)

Non- monetary benefits not specifically addressing issues alleged in the charge, for example " Respondent agrees to continue to provide diversity training."

Provisions which bar discrimination in broad statutory terms, for example " Respondent agrees not to discriminate."

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Settlement Factors to Consider

- **Type of Case**
- **Processing Stage**
- **Difficulty in Processing**

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Quality Enforcement Practices

1. EEOC invites the Respondent to participate in conciliation efforts
2. The Conciliation seeks meaningful relief for the victims of discrimination and seeks to remedy the discriminatory practices
3. EEOC considers offers made by the Respondent
4. EEOC attempts to secure a resolution acceptable to the agency

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The Conciliation Process: The LOD sets the Framework

- Identify victim(s) of discrimination
- Identify employment practice(s) at issue-i.e. failure to hire….
- Offer opportunity to engage in conciliation, "opportunity to discuss the matter in an effort to achieve voluntary compliance."
  - Can be written or oral if confirming emails

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The Conciliation Process: What Comes After the LOD?

✓Prepare. Prepare. Prepare.

✓ Conciliation request seeks meaningful relief

✓relief sought is case specific

✓Includes TER

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The Conciliation Process: Proposal Sent, Then What?

- Considers offers made by the respondent in a timely fashion
- No hard & fast rules.
- What is appropriate is within the discretion of the agency.

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When is Conciliation Over?

When we say its over. If:

- **Respondent states it is not interested in engaging in conciliation or further conciliation with the EEOC.**
- **Respondent offers relief which the Commission finds to be insufficient and we do not believe Respondent will agree to acceptable relief.**
- **Respondent repeatedly fails to timely respond or refuses to respond at all to a conciliation proposal by the Commission.**

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. . . Ending Conciliation

- **Respondent's representative with settlement authority does not participate.**
- **Respondent makes further discussion contingent on the production of information Respondent is not entitled to receive.**
- **Respondent's offer to discuss settlement has preconditions that cannot be met.**

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When you decide conciliation is over:

- **Write a letter confirming conciliation failure to Respondent.**
- **The letter should specify the efforts made by EEOC and that we have determined that we will not be able to reach a conciliation proposal acceptable to the Commission.**
- **Consult with Supervisor and Legal (where appropriate).**
- **Document in the file the specific reason for failure.**

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Failing Conciliation

Factors to Consider Before Failing Conciliation

✓Respondent

✓Charging Party

✓EEOC

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Conciliation - File

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Tips for Managing the file

- If the case is litigated and the EEOC may need to submit an affidavit, to confirm the agency complied with its obligation to offer the employer the opportunity to engage in conciliation based on review of the file. The file needs to accurately reflect conciliation communications.

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A separate accurate file

- **A separate file or tab in the file should be kept for all post-LOD conciliation activity.**
- **Ensure that if someone else had to pick up the case file where you left off that they could follow your paper (or digital) trail.**

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You Have An Agreement

- **You have helped the parties reach an agreement that provides meaningful relief, is specific and includes TER.**
- **Now What?**

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Drafting an Agreement

- CP will not sue regarding this charge
- Detailed statement of relief
- No admission of violation (NSA)
- R will notify EEOC when obligations met
- Agreement may be enforced in court
- EEOC will terminate this investigation; does not waive future actions
- ADEA only: CP advised to consult with attorney

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Drafting Conciliation Agreements :

- **Careful drafting.**
  - Start new from model.
  - Don't use old drafts.
- **Make sure enforceable.**
  - Impose deadlines.
  - Use clear and specific language.
- **Be creative!**
  - Tailor relief to case.
- **Have someone proof!**
  - Have someone proof again!

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Non-Monetary Relief / TER

- To ensure that the discrimination never reoccurs.
- To think creatively about the sources of the discrimination.
- To think about the specifics of the case, the employer and all of the deficits/ problems we have uncovered during discovery.
- To aggressively and creatively draft concrete, specific, problem solving provisions.

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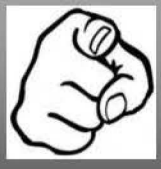
Non-Monetary Provisions



- Reflect basis and issue related to case
- Anti-retaliation provision
- Not too broad
- Language
  - "Shall comply" (Conciliation)
  - "Shall not" or "will not", do not use "agrees"

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Examples

- EEO compliance in manager evaluation
- Job shadowing or mentoring
- Training, diversity programs
- PSA (public service announcements)
- Implement policy changes or compliant procedures
- Increase representation of protected groups
- Outreach to specific organizations

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Be Creative

Make an IMPACT!!!

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United States Equal Employment Opportunity Commission

New Investigator Training
August 2017

Participant Manual

New Investigator Training
August 2017

PATRICIPANT MANUAL

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EEOC OVERVIEW AND LEGACY

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COURSE INTRODUCTION

Welcome to the United States Equal Employment Opportunity Commission and the New Investigator Training. We hope you come ready to learn as we are excited to learn with you.

This training is designed to stretch your mind, enhance your skills and prepare you for the very rewarding work of fighting employment discrimination.

TRAINING PURPOSE AND OBJECTIVES

The purpose of this training is to introduce you to and work with you on the basic investigative tools and techniques used by the U.S. Equal Employment Opportunity Commission, and to welcome you to the EEOC as Investigators. Although some of you have been with the EEOC longer than others, we believe that this national training is important to ensure that you are all using the same tools and techniques that allow us to do the work of the Commission.

We will also consider the role of an EEOC Investigator and focus on the critical skills needed to be a successful EEOC Investigator:

- **Analytical / Critical Thinking**
- **Thorough understanding of the Models / Elements of Proof**
- **Excellent Communication Skills – written, verbal and listening**
- **Sound Customer Service**

The overall training goal is to provide each of you with the tools necessary to:

- Conduct an intake interview, determine whether **jurisdictional/ threshold requirements** have been met and draft a **charge**;

- Assess a charge using the **Priority Charge Handling Procedures (PCHP)**;
- Gather and analyze evidence under the appropriate **theory of discrimination**;
- Plan and conduct an **on-site** as part of an investigation;
- Plan and conduct a **fact-finding conference**;
- Conduct a probative witness interview and **assess credibility**, using critical thinking and a variety of **interview techniques**;
- Engage in conciliation efforts and draft a conciliation agreement, applying the appropriate **remedies and relief**.

We do not intend this training or any other training to give you the "answers" for all your questions. We hope that this training will teach you to **ask questions**. Our expectation is that after you complete this training you will have a better appreciation for the complexities of the work that you do and an understanding that there are resources available to help you find the answers for those questions.

There are many ideas and skills we want you to take back with you to your workplace when this training is over.

Get the facts: You should have the tools necessary to focus on getting the facts, at intake, during witness interviews, while conducting on-sites, and during settlement discussions.

Be inquisitive: You should have the tools necessary to ask the right questions at the right time -- developing your ability to inquire about every aspect of a factual situation which may be relevant.

Plan carefully: You should have the tools necessary to develop well thought out plans for conducting investigations and interviews and for analyzing evidence.

Be flexible: You should learn to develop your ability to "switch gears" whenever warranted by the situation, adjusting your approach to conducting an investigation, interviewing or conducting settlement discussions.

Be objective: You should learn that it is essential to be ever conscious of the need for objectivity and fairness. Evidence obtained from one party to the investigation must be checked against evidence held by the other party to the investigation. It is essential to give each party adequate opportunity to rebut the evidence presented by the other side.

Follow the law and required procedures. You will gain an appreciation of the importance of your role as a front-line representative of a federal law enforcement agency. In your work you will be called upon to fairly and accurately investigate the allegations brought to the agency in charges of discrimination, and then to assess whether there is reasonable cause to believe the law has been violated. Accurate handling of charges and consistent adherence to required procedures are therefore essential to our work and to protecting the rights of the parties.

Take Advantage of Learning Opportunities. This training will provide you with the most recent updates regarding intake and investigatory procedures, as well as the laws that you will be responsible for enforcing. Since laws and procedures are constantly being modified, it is important that you keep abreast of such changes by taking advantage of any learning opportunities that are available to you.

Build confidence: We hope that this training will increase the level of confidence you have in yourself as an Investigator for EEOC.

OVERVIEW OF THE U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Pursuant to 5 U.S.C. §§ 101-105, the U.S. Equal Employment Opportunity Commission ("EEOC" or "the Commission") is an independent agency of the Federal Government, operating as part of the Executive Branch. The EEOC was created by Congress to enforce Title VII of the Civil Rights Act of 1964 which prohibits employment discrimination.

The laws enforced by EEOC protect individuals from employment discrimination because of their race, color, religion, sex (including pregnancy, gender identity and sexual orientation), national origin, age (40 and over), disability or genetic information, as well as from retaliation.

EEOC was created by the historic Civil Rights Act of 1964. The Civil Rights Act is a federal law that addresses not only discrimination in employment, but also discrimination in voting, public accommodations, and education. EEOC enforces only Title VII, the employment section of the Civil Rights Act.

On July 2, 2015, the Commission celebrated its 50th Anniversary. Since we opened our doors on July 2,1965, individuals like you, have stood up against job discrimination, and worked successfully to advance our mission to stop and remedy unlawful employment discrimination so that the nation can realize our vision of justice and equality in the workplace. We opened with five Commissioners and a staff of 100. In its first year, EEOC received approximately 9,000 charges of discrimination. Today, having added enforcement authority and staff, the EEOC receives approximately 90,000 charges each year.

EEOC has authority to investigate charges of discrimination filed against employers, labor organizations, and employment agencies that have a minimum number of employees. The Commission's role in an investigation is to evaluate the evidence to determine if discrimination occurred.

If EEOC determines that there is reasonable cause to believe discrimination has occurred and conciliation efforts have been unsuccessful, EEOC may take the case to court.

The Commission also develops regulations and policy guidance to promote equal opportunity in the workplace. In addition, the EEOC provides training and technical assistance, and outreach and education programs to assist employers, employees, and other groups to understand their rights and responsibilities under the laws and to prevent discrimination.

In the federal sector, the EEOC provides leadership and guidance to federal agencies on all aspects of equal employment opportunity. The EEOC Administrative Judges conduct hearings on EEO complaints from federal employees, and the Commission adjudicates appeals from administrative decisions made by federal agencies on EEO complaints.

Chair, Commissioner and General Counsel

The EEOC is led by five Commissioners all appointed by the President of

the United States and confirmed by the Senate. The EEOC is a bi-partisan Commission and depending on the Administration, the Commission will have either 3 Republicans or 3 Democrats.

- At the time of print of this Manual, the current Commissioners are: Acting Chair Victoria A. Lipnic (R) and Commissioners, Chai R. Feldblum (D), Jenny R. Yang (D), and Charlotte A. Burrows (D). One seat is vacant. However, Janet Dhillon (R) has been nominated to fill the soon to be vacant seat of Commissioner Yang whose term expired on July 1, 2017 (currently in holdover). We are awaiting the nomination to fill the other vacant seat on the Commission.

- The EEOC also has a General Counsel, appointed by the President and confirmed by the Senate. This seat is currently vacant.

- Commissioners are appointed for 5-year staggered terms; the General Counsel's term is 4 years.

- The incumbent President designates a Chair and a Vice Chair. The Chair is the chief executive officer of the Commission. The current Acting Chair is Victoria A. Lipnic. Currently, there is no Vice Chair.

- The Commissioners have authority to establish policy and to approve litigation, make decisions in federal sector appeals, approve certain contracts, and other matters.

- The General Counsel is responsible for conducting litigation under the laws enforced by the Commission.

EEOC carries out its enforcement, education, and technical assistance activities through its headquarters office in Washington, D.C. and through its 53 field offices throughout the nation.

EEOC also contracts with state and local government Fair Employment Practices Agencies (FEPAs) for the intake and resolution of Title VII, ADEA, ADA and GINA charges received by the EEOC and/or a FEPA. EEOC's relationship with state and local FEPAs has its origins in Title VII of the Civil Rights Act of 1964, as amended.

The provisions of Title VII mandate that the Commission defer charges to

designated FEPAs for 60 days and give substantial weight to the determinations of the FEPAs. Title VII permits the Commission to cooperate with FEPAs, pay them for their assistance in Title VII enforcement, and enter into written agreements for charge intake and investigation. The ADA and the ADEA have similar charge deferral provisions, but there are some procedural differences under these statutes.

You may remember from your high school civics class that governmental power and operations in the United States rest in three branches of government: the legislative, the judicial, and the executive.

The Constitution of the United States:

- defines the legislative branch and grants power to legislate to Congress (the U.S. House of Representatives and the U.S. Senate);
- defines the executive branch and places executive power with the President of the United States; and
- defines the judicial branch and places judicial power with the U.S. Supreme Court and lower federal courts.

Please see the chart at the end of this section for a breakdown of the Government of the United States and the various branches. This chart shows the EEOC in the context of all other executive branch departments and agencies, including those with which the EEOC interacts on a regular basis or has shared or complementary responsibilities, such as the U.S. Departments of Justice and Labor.

EEOC's STRATEGIC PLAN AND STRAGETIC ENFORCEMENT PLAN

The EEOC's Strategic Plan (currently being updated) establishes a framework for achieving the agency's mission to "stop and remedy unlawful employment discrimination" so that the nation might soon realize the Commission's vision of "justice and equality in the workplace."

The Strategic Plan articulates the EEOC's comprehensive strategies and goals for achieving its mission and vision.

The Strategic Plan identifies three objectives for the Commission's work:

1. **Combating employment discrimination through strategic law enforcement**, with the goal of: 1) having a broad impact on reducing employment discrimination at the national and local levels; and 2) remedying discriminatory practices and securing meaningful relief for victims of discrimination;

2. **Preventing employment discrimination through education and outreach**, with the goal of: 1) members of the public understanding and knowing how to exercise their right to employment free of discrimination; and 2) employers, unions and employment agencies (covered entities) better addressing and resolving EEO issues, thereby creating more inclusive workplaces; and

3. **Delivering excellent and consistent service through a skilled and diverse workforce and effective systems,** with the goal that all interactions with the public are timely, of high quality, and informative.

The first requirement of the Strategic Plan was the development of a **Strategic Enforcement Plan (SEP)** to establish national priorities for the Commission's administrative and legal, as well as education and outreach, programs for the private, public, and federal sectors. The SEP was developed with extensive input from agency staff and external stakeholders to identify issues where government enforcement is most likely to achieve broad and lasting impact on the workplace. The Commission approved the current SEP for fiscal years 2017-2021. A guiding principle of the current SEP is to have a targeted approach that allows the EEOC to focus on priorities where our work can have strategic impact or work that has a significant effect on development of the law or promoting compliance across particular industries, organizations or communities.

The **SEP priorities** are as follows:

1. **Eliminating Barriers in Recruitment and Hiring.** The EEOC will target class-based recruitment and hiring practices that discriminate against racial, ethnic and religious groups, older workers, women, and people with disabilities. Under this priority, we look for barriers to diversity in hiring in the tech industry, policing, and the temporary workforce. We may analyze how companies are using big data and

online job application processes that may pose arbitrary barriers in hiring members of particular groups.

2. **Protecting Immigrant, Migrant and Other Vulnerable Workers.** The EEOC will target disparate pay, job segregation, harassment, trafficking and discriminatory policies affecting vulnerable workers who may be unaware of their rights under the equal employment laws, or reluctant or unable to exercise them. While immigrants and migrants may be vulnerable workers, in particular localities, there may be a need to focus on other vulnerable groups or underserved communities.
3. **Addressing Emerging and Developing Issues.** The EEOC will target emerging issues in equal employment law, including issues associated with significant events, demographic changes, developing theories, new legislation, judicial decisions and administrative interpretations. Current issues include accommodating pregnancy-related limitations that fall under the ADA; protecting members of the LGBT communities from sex discrimination; qualification standards and inflexible leave policies under the ADA. Within this priority, the EEOC is looking at how complex employment relationships (i.e. temp workers, independent contractors, on-demand economy) may pose arbitrary and significant issues for particular protected groups. Also, under this priority, the EEOC is targeting backlash discrimination against members of the Muslim or Sikh religions, people of Arab, Middle Eastern or South Asian descent as well as those who may be perceived to be from these areas or of these religions.
4. **Enforcing Equal Pay Laws.** The EEOC will target compensation systems and practices that discriminate based on gender, race, national origin, disability, age, etc.
5. **Preserving Access to the Legal System.** The EEOC will target policies and practices that discourage or prohibit individuals from exercising their rights under the employment discrimination statutes, or that impede the EEOC's investigative or enforcement efforts. With this priority, we focus on overly broad waivers, releases and provisions in arbitration agreements, as well as record-keeping violations and significant retaliatory practices that "effectively dissuade others from exercising their rights."
6. **Preventing Harassment Through Systemic Enforcement and Targeted Outreach.** The EEOC will pursue systemic or pattern and practice investigations and litigation and conduct a targeted outreach campaign to deter harassment in the workplace.

+ Strategic Impact – New SEP Priority

For EEOC to maximize its effectiveness, the agency's resources must align with its priorities. EEOC will pursue matters and issues that are not identified within the above substantive area priorities where government enforcement will have a strategic impact.

We encourage you to become familiar with the agency's Strategic Plan and the Strategic Enforcement Plan, https://www.eeoc.gov/eeoc/plan/strategic_plan_12to16.cfm and https://www.eeoc.gov/eeoc/plan/sep-2017.cfm on the EEOC's public website.

The Strategic Plan and Strategic Enforcement Plan set the direction for the entire agency. However, the Strategic Plan also provided for the adoption of District Complement Plans (DCP). The DCPs allow each district to have additional substantive priority areas for targeting locally. For example, some districts target the poultry farm industry, or race harassment in certain geographic locations within the particular district's jurisdiction.

The SEP also builds upon the Strategic Plan's efforts to coordinate and target the Commission's activities across its 53 offices and all program areas so that the Commission operates as One EEOC.

What does this vision of One EEOC mean for each of us? The point is that our individual efforts are part of a nationwide effort and we have more impact collectively when more of our time and resources are focused on priority issues. To make this vision a reality, we have identified three approaches to align our efforts with this vision:

Vision for One EEOC

1. Across our agency, we strategically invest our resources to tackle the most significant barriers to opportunity in workplaces today and develop solutions to these persistent problems. We lead strategies to address emerging forms of discrimination in an increasingly diverse society, as the nature of work and employment relationship change.

2. We provide timely and effective service to the public. We use data to inform our decisions; we define clear and common objectives across the agency; and we promote broad compliance through robust and

coordinated enforcement, guidance, federal sector decisions, and outreach.

3. We have a "can do" attitude, with a culture of excellence and a focus on accountability and results. We attract and retain highly talented employees with a strong commitment to fulfilling our mission. EEOC leaders and staff work collaboratively across organizational lines as one team. Employees at all levels are empowered to continually innovate to advance our mission and to best serve the public.

In the SEP, the Commission reaffirmed two other guiding principles--- collaboration between functioning units within offices, as well as, across offices, and accountability. The expectation is that offices will consult and collaborate between Legal and Enforcement units, different districts, FEPA partners and other federal agencies in the effort of have the most significant broad impact as possible. With the agency's new Digital Charge System and the Quality Practices for Effective Investigations and Conciliations (QEP), we show the public our strong enforcement efforts and we provide the best in customer service.

To achieve this vision, we must align our work to focus on achieving three KEY RESULTS:

1. To shift efforts and resources to activities that have strategic impact to more effectively manage our workload (and streamline or reduce other activities).

2. To make significant progress toward building a digital workplace to increase our efficiency and to provide timely service to the public.

3. To strengthen employee engagement and increase retention of talented and committed employees.

EEOC LEGACY

Over the years since the passing of the Civil Rights Act and the establishment of EEOC, our investigative authority has grown. Title VII was amended to include the Pregnancy Discrimination Act. In 1979, the Age Discrimination in Employment Act (ADEA) and the Equal Pay Act (EPA) were transferred from the Department of Labor to the EEOC for enforcement. The Older Workers Benefits Protection Act (OWBPA)

became part of the ADEA which ensures protections against older workers relating to signing employment-related contracts, among other things. In 1990, the Americans with Disabilities Act (ADA) was enacted, giving protection to millions of qualified individuals with disabilities. The Civil Rights Act of 1991 (CRA) was enacted to correct Supreme Court decisions of the 80's which impacted individual rights. In 2008, Congress passed the Genetic Information Nondiscrimination Act (GINA), which protects against discrimination based on genetic information and family medical history and restricts the acquisition and disclosure of such information. The ADA Amendments Act of 2008 clarified the scope of the definition of disability to ensure that it would be easier for individuals seeking the protection of the ADA to establish that they have a disability covered by the law. In January of 2009, the Lilly Ledbetter Fair Pay Act, amended Title VII, ADEA, and ADA and provided a new statute of limitations each time the employee receives a paycheck, thereby reversing a U.S. Supreme Court decision, *Ledbetter v.Goodyear Tire & Rubber (2007).*

Over the last decades, we have seen some shifts in the nature of employment discrimination. In the early years of the Civil Rights Act, bias was blatant and sometimes clearly visible. Today, discrimination is often much more subtle. Large demographic shifts have taken place throughout the labor market. Advances in technology have changed the recruitment, selection and hiring process. For example, we now routinely see age- and gender-based bias in some on-line job recruiting and advertising. All of these changes in the workplace affect how we investigate.

Economic downturns tend to increase the number of charges filed with the EEOC, as companies downsize, and become more selective in their hiring and promotion decisions. This typically causes a spike in our intake and our pending workload.

If you would like to learn more about the history of EEOC's laws, you can read this presentation on the "History of the EEOC and Overview of the Laws" located at the end of this section in the appendix.

You have had the opportunity to hear about the history of the Civil Rights Act and why the EEOC came to exist. We recognize that many of you did not experience these events as they happened so we wanted to give you a better since of the discrete, overt, and pervasive discrimination that historically has occurred in the workplace, and continues today.

THE INVESTIGATOR'S ROLE

It is important to understand that as an investigator with the Equal Employment Opportunity Commission, you are charged with enforcing the anti-discrimination federal laws relating to employment. While not all employees are treated equally in the workplace, it doesn't necessarily mean that the employment action is unlawful. Therefore, it is the investigator's job to objectively obtain the facts, assess the evidence based on the requirements of the law, and make a recommendation regarding whether the law has been violated.

You are the face and representative of the EEOC and how you interact with individuals determines how the public perceives the EEOC. We expect you to be professional, respectful and courteous in your interactions with the public.

TRAINING EXPECTATIONS

This training will be an opportunity for you to learn about approaches and solutions that will equip you to perform your job more efficiently and effectively. We know that managing an active caseload can be challenging. This training will include a focus on best practices for case management. Learning the principles that apply to EEOC's areas of law enforcement is key. This training will give you many resources and a strong foundation for taking advantage of future learning opportunities.

Below are some tips for success in your job as an investigator:

- Communicate with your supervisor
- Learn to effectively manage your time
- Ask about working with a mentor (formally or informally)
- Bounce things off each other
- Don't be afraid to ask for help or guidance
- Break down the day – when do you work best – morning or afternoon and tailor your work-day in that manner

- Use telework as a tool to have a large block of uninterrupted time to work on something like an analysis, or writing up a cause recommendation
- Set up interviews at a particular time
- Check e-mails at specific times each day
- Let telephone go to voice mail and return calls at specific times during the day.

During this training, you will learn many more good strategies for working most effectively as an EEOC investigator. We encourage you to ask questions, share your ideas, and enjoy the opportunity to work together with colleagues from many other EEOC offices.

THE GOVERNMENT OF THE UNITED STATES
THE CONSTITUTION

LEGISLATIVE BRANCH	EXECUTIVE BRANCH		JUDICIAL BRANCH
THE CONGRESS SENATE HOUSE	THE PRESIDENT THE VICE PRESIDENT EXECUTIVE OFFICE OF THE PRESIDENT		THE SUPREME COURT OF THE UNITED STATES
ARCHITECT OF THE CAPITOL US BOTANIC GARDEN GENERAL ACCOUNTING OFFICE GOVERNMENT PRINTING OFFICE LIBRARY OF CONGRESS CONGRESSIONAL BUDGET OFFICE	WHITE HOUSE OFFICE OFFICE OF THE VICE PRESIDENT COUNCIL OF ECONOMIC ADVISERS COUNCIL ON ENVIRONMENTAL QUALITY NATIONAL SECURITY COUNCIL OFFICE OF ADMINISTRATION	OFFICE OF MANAGEMENT AND BUDGET OFFICE OF NATIONAL DRUG CONTROL POLICY OFFICE OF POLICY DEVELOPMENT OFFICE OF SCIENCE AND TECHNOLOGY POLICY OFFICE OF THE U.S. TRADE REPRESENTATIVE	US COURTS OF APPEALS US DISTRICT COURTS TERRITORIAL COURTS US COURT OF INTERNATIONAL TRADE US COURT OF FEDERAL CLAIMS US COURT OF APPEALS FOR THE ARMED FORCES US TAX COURT US COURT OF APPEALS FOR VETERANS CLAIMS ADMINISTRATIVE OFFICE OF THE US COURTS FEDERAL JUDICIAL CENTER US SENTENCING COMMISSION

CABINET LEVEL DEPARTMENTS				CABINET LEVEL DEPARTMENTS			
Department of Agriculture	Department of Commerce	Department of Defense	Department of Education	Department of Energy	Department of Health and Human Services	Department of Homeland Security	Department of Housing and Urban Development
Department of the Interior	Department of Justice	Department of Labor	Department of State	Department of Transportation	Department of the Treasury	Department of Veterans Affairs	

INDEPENDENT ESTABLISHMENTS AND GOVERNMENT CORPORATIONS

African Development Corporation Central Intelligence Agency Commodity Futures Trading Commission Consumer Product Safety Commission Corporation for National and Community Service Defense Nuclear Facilities Safety Board Environmental Protection Agency Equal Employment Opportunity Commission Export-Import Bank of the US Farm Credit Administration Federal Communications Commission Federal Deposit Insurance Corporation Federal Election Commission Federal Housing Finance Board	Federal Labor Relations Authority Federal Maritime Commission Federal Mediation and Conciliation Service Federal Mine Safety and Health Review Commission Federal Reserve System Federal Retirement Thrift Investment Board Federal Trade Commission General Services Administration Inter-American Foundation Merit Systems Protection Board National Aeronautics and Space Administration National Archives and Records Administration National Capitol Planning Commission National Credit Union Administration	National Foundation on the Arts and Humanities National Labor Relations Board National Mediation Board National Railroad Passenger Corporation (AMTRAK) National Science Foundation National Transportation Safety Board Nuclear Regulatory Commission Occupational Safety and Health Review Commission Office of Government Ethics Office of Personnel Management Office of Special Counsel Overseas Private Investment Corporation Peace Corps Pension Benefit Guaranty Corporation	Postal Rate Commission Railroad Retirement Board Securities and Exchange Commission Selective Service System Small Business Administration Social Security Administration Tennessee Valley Authority Trade and Development Agency US Agency for International Development US Commission on Civil Rights US International Trade Commission US Postal Service

Slide Show

U.S. Equal Employment Opportunity Commission

NEW INVESTIGATOR TRAINING

August 7–18, 2017
Washington, D.C.

Training Purpose & Objectives

- Welcome
- Introduction to Tools & Techniques
- Practice Essential Skills for High Performing Investigators

Essential Skills

- Analytical/Critical Thinking
- Thorough Understanding of the Models/Elements of Proof
- Excellent Communication Skills (written, verbal, listening)
- Sound Customer Service

Goal

- Intake Interview/Threshold Issues/Draft Charge
- Apply PCHP
- Gather/Analyze Evidence—Theory of Discrimination
- Conduct Onsite
- Conduct Fact-Finding Conference
- Conciliation/Remedies/Relief

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Techniques and Skills

- Get the facts
- Be inquisitive
- Plan carefully
- Be flexible
- Be objective
- Listen
- Follow law and procedures
- Take advantage of learning opportunities
- Build Confidence

5

EEOC: An Independent Federal Agency

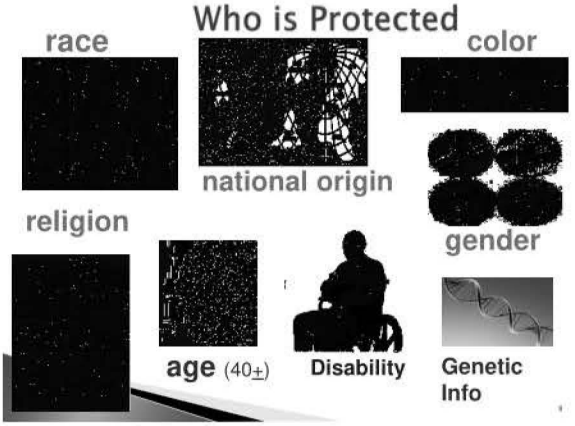
Created to enforce Title VII of the Civil Rights Act of 1964

6

Laws Enforced by the EEOC

Title VII of the Civil Rights Act of 1964
ADEA: Age Discrimination in Employment Act of 1967
EPA: Equal Pay Act
ADA: Americans with Disabilities Act
GINA: Genetic Information Nondiscrimination Act of 2008

Who is Protected



The Beginning

- The EEOC opened its doors on July 2,1965.
- Started with 5 Commissioners and a staff of 100.
- Took in 9,000 charges in the first year.
- In July 2015, offices across the U.S. celebrated 50 years of service.
- Since opening in 1965, and enforcing Title VII of the Civil Rights Act of 1964, EEOC has gained authority to enforce additional anti-discrimination statutes.

EEOC'S MISSION:

To stop and remedy unlawful employment discrimination

EEOC'S VISION:

Justice and equality in the workplace

10

EEOC's Purpose

To investigate charges of employment discrimination filed against employers, labor organizations and employment agencies who have a minimum number of employees

To evaluate evidence to determine if discrimination occurred

To litigate cases where discrimination has been found and conciliation efforts have been unsuccessful

11

To develop regulations and policy guidance to promote equal opportunity in the workplace

To provide training and technical assistance, outreach and education programs

In Federal Sector, the EEOC provides leadership/guidance to federal agencies in all aspects of EEO and EEOC AJs conduct hearings on EEO complaints from federal employees. Commission also adjudicates appeals from administrative decisions by federal agencies on EEO complaints.

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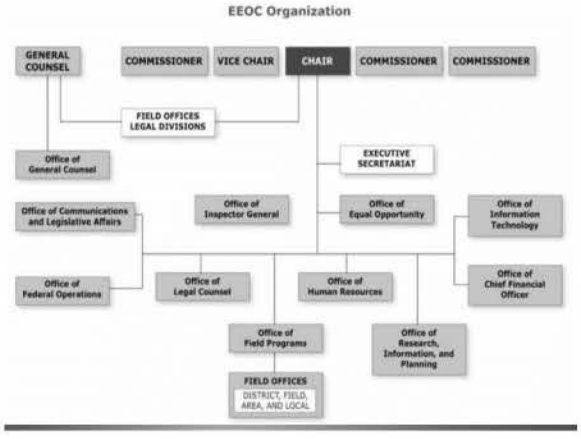
Chair, Commissioner, General Counsel

- Five Commissioners and a General Counsel all appointed by the President
- Commissioners have 5 year staggered terms
- General Counsel has 4 year term
- Incumbent President designates the Chair and the Vice Chair of the EEOC
- Commissioners establish employment policy and approve litigation
- General Counsel conducts litigation



EEOC's Strategic Plan Objectives

- Combating Employment Discrimination through Strategic Law Enforcement
- Preventing Employment Discrimination through Education and Outreach
- Delivering Excellent and Consistent Service through a Skilled and Diverse Workforce and Effective Systems

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Strategic Enforcement Plan Fiscal Years 2017–2021

- Overarching Theme = Strategic Impact
- Guiding Principles
  - Targeted Approach
  - Collaboration
  - Accountability

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SEP National Priorities

- Eliminating Barriers in Recruitment and Hiring
- Protecting Immigrant, Migrant and Other Vulnerable Workers
- Addressing Emerging and Developing Issues
- Enforcing Equal Pay Laws
- Preserving Access to the Legal System
- Preventing Harassment Through Systemic Enforcement and Targeted Outreach
- + Strategic Impact

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New SEP Priority—Strategic Impact

A charge/case with "strategic impact" is one that will have a significant effect:

1. On the development of the law
2. On promoting compliance across a large organization, community, or industry

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District Complement Plans

- Provided for through the Strategic Plan
- Allows each district to have local priorities in addition to the SEP national priorities

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ONE EEOC

- We invest our resources to tackle the most significant barriers to opportunity in workplaces today and develop solutions to these persistent problems;
- We provide timely and effective service to the public;
- We have a "can do" attitude, with a culture of excellence and a focus on accountability and results.

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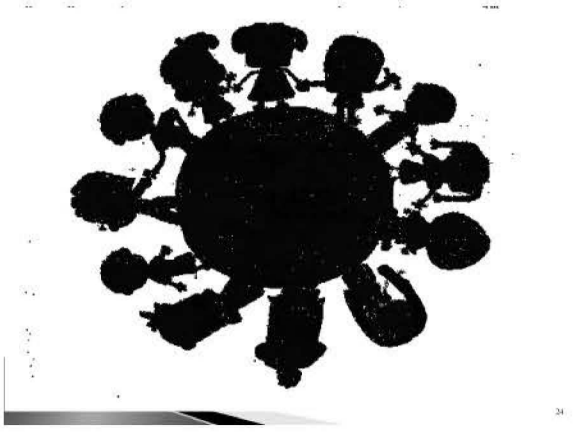
EEOC Legacy/Investigator's Role

Exercise



Jurisdiction/Threshold Issues

JURISDICTION/THRESHOLD ISSUES

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JURISDICTION/THRESHOLD ISSUES

LEARNING OBJECTIVES:

At the end of this session, participants will:

- Understand the importance of addressing jurisdiction/threshold issues *first*
- Recognize jurisdiction/threshold requirements for each of the laws enforced by the EEOC
- Gain familiarity with resources on difficult jurisdiction/threshold questions

INTRODUCTION

Generally, the **first** thing an Investigator must consider when interviewing a potential charging party ("CP") at Intake, or when reviewing a charge assigned for investigation, is whether the individual is covered by the laws enforced by the EEOC, i.e., whether certain jurisdiction/threshold requirements are met. The Investigator's first task is to identify and distinguish those actions/events which are covered by the statutes the EEOC enforces from those that are not.

JURISDICTION/THRESHOLD REQUIREMENTS

Jurisdiction/threshold requirements are the statutory standards that limit the scope of the claims that the EEOC can investigate. These basic standards establish whether the EEOC has authority to investigate a charge of employment discrimination. These standards require you to answer basic questions about the allegation such as:

- Is the complaint about an employment action covered by our laws?
- Is the complaint timely?
- Is the employer covered by our statutes?

- Is there some special circumstance that makes the employer exempt from the law?

- Is the person complaining covered by our laws?

In sum, does the person's complaint meet all the requirements for coverage set out in the statutes?

GENERAL PROVISIONS

Title VII, the ADEA, and the ADA make it illegal to discriminate in any aspect of employment, including:

- hiring and firing;
- compensation, assignment, or classification of employees;
- transfer, promotion, layoff, or recall;
- job advertisements;
- recruitment;
- testing;
- use of company facilities;
- training and apprenticeship programs;
- fringe benefits;
- pay, retirement plans, and disability leave; or
- other terms and conditions of employment.

Title VII, the ADEA and ADA cover all aspects of employment from the initial action an employer takes to advertise a position and recruit applicants, to its decision to terminate or lay off an employee, and all employment actions in between. Title VII, the ADEA and ADA also covers former employees with respect to matters that arose out of the prior employment relationship, such as a retaliatory job reference or a discriminatory reduction in pension benefits.

Discriminatory practices under Title VII, the ADEA and the ADA also include:

- **harassment** on the basis of race, color, religion, sex, national origin, age or disability that results in a hostile work environment;

- **constructive discharge, i.e.,** resigning because working conditions are so intolerable a reasonable person would not be willing to stay;

- employment practices that **"limit, segregate, or classify"** employees or applicants in a way that would deprive or tend to deprive an individual of employment opportunities or otherwise adversely affect his/her status as an employee.

This means that employers may not limit opportunities for employees or applicants to advance or to avail themselves of the full spectrum of positions for which they are qualified.

- It is unlawful for an employer to segregate employees because they belong to a protected group by physically isolating them from other employees or from customer contact.

- It is also illegal to exclude members of one group from particular positions or to group or categorize employees or jobs so that certain jobs are generally held by members of a certain protected group.

- It is unlawful to retaliate against an individual who has engaged in protected activity, i.e., opposed discrimination or participated in the EEO process, by taking an action reasonably likely to deter protected activity.

- It also means that a facially neutral employment practice having a disparate impact on a particular protected group must be job related and consistent with business necessity under Title VII and the ADA. Under the ADEA, such practices must be justified by a reasonable factor other than age.

Illegal discrimination may also include:

- **Discrimination by a Member of the Same Protected Class:** The EEO statutes prohibit discrimination on a protected basis even if the person engaging in the discriminatory act is a member of the same protected class as the victim of the discrimination. For example, Title VII prohibits a male supervisor from harassing his male subordinates on the basis of sex.

- **Discrimination Against a Subgroup:** The EEO statutes prohibit discrimination against a subgroup of a particular protected group. For example, an employer cannot refuse to hire women with preschool age children if it hires men with preschool age children.

- **Intersectional Discrimination:** The EEO statutes prohibit discrimination against an individual based on his/her membership in two or more protected classes. For example, Title VII prohibits discrimination against African-American males even if an employer does not discriminate against white males or African-American females. Similarly, intersectional discrimination can involve more than one EEO statute, e.g., discrimination based on age and disability, or based on sex and age.

- **Stereotype:** Discrimination on a protected basis includes discrimination because of stereotypical assumptions about members of the protected class. For example, discrimination against a woman because she is perceived as "too aggressive" or because she uses profanity, which is seen as "unfeminine," is a form of sex discrimination.

Title VII of the Civil Rights Act

Title VII prohibits employment discrimination against any individual **because of** his/her **race**, **color**, **religion**, **sex**, **national origin**, or **opposition** to discrimination or **participation** in the EEO process.

Race and Color Discrimination

Race or color discrimination means treating someone less favorably because s/he is of a particular race or has a particular skin color. Discrimination based on **race** covers **all** races, including, African American, White, Asian, Pacific Islander and Native American.

Race may also include a characteristic associated with race, such as skin color, hair texture, or certain facial features, even though not all members of that race share the same characteristic.

Discrimination based on **color** covers issues such as a difference in treatment between individuals with lighter skin tones and those with darker skin tones.

Sex Discrimination

Discrimination because of **sex** means making any employment decision on the basis of an individual's gender. Sex discrimination includes discrimination on the basis of gender identity or sexual orientation. Title VII's coverage of lesbian, gay, bisexual, and transgender (LGBT) individuals has been identified as an SEP priority under Emerging and Developing Issues. This issue will be considered a priority in most instances, and your legal unit, as well as management, should be consulted when the issue arises.

Sex discrimination includes both sexual conduct, such as demands for sexual favors, and non-sexual gender-based conduct, such as derogatory comments about the role of women in the workplace.

Sex discrimination also includes discrimination because of **pregnancy, childbirth, and related medical conditions**. You should also note that accommodation of pregnancy-related limitations under the Pregnancy Discrimination Act (PDA) and the ADA is a priority issue in the SEP under Emerging and Developing Issues.

Discrimination Based on Religion

Discrimination because of **religion** is prohibited regardless of how common or unique a person's religious beliefs are. Title VII protects people who belong to traditional organized religions, such as Buddhism, Christianity, Hinduism, Islam, and Judaism, people who hold what others consider non-traditional beliefs, such as Wiccans or Rastafarians, and atheists and other people who do not have any religious beliefs.

"Religion" includes moral or ethical beliefs as to right and wrong that are sincerely held with the strength of traditional religious views. This broad coverage ensures that individuals are protected against religious discrimination--even if their particular religious beliefs or practices are not shared by others.

Religious discrimination may manifest itself as a difference in treatment.

- Employers may not treat applicants or employees more or less favorably because they are a particular religion, or because they are non-believers.

- Employers may not coerce or require employees to participate in religious activity as part of their employment.

- Employers may not give a preference to applicants or employees of one religion over those of another, or give a preference to a religious employee over a non-religious employee (or vice versa) based on religion.

Title VII also defines religious discrimination to include a denial of a **reasonable accommodation** for a religious practice or belief. For example, an employer may be required, absent undue hardship, to accommodate an individual who requests a change in work schedule due to a sincerely-held religious belief of not working on his or her Sabbath.

Religious Organization Exemption for Hiring and Discharge

Title VII contains an **exemption** that **permits religious organizations to**

grant a preference to members of their own religion with respect to hiring or discharge.

In general, an entity is a religious organization if its purpose and character are primarily religious. Churches, synagogues, and mosques are religious organizations, and schools run by such organizations are also considered religious organizations.

This exemption from Title VII is **very narrow**. Religious organizations are not allowed to discriminate on the basis of other protected characteristics. For example, a Catholic school may decide to hire only Catholics, but it cannot discriminate among Catholics or anyone else based on race, sex, national origin, age, disability, or genetic information.

National Origin Discrimination

Title VII prohibits discrimination against people because of their national origin. This means that it is illegal for an employer to discriminate against someone because he or his ancestors came from a certain country. National origin discrimination also means treating someone less favorably because of ethnicity or because of physical, cultural, or linguistic characteristics common to a specific ethnic group.

Whether an employee or job applicant is Hispanic, Ukrainian, Filipino, Arab, American Indian, or any other nationality or ethnicity, s/he is entitled to the same employment opportunities as anyone else.

Accent/Language: National origin discrimination includes discrimination related to accent, manner of speaking, or English fluency. We will look in more detail at specific kinds of national origin discrimination during the theories of discrimination portion of this training.

Title VII prohibits discrimination against employees regardless of citizenship or work authorization. Some remedies, such as reinstatement, however, may be limited if someone lacks work authorization.

Retaliation

It is unlawful under Title VII for an employer to take action (retaliate) against an employee because the employee participated in an EEO complaint procedure or opposed an employment practice which s/he believed was unlawful under Title VII.

Retaliation for other reasons such as union activity or being outspoken about other types of employment practices might be covered by other federal laws or by state or local laws, but this activity is unrelated to discrimination covered by the EEO statutes.

Retaliation is interpreted very broadly, so that anyone who participates in the EEO process is covered. Any action by an employer that is likely to deter a reasonable person from participating in the complaint process or opposing discrimination could be considered retaliation. An individual does not have to file a formal charge to be protected from retaliation. If an individual was a witness in his/her employer's internal investigation of a complaint and was later discharged, that individual is covered. In addition, requesting a religious accommodation is "protected activity" under Title VII, as is requesting a reasonable accommodation under the ADA. It is unlawful for the employer to retaliate against someone who requests an accommodation under either statute. We will be discussing this in more detail later when we talk about theories of discrimination.
Note that the SEP prioritizes the issue of preserving access to the legal system. This includes policies and practices that discourage or prohibit individuals from exercising their rights or impede the EEOC's investigative and enforcement efforts. The most current SEP includes language indicates that "significant retaliatory practices that effectively dissuade others from exercising their rights" is a Commission priority.

GENERAL PROVISIONS

The Age Discrimination in Employment Act (ADEA)

The ADEA covers individuals age forty (40) and older. There is no upper age limit for ADEA coverage. However, except for retaliation claims, the charging party must have been forty or older at the time of the adverse employment action.

The ADEA prohibits discrimination between individuals in the protected group as well as between individuals inside and outside the protected group. Thus, a 55-year-old can allege age discrimination if he is replaced by a 45-year-old. The ADEA, however, does not prohibit discrimination against a relatively younger worker, even if he or she is 40 or older, in favor of an older worker. Thus, the ADEA does not prohibit an employer from treating a 65-year-old more favorably than a 45-year-old. The evidence is analyzed on a case-by-case basis.

The age difference between the charging party and his or her replacement is merely one factor in the determination of whether the employment action was motivated by age discrimination. Thus, an ADEA violation can be established even if the charging party's replacement is only slightly younger.

The ADEA does not necessarily prohibit reliance on factors that correlate with age such as years of service. However, an employer may not use such factors as a proxy for age.

An employment action based on retirement eligibility constitutes unlawful age discrimination where age is a component of eligibility. Thus, if an individual must meet both years of service and age requirements to be eligible to retire, then eligibility is based on age. Investigators should note, however, that under *Kentucky Retirement Systems v. EEOC*, 128 S. Ct. 2361 (2008), some eligibility criteria are not necessarily age-based. If this arises, investigators should contact the legal unit or OLC.

As under Title VII, the ADEA applies to all aspects of employment from recruitment to discharge and post-employment interactions such as benefits and references. Thus, any reference to a specific age or age range in employment advertisements or job postings is a violation of the ADEA. Likewise, requiring individuals to retire at a certain age is generally prohibited.

As with Title VII, prospective, current, and former employees are covered.

The ADEA also prohibits an employer from retaliating against an employee for participating in the EEO process or opposing employment practices which s/he believes are unlawful under the ADEA. The coverage for

retaliation is very broad, as it is under Title VII, and extends to those under age 40. For example, a 25-year-old may allege retaliation for testifying in an ADEA proceeding initiated by a fellow employee.

Older Workers Benefits Protection Act (OWBPA)

The ADEA has special provisions prohibiting discrimination in benefits on the basis of age. The Older Workers Benefit Protection Act of 1990 (OWBPA) amended the ADEA specifically to prohibit employers from denying equal benefits to older workers.

In enacting the ADEA, Congress recognized that the cost of providing certain benefits to older workers is greater than the cost of providing the same benefits to younger workers, and that those greater costs would create a disincentive to hire older workers. For these reasons, in limited circumstances, such as with health and life insurance, employers are permitted to reduce benefits based on age, as long as they spend the same amount for the reduced benefits of older workers as they spend on the better benefits for younger workers. In other words, an employer cannot spend less on older workers than it spends on younger workers, but it can provide a reduced benefit to older workers if the same amount of money it spends for younger workers will buy less of a benefit for an older worker.

Because benefits issues are a complex and complicated area of the law, investigators should consult their supervisor and/or the legal unit or the Office of Legal Counsel if a benefits issue arises. You should refer to the EEOC"s Compliance Manual Section on Employee Benefits and to 29 C.F.R. Part 1625 for further information. Both resources are available at www.eeoc.gov.

Waivers

In termination situations, employers may ask employees to sign a waiver giving up their rights to bring a lawsuit against the employer in exchange for severance pay or some other extra benefit.

While waivers are permitted under all the federal EEO statutes, only the ADEA, as amended by the OWBPA, includes specific requirements that a

waiver must meet to be valid. Generally, a waiver that satisfies the OWBPA requirements also will be valid as to the waiver of Title VII and ADA rights. The waiver of rights under state and local laws might be governed by different standards.

A waiver may not prevent the individual from filing a charge with the EEOC under any of the EEO statutes. However, a valid waiver will generally prevent a charging party from obtaining any individual relief, such as back pay, reinstatement, or compensatory damages.

GENERAL PROVISIONS

The Equal Pay Act (EPA)

Passed by Congress one year before Title VII, the Equal Pay Act of 1963 covers only one claim: gender-based wage discrimination. Basically, the Equal Pay Act covers persons who allege they are being paid less than a person of the opposite sex even though they are performing substantially the same job. The Act covers both males and females. We will talk about how to compare jobs when we discuss theories of discrimination. Equal Pay Act violations usually also constitute sex-based wage discrimination in violation of Title VII. Under the SEP, enforcing Equal Pay laws is one of the six national priorities. The current SEP also includes wage disparities based on race, age, disability, etc. Therefore, investigators must be careful to identify the correct statutes in cases of unequal pay. The EPA only includes sex-based wage discrimination.

Wages as defined by the Equal Pay Act include all forms of compensation, including hourly pay, salary, overtime pay, commissions, bonuses, and premium pay. Wages also include any benefits such as:

- Employee benefit plans, including stock options, profit sharing, and retirement benefits;

- Medical, hospital, accident and/or life insurance;

- Vacation, holiday and sick leave or pay;

- Uniforms, cleaning, travel, and car allowances;
- Hotel accommodations;
- Use of company car; and
- Reimbursement for travel expenses and expense accounts.

An EPA violation may be established if male and female employees perform substantially equal work and receive equal salaries but receive unequal fringe benefits.

The Equal Pay Act is a part of the Fair Labor Standards Act (FLSA), which prohibits retaliation as do all of the statutes we enforce.

GENERAL PROVISIONS

The Americans with Disabilities Act (ADA)

The Americans with Disabilities Act (ADA):

- prohibits employment discrimination against a "qualified" individual on the basis of disability" (e.g., disparate treatment or harassment)
- prohibits employment discrimination against an applicant or employee because of that person's relationship or association with a person with a disability (e.g., spouse, child)
- requires employers to provide reasonable accommodations to "qualified individuals with disabilities" absent undue hardship (except for persons who only meet the "regarded as" definition of disability)
- requires employers to follow certain rules for disability-related inquiries and medical exams of any applicant or employee

(regardless of whether or not he or she is an individual with a disability")

- requires employers to follow certain rules to keep the medical information of any applicant or employee confidential (regardless of whether or not he or she is an individual with a disability")

- requires employers to refrain from retaliation against any applicant or employee who has engaged in protected activity (regardless of whether or not he or she is an individual with a disability").

To have a "disability" as defined by the ADA, an individual must have a physical or mental impairment that substantially limits one or more major life activities (including major bodily functions), or have a record of such an impairment, or be subjected to an action that is prohibited by the ADA because of an actual or perceived impairment (i.e., be regarded as having a disability). The ADA Section of this training provides information on how to investigate and analyze this issue.

An individual is "qualified" as defined by the ADA if s/he possesses the basic job requirements, such as skill, education, or experience, and if s/he can perform the essential functions of the position in question, with or without a reasonable accommodation. However, if an individual only meets the "regarded as" definition of disability, he or she must be able to perform the essential functions of a position without reasonable accommodation in order to be considered "qualified."

As with Title VII and the ADEA, all aspects of employment from recruitment to discharge and post-employment interactions are covered under the ADA. Also, as with Title VII and the ADEA, prospective, current, and former employees are covered.

As with all the other statutes, the ADA prohibits retaliation. "Protected activity" for purposes of an ADA retaliation claim includes making a request for reasonable accommodation, even if it is determined that the person is not an individual with a disability or is not entitled to the accommodation requested.

GENERAL PROVISIONS

Genetic Information Nondiscrimination Act (GINA)

Under Title II of the Genetic Information Nondiscrimination Act (GINA), it is illegal to discriminate against employees or applicants because of genetic information. Title II of GINA prohibits the use of genetic information in making employment decisions, restricts acquisition of genetic information by employers and other entities covered by Title II, and strictly limits the disclosure of genetic information.

The EEOC enforces Title II of GINA (dealing with genetic discrimination in employment). The Departments of Labor, Health and Human Services and the Treasury have responsibility for issuing regulations for Title I of GINA, which addresses the use of genetic information in health insurance.

As with Title VII, the ADEA and the ADA, GINA covers all aspects of employment from recruitment to discharge and post-employment interactions; prospective, current, and former employees and prohibits retaliation.

TIME LIMITS FOR FILING A CHARGE

TITLE VII, ADEA, ADA, and GINA

Under Title VII, the ADEA, the ADA, and GINA an individual must file a charge with the EEOC (or a FEPA) before going to Court. In order to be considered timely under Title VII, the ADA, or GINA, a charge must be filed within 300 days of the alleged discriminatory act if there is a FEPA that also has the authority to enforce and obtain relief under a state or local law. If there is no such FEPA, then the charge must be filed within 180 days.

Under the ADEA, there must be a state law to get the advantage of the 300-day filing period. Otherwise, the time limit is 180 days. If a charging party files an ADEA charge more than 180 days after the challenged action in a jurisdiction with only a local age discrimination law, the Investigator should consult his or her supervisor about how to proceed.

THE EQUAL PAY ACT

Rather than a time limit for filing a **charge**, the Equal Pay Act provides a time limit for an individual to file a **lawsuit**. The EPA does not require that an individual file a charge with the EEOC before going to court. A lawsuit may challenge any compensation received within the past two years (three years if the violation was willful).

A charge may be filed any time before the expiration of the statute of limitations. However, the filing of a charge under the EPA does not toll the statute of limitations for filing a lawsuit. Investigators should inform charging parties of this, and investigate the case expeditiously so the charging party or the Commission can bring a timely lawsuit with the benefit of a completed investigation.

Many claims of sex-based wage discrimination can be raised under both Title VII and the Equal Pay Act (EPA). Allegations of sex-based unequal pay should generally be filed concurrently under both Title VII and the EPA.

If a sex-based wage discrimination claim is not covered by Title VII

because the employer has fewer than 15 employees, it may be covered under the EPA. For example, if an employer has only one employee, under the EPA an individual may compare his/her wages with a predecessor or successor of a different gender.

WHEN DOES THE CLOCK START FOR DETERMINING THE DATE OF THE ALLEGED VIOLATION?

Discrete Acts

The starting date for challenging any **discrete act,** such as a failure to hire or promote, termination, or denial of transfer, is the date of the adverse action. In general, the date of an adverse action of this type is the first date the employee is given unequivocal notice of the adverse action, not the effective date of the action.

For example:

- If an employee receives notice of termination three months before her actual termination, the 180/300 days begin to run on the date she receives notice, not on her last day of work.

- In the case of a college professor seeking tenure, if the notice of tenure denial was given one year before the date that the individuals contract terminates, the 180/300 days will begin to run when the professor is given notice and will expire before the effective date of termination.

In other circumstances, a charging party may not receive notice until **after** the effective date of the action.

- If a job applicant is not notified of his rejection by the employer and only learns about it three months after the position has already been filled, then the 180/300 days will begin from the date that the applicant learned that the position had been filled.

- If an individual takes disability leave for six weeks in August and September and learns upon her return to work on September 28 that her employment was terminated on August

15, the starting date for the period during which she can file a charge is September 28, not August 15.

Even if earlier discrete acts of discrimination are not part of a timely claim, the EEOC should investigate all allegations because they may be relevant to the determination of whether acts taken inside the filing period were discriminatory. **There is no time limit on relevant evidence.**

Pay Discrimination under the Lilly Ledbetter Fair Pay Act

The timeliness of pay discrimination claims under Title VII, the ADEA, the ADA, and GINA is governed by the Lilly Ledbetter Fair Pay Act.

Under the Act, the date of the alleged discrimination occurs with each paycheck that is lower as the result of a discriminatory compensation decision or other discriminatory practice, even if the underlying discriminatory decision or practice initially occurred more than 180/300 days before the charge filing.

The Fair Pay Act supersedes the Supreme Court's decision in *Ledbetter v. Goodyear Tire & Rubber Co.,* 127 S. Ct. 2162 (2007), and restores the timeliness principles that had been followed by the Commission prior to the Ledbetter decision. Because the Act was made retroactively effective to the day before the Ledbetter decision was issued, all Title VII, ADEA, ADA, and GINA pay claims fall under the Act.

Hostile Environment

In the *National R.R. Passenger Corp. v. Morgan* decision, the Supreme Court held that when an employee claims to have been harassed, all of the conduct contributing to the hostile environment can be the subject of the complaint, as long as one event occurred within 180/300 days of the date of charge filing. This is so because all the incidents contributing to a hostile environment "collectively constitute one "unlawful employment practice." *Morgan*, 501 U.S. at 117. Thus, someone who is sexually harassed for three years may obtain solace for all of his or her injuries so long as one event that is part of the hostile environment claim occurred within 180/300 days of the filing of the charge.

Constructive Discharge

In *Green v. Brennan*, a 2016 decision, the Supreme Court held that the limitations period for challenging an alleged constructive discharge starts running when the employee gives notice of his resignation, not on the date of the employer's last discriminatory act. The Court reaffirmed that a constructive discharge claim has two basic elements: working conditions so intolerable that a reasonable employee would have felt compelled to resign, and the employee's resignation. A constructive discharge claim does not require evidence that the employer intended to force the employee to quit. Although *Green* was a federal sector case, the basic principles apply to private sector charges as well. (Note, however, that in the federal sector, certain other regulatory provisions apply to the timeliness of claims brought by federal employees, which were not addressed in *Green*.)

Pattern or Practice

All discriminatory acts that are part of a pattern or practice of discrimination can be challenged as a single claim. If the pattern or practice continues into the filing period, all specific acts that are part of the pattern or practice will be timely.

For example:

> A charging party alleges in August 2017 that he has been repeatedly denied admission to an apprenticeship program since it was first offered in 2005, including most recently in April 2017, and that he believes it is because he is an African American. The investigation reveals that African Americans are selected at a significantly lower rate and that there is a systemic pattern of discrimination by the program. All discriminatory selection decisions under the program are timely.

Seniority Systems

If a Title VII, ADEA, ADA, or GINA charge alleges that a seniority plan was adopted for a discriminatory purpose, the starting date for charge filing is any one of three times: (1) when the seniority system was adopted; (2) when the charging party became subject to the seniority system; or (3)

when the charging party was injured by application of the system.

EXTENDING TIME FRAMES

Under rare circumstances, the time limits for filing a charge may be extended.

The time limit for filing a charge may be extended when the charging party was understandably not aware of important facts that should have led him or her to suspect discrimination at the time that the discriminatory action was taken. The time frame also may be extended if the employer actively deceived or misled the potential charging party.

For example:

- After an individual applies for a job and is interviewed, the employer tells him that it has decided not to fill the position. Six months later, the applicant learns from a friend that the employer had lied and filled the position with an individual of a different protected group many months ago. In this case, the time period for filing a charge would begin when the applicant became aware of the deception.

Another reason for extending the time limit for filing a charge is if a potential charging party was advised by an EEOC representative that she should delay filing. Investigators should **never** give potential charging parties advice suggesting a delay in filing a charge beyond the statutory time limits for filing. In fact, any contact with potential charging parties, whether in person or by phone, should provide clear counseling on time limits for filing. **Any potential charging party must be counseled about the need to file a charge within the time limits to preserve his or her right to file suit in federal or state court.**

Time **will not** be extended while a potential charging party attempts to resolve a dispute through another forum such as an internal grievance procedure, a union grievance, or mediation prior to filing a charge **unless** the respondent **agrees to waive** the filing time limit. Other forums for resolution may be pursued concurrently with the investigation of the EEOC

charge.

EXERCISE: TIMELINESS

~~Scenario 1~~

Dorothy taught art at a child care center. She was sexually harassed by the director of the center from almost the first day she began working there 4 years ago. She did not complain until the center adopted a sexual harassment policy in November 2016. She was discharged on January 16, 2017 and filed a charge with the EEOC office on July 17, 2017, claiming she was retaliated against for complaining about harassment internally. Respondent told Dorothy that she was fired for poor performance.

Statute:
Basis:
Issue:

Timeliness: **Is this a timely charge?**

Additional Intake Questions:

~~Scenario 2~~

Ming, who is Asian American (of Chinese descent), came to the EEOC on July 31, 2017. She is an assistant office manager for a busy real estate company. She states that she has been denied promotion to office manager twice when the position was open. Despite her excellent performance and handling all the responsibilities of her job, the position was awarded to a Caucasian American in 2015 and to an African American in April 2017. Ming believes that she has been discriminated against because of her national origin and/or race.

Statute:
Basis:
Issue:

Timeliness: Is this a timely charge?

On the first denial of promotion in 2015—is it a discrete act?

What if the evidence showed that both promotions were part of a pattern or practice claim?

Additional Intake Questions:

COVERAGE

PERSONS PROTECTED FROM DISCRIMINATION

Employee

In most circumstances, an individual is only protected (and counted for purposes of employer coverage and the damages caps) if s/he was an "employee" at the time of the alleged discrimination, rather than an independent contractor or other non-employee.

The question of whether an employer-employee relationship exists is fact-specific and depends on whether the employer controls the means and manner of the worker's work performance.

Factors to consider are provided in the EEOC Guidance on Threshold Issues. No one factor is controlling, but all must be considered in their totality.

Factors to determine whether an individual is an employee include:

- who controls when, where, and how the worker performs the job;
- whether the entity provides leave or other benefits;
- whether the entity pays social security taxes; and
- who provides the tools for performing the job.

Some individuals will have a formal contract delineating their relationship as an independent contractor. However, the existence of such a contract does not necessarily mean that an individual is an independent contractor and not a covered employee under the EEO statutes. You must weigh all of the factors, including any contract between the charging party and the respondent. Anytime an employer asserts the defense that the individual is an independent contractor, the Investigator should ask if a contract exists, and obtain a copy of the contract.

Occupations in which the issue of independent contractor v. employee status frequently arises include insurance sales, owner-operator truck drivers, taxi drivers, sales and distribution persons, computer and technical consultants, and doctors.

As long as the employer exerts sufficient control for an individual to be considered an "employee," the individual is protected regardless of whether s/he works full time, part time, or seasonally or is paid by the hour, on a commission, by production, or on a salaried basis. A temporary employee is also protected.

- **Welfare Recipients**

  A welfare recipient participating in work-related activities as a condition for receipt of benefits will likely be an "employee."

- **Union Stewards**

  A union steward who does not receive wages from the union may still be an "employee" of the union if s/he is reimbursed by the union for time spent performing union duties during work hours, for union dues, or for retirement contributions.

- **Partners**

  Whether a "partner" is an "employee" is a fact-specific determination. The label "partner" is not dispositive. A partner generally is not an employee if he or she acts independently and participates in managing the organization, but is an employee if he or she is subject to the organization's control.

- **Volunteers**

  Volunteers are generally not covered "employees" under the EEO statutes. A volunteer may be covered if s/he receives benefits such as a pension, group life insurance, workers' compensation, and access to professional certification, even if the benefits are provided by a third party. A volunteer also may be covered if volunteer work is required for regular, i.e., paid, employment or volunteer work routinely leads to regular employment. In some cases work which is

labeled "volunteer" is actually paid work, such as a volunteer firefighter who may be paid on a per-run basis, and thus, the individual would be covered. Coverage under state or local laws may differ.

Applicants for Employment

Applicants for employment are protected from discrimination with respect to the application/hiring process, and may be entitled to religious or disability accommodation.

Former Employees

Former employees are protected from discrimination with respect to actions that arise out of their employment such as discharge, retirement benefits, an employment reference, or any retaliation that occurs after the termination of employment.

Applicants to, and participants in, training and apprenticeship programs

Applicants to, and participants in, an apprenticeship or training program are protected regardless of whether they are employees.

Foreign Nationals Working in the United States

All employees working in the U.S. for covered employers are protected by the EEO laws, regardless of citizenship or work authorization status. Because of immigration laws, however, some remedies to undocumented workers may be limited. For example, an undocumented worker who was terminated for unlawful discriminatory reasons would not be entitled to reinstatement until he obtained work authorization. However, backpay is available for work performed.

American Citizens Working Abroad

U.S. citizens who are employed by an American employer in a foreign country are covered by Title VII, the ADA, the ADEA, and GINA. The EPA, however, does not apply overseas. In addition, foreign nationals working

outside the U.S. are not covered under any of the EEO statutes, nor are American citizens protected under any of the EEO laws when working abroad for a foreign employer.

Note however that, even though U.S. citizens working abroad for American employers generally are covered, the statutes allow distinctions based on race, color, religion, sex, national origin, age, and disability where the laws of the host country require these distinctions. For example, if the law in a Muslim country did not allow women to perform certain jobs, then a U.S. employer operating in that country would not be held liable for denying female U.S. citizens such positions.

Elected Officials

Elected officials are specifically excluded from coverage under Title VII, the ADEA, and GINA. The ADA does not exclude elected officials from coverage.

The personal staff and high level appointees of elected state officials are covered but only under special procedures established by the Government Employee Rights Act (GERA). These procedures are explained in detail at 29 C.F.R. Part 1603. For example, an elected sheriff or mayor will not be covered, but a deputy sheriff or deputy mayor will be. Claims by personal staff and high-level appointees must be filed within 180 days of the occurrence of the alleged violation. Sometimes, it can be difficult to determine whether a charging party is covered under GERA or under the regular procedures. Consult with your supervisor if this situation arises.

Special Exemptions under the ADEA

The ADEA excludes certain employees from coverage for certain types of claims, as follows:

- The ADEA allows for certain maximum hiring and mandatory retirement ages for firefighters and law enforcement officers. However, firefighters and law enforcement officers are fully covered for discriminatory hiring based on factors other than age, such as race, sex, etc. They are also covered as to age-based employment actions other than hiring and termination,

such as age-based promotions or wages.

- The ADEA allows compulsory retirement at age 65 of an individual in a bona fide executive or high policy-making position. The employee must be eligible for an annual retirement benefit of at least $44,000. The eligibility for this retirement benefit does not automatically deprive the individual of protection under the ADEA because the standard to establish status as a bona fide executive or being in a high-policy making position is very narrowly construed.

- The ADEA allows colleges and universities to offer supplemental voluntary retirement benefits for tenured faculty that are reduced or eliminated on the basis of age.

- The ADEA does not apply to federally funded or state programs designed to enhance employment of individuals with "special employment problems." Such programs include those designed to enhance employment of the long-term unemployed, individuals with disabilities, older workers, or youth.

EMPLOYERS AND OTHER ENTITIES

EMPLOYERS---Title VII, ADEA, ADA and GINA

An "employer" is defined as a person engaged in an industry affecting commerce that has the requisite number of employees. Employers as defined by the statute include:

- private companies,
- state or local government agencies,
- both private and public schools and universities, and
- non-profit corporations.

As a practical matter, all employers with the requisite number of employees are generally considered covered for the purposes of filing a charge.

COUNTING EMPLOYEES

An employer must have a minimum number of employees for a specific period of time to be covered by the federal EEO statutes. Title VII, the ADA and GINA each require 15 or more employees for each working day in twenty or more calendar weeks in the current or preceding calendar year for the employer to be subject to the statute. The ADEA requires a minimum of 20 employees.

Coverage may vary under state or local law enforced by FEPAs (e.g., allowing claims against employers with fewer than 15 employees).

How do we count employees and who do we include?

All employees with an ongoing employment relationship are counted, regardless of whether they were full-time, part-time, or seasonal. They do not have to work every week, or every day, or all day.

The twenty weeks do not have to be consecutive. For example, an employer at a ski resort may have fewer than 15 employees during the summer. You can skip the summer months, and just include January through April and October through December to get twenty weeks.

All locations of the employer are counted. For example, an employer could have fewer than 15 at each location, but if the total number of employees is 15 or greater, the employer would be covered under Title VII, the ADA or GINA.

When the Investigator discovers that there are not enough employees for jurisdiction, the Investigator must determine whether the employer is part of an integrated enterprise.

Investigator Tip: Counting Employees

To count employees, determine the number of employees on an employer's payroll; exclude individuals who are not employees, e.g., discharged/former employees or independent contractors. Add to that

figure any other individuals who have an employment relationship with the employer, such as "temporary" or other staffing firm workers. Where a charge is filed during the early part of the calendar year, it may be necessary to wait until later during the same year to assess employer coverage.

Integrated Enterprise

The operations of two or more employers may be so intertwined that they can be considered the single employer of the charging party. For example, the employees of three beauty salons may, under certain circumstances, be aggregated. The integrated enterprise theory examines whether the management, ownership, and operations of nominally separate business enterprises are, in fact, so interrelated that for purposes of Title VII, the ADEA, GINA and the ADA, they should be considered as a single employer.

The EEOC Compliance Manual Section on Threshold Issues delineates the factors to be considered when making a determination whether to aggregate employees.

EPA

EPA coverage is extremely broad. The EPA applies to any employee "engaged in commerce or in the production of goods for commerce."

The EPA also applies to any "enterprise" engaged in commerce or the production of goods for commerce with an annual gross volume of sales or business done of at least $500,000. All employees of such an enterprise are covered by the EPA, even those not engaged in commerce. Health and educational institutions and government agencies are covered by the EPA, regardless of size.

Because of the breadth of coverage under the EPA, we may have jurisdiction under the EPA, even when we do not have jurisdiction under Title VII for an employer with fewer than 15 employees.

In the unlikely event that the respondent challenges EPA coverage, the investigator should consult the legal unit or OLC.

EMPLOYMENT AGENCIES

Regardless of size, employment agencies are covered if they serve covered employers. An employment agency is prohibited from discriminating against its own employees, as well as in its referral practices. Note that the current SEP hiring and recruitment priority focuses, among other things, on special employment relationships such as those with staffing agencies.

What are unlawful referral practices?

• An employment agency may not honor discriminatory employer preferences.

For example, it is unlawful to accept a job order specifying the race, sex, age, etc. of the candidate.

• An employment agency may not categorize, group or classify job applicants, jobs, or employers on a prohibited basis and make referrals based on the categorizations.

For example, it is unlawful to classify and refer only males to "light industry" positions or only females to "clerical" positions.

• In addition, an employment agency may not otherwise discriminate by maintaining a discriminatory environment, or discriminating against its own employees with respect to wages, promotions, etc.

Common allegations against employment agencies include covertly coding applications to indicate protected status, and use of pictures on applications to disclose protected status.

LABOR ORGANIZATIONS

A labor organization may be liable for its actions in its capacity as an employer, in its capacity as a bargaining representative for its members, or as a referral agency or hiring hall. It is unlawful for a labor organization to:

- Exclude or expel from membership individuals because of their protected status

- Limit, segregate, or classify its membership based on race, color, religion, sex, national origin, age, disability, or genetic information
- Fail or refuse to refer an individual for employment because of the individual's protected status
- Cause or attempt to cause an employer to unlawfully discriminate
- Fail or refuse to represent a person because of his/her protected status
- Otherwise discriminate against a person because of his/her protected status

JOINT APPRENTICESHIP COMMITTEE

Title VII, the ADEA, the ADA, and GINA also cover any joint labor-management committee controlling apprenticeship or other training or retraining programs, including an on-the-job training program. It is unlawful for such a committee to discriminate against any individual because of their race, color, religion, sex, national origin, age, disability, or genetic information in admission to, or employment in, any program established to provide apprenticeship or other training. **When drafting a charge alleging discrimination in the apprenticeship program, be sure to include the Joint Apprenticeship Committee as a respondent.**

SUCCESSOR LIABILITY

During the course of the investigation of a charge, the employer may be sold, reorganized, or go through bankruptcy proceedings. In such a case, the Investigator must determine if there is a successor corporation which is liable for the alleged discrimination. The factors to make this assessment are discussed in the EEOC Compliance Manual Section on Threshold Issues. All factors must be considered in their totality. Factors to be considered include the following:

- Did the successor purchase the liabilities as well as the assets?

- Did the successor have notice of the charge?

- Have the same business operations continuously been in place?

JOINT EMPLOYER

Two or more independently owned and operated businesses may share control over the charging party's working conditions so that they are considered joint employers of the charging party. This often arises in cases involving temporary employees or "contract" workers. The joint employer theory acknowledges that each of the employers is a separate and distinct entity, with separate owners, managers, and facilities. However, because of the degree of control exercised over the employment of the charging party, each entity may be considered an employer of the charging party. If an individual is jointly employed, a charge may be filed against each joint employer that meets the numerous requirements.

EXEMPTIONS - WHO IS NOT A "COVERED ENTITY"

- **Bona Fide Private Membership Clubs**

  This exemption applies only to Title VII, the ADA and GINA. The exemption applies only to clubs which are truly private, i.e., with limited membership, and are exempt from taxation under Section 501c of the Internal Revenue Code.

- **Public international organizations** such as the World Bank, the United Nations, and the International Monetary Fund.

- **Indian tribes**

  While charges against Indian tribes themselves are not subject to Title VII, the ADA or GINA, tribally owned companies are covered under limited circumstances. The EEOC Compliance Manual Section on Threshold Issues includes guidance on coverage of these claims.

WHO HAS STANDING TO FILE?

To file a charge an individual must have "standing" to complain about an employment practice.

Must have been harmed

- To have standing, an individual must have been harmed by the practice s/he is complaining about. Typically, a charging party has been harmed because s/he was the direct target of discriminatory conduct. In some circumstances, however, a charging party may be harmed by discriminatory acts directed at others in her workplace. However, it will generally be more difficult for the charging party to establish actionable harm in the latter case.

  For example:

  An employee may observe other employees being sexually harassed. Even though the observer is not the target of the harassment, s/he may have standing to file a charge if the harassment of another contributed to a hostile work environment for the observer. Typically, it will be more difficult to establish that harassment was sufficiently severe or pervasive to be actionable if it was directed solely at individuals other than the charging party.

- For class cases, in order for the charging party to be able to represent the class, charging party must have suffered harm.

  For example:

  In an ADA reasonable accommodation class claim, charging party will not have standing if he/she never requested an accommodation like the rest of the class members.

"On behalf of"

The statutes allow a person to file a charge "on behalf of" another person who has been harmed by a discriminatory practice, but for whatever reason does not want to file the charge personally.

The main reason for filing a charge "on behalf of" someone else is to preserve the confidentiality of the aggrieved party. In practice, it may be difficult to hide the identity of the aggrieved party during the investigation, even though his/her name is never released, because of the circumstances of the charge.

> Example:
>
> The aggrieved party may be the only female probationary employee terminated during the relevant period of the investigation. The employer may deduce the identity of the aggrieved party simply based upon the alleged issue and basis.

Another reason for filing "on behalf of" another person may be strategic.

> Example:
>
> A union may encourage its members to file against an employer for a policy or practice the union believes is discriminatory. In that case, one employee may file the charge "on behalf of" all the other members. Rather than process the paperwork for several hundred charges, there is only one charge to process.

The important thing to remember in a charge filed "on behalf of" another individual or class of individuals is that the EEOC is required to maintain the confidentiality of the aggrieved party(ies), and may reveal the identity of only the charging party listed on the face of the charge to the respondent. Note also that while confidentiality of the aggrieved party is maintained during the investigative process, if the case goes to court, the aggrieved party's identity would most likely be disclosed.

EEOC as the Charging Party?

At times, the EEOC will acquire information from a variety of sources which indicates a covered entity may be engaging in practices which violate a statute, but no aggrieved party is identified, or is willing to file a charge.

Since the Commission's mission is to eliminate discrimination, each statute has a set of procedures to deal with this contingency.

Commissioner's Charge

Under Title VII, the ADA and GINA, the field office will gather information to confirm the allegations, and use this to propose a Commissioner's Charge.

Directed Investigation

Allegations received under the ADEA may be acted upon through a Directed Investigation. A District Director may initiate a Directed Investigation on his or her own authority. The office gathers supporting information and notifies respondent of the investigation.

Under the Equal Pay Act, the EEOC has the authority to conduct reviews of any respondent where it has information that there may be a violation. This does not require a formal charge, or advance notice to the respondent. There may be opportunities for coordination with the Department of Labor, Wage and Hour Division (enforces minimum wage laws).

WRAP UP

In most cases, whether the EEOC has authority to investigate the charge will be established with only a few basic questions. However, when jurisdiction becomes one of the issues which must be investigated, it should be investigated first. You should refer to the EEOC Compliance Manual Section on Threshold Issues, your supervisor, an attorney in your office's legal unit, and/or the Office of Field Programs at the EEOC headquarters for expert guidance.

Jurisdiction
Threshold Issues

•1

Basic Requirements-Threshold Questions

- Is the complaint about employment under one or more of the laws we enforce?
- Is the complaint timely?
- Is the employer/entity complained of covered?
- Is there something that makes the employer/entity exempt from coverage?
- Is the complaining person covered by the laws we enforce?

•2

Title VII, ADEA and ADA

- discrimination in hiring, firing, compensation, and all terms, conditions, or privileges of employment
- Covers all aspects of employment from initial action an employer takes to advertise a position and recruit applicants to the decision to terminate, and all employment actions in between.
- Covers former employees regarding matters arising from prior employment relationship

•3

Discriminatory Practices

- Harassment on all bases that creates a hostile work environment
- Constructive Discharge (reasonable person standard)
- Limiting, Segregating and Classifying employees or applicants in ways that affect employment opportunities and advancement

Title VII, ADEA & ADA prohibit:

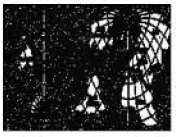
- Discrimination by member of same protected class
- Discrimination against a sub-group
- Intersectional discrimination
- Stereotyping

Title VII of the Civil Rights Act

Who is protected?

race

color



religion

sex

national origin

Title VII Prohibits

- discrimination based on race, color, religion, sex, national origin
- Retaliation for opposition to discrimination or participation in the EEO process

Race and Color Discrimination

- Treating someone less favorably because s/he is a particular race or skin color
- Covers all races
- Includes discrimination based on race-related characteristics

Sex Discrimination

- Making any employment decision based on an individual's gender
- Includes
  - sexual harassment
  - gender harassment (non-sexual)
  - discrimination against LGBT individuals
    - on the basis of gender identity or
    - sexual orientation
  - pregnancy, childbirth & related medical conditions
    - Pregnancy Discrimination Act (PDA) coverage;
    - ADA issues

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Religious Discrimination

- Difference in treatment because of a religious belief (or non-belief)
- Denial of a reasonable accommodation for a religious practice
- Covers persons of all faiths as well as atheists
- Narrow exception for Religious Organizations

National Origin Discrimination

- Discrimination because of
  - Place of birth
  - Ethnicity
    - Including physical, cultural, or linguistic characteristics
- All nationalities entitled to same employment opportunities
- Accent/Language Issues
- Employees are covered by Title VII regardless of citizenship or work authorization

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Retaliation

- Unlawful for an employer to take action (retaliate) against an employee because the employee
  - Participated in an EEO process or investigation, or
  - Opposed an employment practice s/he believed was unlawful under Title VII

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The Age Discrimination in Employment Act

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Age Discrimination in Employment Act

- Covers individuals age 40 and over
- No upper age limit
- All aspects of employment covered
- Retaliation
- Older Workers Benefits Protection Act (OWBPA)
- Waivers

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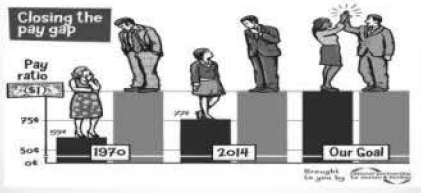
THE EQUAL PAY ACT



The Equal Pay Act

- One Claim: gender-based wage discrimination
- Prohibits discrimination in wages for men and women performing substantially equal work under similar conditions in the same establishment

Forms of Compensation

- Company car
- Medical, Accident, Life Insurance
- Retirement Benefits
- Stock Options, Profit Sharing, Bonus Plans
- Travel expenses, expense accounts
- Other benefits
- Hourly Wages
- Salary
- Overtime Pay
- Bonuses
- Vacation or Holiday Pay
- Cleaning or Gasoline Allowance
- Hotel Accommodations

The Americans with Disabilities Act

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General Prohibitions under the ADA

- Prohibits discrimination because of an individual's disability
- Prohibits discrimination because of association or relationship with a disabled person
- Requires an employer provide a *Reasonable Accommodation* to a qualified individual with a disability, absent undue hardship

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ADA also ---

- Prohibits certain disability-related inquiries and medical exams
- Requires confidential handling of medical information
- Prohibits retaliation

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Disability under the ADA

A "disability" means:

- A physical or mental impairment that substantially limits one or more major life activities (including major bodily functions)
- A record of such an impairment, or
- Being subjected to an action that is prohibited by the ADA because of an actual or perceived impairment even if it is not substantially limiting

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Qualified under the ADA

- Satisfies requisite skill, experience, education, and other job-related requirements, and

- Able to perform the essential functions of the job with or without a reasonable accommodation

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Genetic Information Nondiscrimination Act (GINA)

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Basic Rules Related to Employment

- Prohibits use of genetic information to discriminate in employment
  - Includes prohibition on harassment and retaliation
- Restricts employers and other entities covered by GINA from requesting, requiring or purchasing genetic information
- Requires that covered entities keep genetic information confidential, subject to limited exceptions

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GINA and the ADA

- ADA prohibits discrimination on the basis of manifested conditions that meet the definition of disability
- GINA prohibits discrimination based on genetic information and not on the basis of a manifested condition.

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Coverage

- GINA applies to:
  - Employers covered under Title VII of the Civil Rights Act of 1964 (15 or more employees)
  - Federal executive branch agencies
  - State and local government employers

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Time Limits

Title VII, ADEA, ADA & GINA

- Must file a charge with EEOC or the FEPA before going to court
- 180 days to file with EEOC, extended to 300 days if there is a state or local FEPA with authority to provide relief
- Under the ADEA, there must be a state law to get the advantage of the 300 day filing period. Otherwise, the time limit is 180 days

EPA

- Time limits apply to filing a lawsuit
- Two year statute of limitations
- Three years, if willful

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When Does the Clock Start?

- Generally the first/earliest date the employee had notice
  - Discrete acts
  - Each pay check received extends filing date under the Lilly Ledbetter Fair Pay Act.
  - Hostile environment
  - Constructive Discharge
  - Pattern or Practice
  - Seniority systems

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Tolling (Extending) Time Frames

- If there was no reason to suspect discrimination until later
- If misled by employer's actions
- If relied upon advice of EEOC or FEPA to delay filing

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Timeliness Scenario #1

- Dorothy taught art at a child care center. She was sexually harassed by the director of the center from almost the first day she began working there 4 years ago. She did not complain until the center adopted a sexual harassment policy in November 2016. She was discharged on January 15, 2017 and filed a charge with the EEOC office on July 16, 2017, claiming she was retaliated against for complaining about harassment internally. Respondent told Dorothy that she was fired for poor performance.

Statute/Basis/Issue?
Is it a timely charge?

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Timeliness Scenario #2

- Ming, who is Asian American (of Chinese descent), came to the EEOC on July 31, 2017. She is an assistant office manager for a busy real estate company. She states that she has been denied promotion to office manager twice when the position was open. Despite her excellent performance and handling all the responsibilities of her job, the position was awarded to a Caucasian American in 2015 and to an African American in April 2017. Ming believes that she has been discriminated against because of her national origin and/or race.

Statute/Basis(es)/Issue
Is it timely?

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COVERAGE

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Persons Protected

- Employees
- Temporary employees
- Applicants for employment
- Former employees
- Applicants to, or participants in, training and apprenticeship programs
- Foreign Nationals in the U.S.

Employee or Independent Contractor?

Who Controls Means and Manner of Work?

- Who controls when, where, and how the work is performed
- Does employer provide leave or other benefits?
- Does employer pay social security?
- Who furnishes equipment?

Our Laws Abroad

- U.S. citizens working for a U.S. company in a foreign country are covered by Title VII, ADEA, ADA & GINA except where the laws of the host country require distinctions
- Foreign nationals outside U.S. are not covered

Exemptions under ADEA

- Hiring and mandatory retirement ages for firefighters and law enforcement officers
- Mandatory retirement for bona fide executives and high policy-making official
- Supplemental voluntary retirement benefits for tenured faculty

Employers and Other Covered Entities

- Employers—Title VII, ADEA, ADA & GINA
  - Private companies
  - State or local government agencies
  - Private and public schools and universities
  - Non-profit corporations
- Employment agencies
- Labor organizations
- Joint-apprenticeship committees

Under EPA-extremely broad coverage

Counting Employees

- All employees with on-going relationship
- Weeks do not have to be consecutive
- Integrated Enterprise?

Employment Agency

Prohibited Acts

- Fail or refuse to refer for employment
- Classify or refer for employment because of protected status
- Otherwise discriminate

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Labor Organization

Prohibited Acts

- Exclude or expel from membership
- Limit, segregate or classify membership
- Fail or refuse to refer for employment
- Cause or attempt to cause an employer to discriminate
- Fail or refuse to represent
- Otherwise discriminate

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Joint Apprenticeship Committee

Prohibited Acts

To discriminate in the admission to, or employment in, any training program

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Successor Liability

Factors to Consider

- Did successor purchase liabilities as well as assets?
- Did successor have notice of the charge?
- Were same business operations continuously in place?

Joint Employers

Two Employers Control Employment

- One employer may control when, where, and how the work is performed
- Another employer may keep employment paperwork, pay taxes, manage payroll
- They are Joint Employers
- Coverage of temporary & contract workers

Exemption: Bona Fide Private Membership Club

Exemption under Title VII, ADA and GINA Only

- Private
- Limited membership
- Non-profit 501 (c) club for IRS purposes

Other Exemptions

- Public International organizations
  - World Bank
  - United Nations 
  - International Monetary Fund
- Indian Tribes 

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Standing to File

- Harmed by an employment practice
  - If class, CP must have been harmed like the class to be a representative of the class
- File on behalf of one who is harmed

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EEOC as the Charging Party

Options

- Commissioner's Charge
- ADEA or EPA Directed Investigation

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Wrap Up!

- General Provisions for each law we enforce
- Time limits for filing a charge
- Coverage
  - Persons Protected
  - Employer/Entities Covered
  - Counting Employees
  - Standing to File

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Wrap Up!

- Basic Questions to determine jurisdiction
- First point of inquiry regards jurisdiction but may need to be investigated as well as the merits in some cases.
- When in doubt—take the charge/preserve CP's rights – The statutes give CPs the right to file a charge.

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EEOC

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OVERVIEW OF THE CHARGE PROCESS

OVERVIEW OF THE CHARGE PROCESS

Table of Contents

OVERVIEW OF THE CHARGE PROCESS

In this section, we will review the EEOC's charge procedures.

The Charge and the Parties

A person who believes that s/he has been discriminated against in employment because of race, color, religion, sex (including pregnancy, gender identity, or sexual orientation), national origin, age, disability, genetic information (including family medical history), or in retaliation for filing a charge, complaining about discrimination, or participating in an investigation or lawsuit, may file a charge of discrimination ("**charge**") with the Agency. The EEOC refers to an individual who has filed a charge as a "**charging party**" and the employer/entity, against whom the charge is filed, as the "**respondent.**"

A charging party does not have to be represented by an attorney to file a charge of discrimination with the Agency. A charging party who chooses to be represented by an attorney does so at his or her own expense.

Contacting the EEOC

Persons who believe they have been discriminated against in employment may contact the EEOC by phone, letter, in person, or online. We refer to such an individual as a **Potential Charging Party (PCP).**

All initial contacts made with members of the public inquiring about their employment rights are entered by staff as an **Inquiry** into the **Integrated Mission System (IMS)** — the EEOC's electronic system that maintains all pertinent data about inquiries and charges from intake through resolution. Each inquiry is assigned a number by IMS. The entry of information as an inquiry is often essential as a way of documenting the first contact the PCP makes with the EEOC when issues of timeliness of the charge are raised.

- Inquiry numbers follow the format of three numeric digits reflecting the office code originating the charge, four digits reflecting the fiscal year of the initial entry in IMS, five digits reflecting a sequential numbering of inquiries received by the specific EEOC field office, and a letter "N" which denotes the matter is an inquiry

(e.g. 540-2016-00201N).

- All charges in the IMS are first entered as Inquiries.
- Once a charge has been "formalized," (finalized, signed and dated) and staff enters this in IMS, the system automatically changes the "N" to a "C" (e.g., 540-2016-00201C). The charge number replicates the inquiry number in all other aspects.
- Inquiries which are never formalized as a charge remain in IMS with the "N" designation.

Telephone Calls to the EEOC's 800# - Intake Information Group (IIG)

A PCP's first contact with the EEOC may be through our toll-free phone number. The PCP will speak to an Intake Information Representative (IIR). The IIR makes an initial assessment to determine whether the individual's complaint or allegation is covered by the laws enforced by the EEOC. If not, the IIR will generally try to refer the person to another federal, state or local Agency for assistance.

- The IIG also offers American Sign Language (ASL) Video Phone services for deaf and hard of hearing PCP's who contact the EEOC for information about the charge filing process.

PCPs wishing to file a charge are either mailed an Intake Questionnaire, provided an electronic link to the Intake Questionnaire, or in cases where timeliness is of issue, provided with the telephone number to the office having jurisdiction over PCP's employment location. In all cases, the information captured by the IIR becomes an inquiry in IMS. All inquiries entered through the IIG have an 846-prefix number in the office field section of the inquiry number format. (The 846 prefix is retained even when the charge is formalized by the field office responsible for the charge.)

- **Telephone Call to an EEOC Office**

PCPs may contact a field office directly. Telephone calls are handled by local enforcement and administrative staff and may result in mailing an Intake Questionnaire, access to an electronic link for the Intake Questionnaire, invitation/instruction to visit the EEOC

office as a Walk-in (with or without an appointment), or in cases where timeliness is of issue, immediate processing of intake information through a telephone interview. Field staff counsels the individual using the models of proof and charge procedures as a guide to help the individual make an informed decision whether to file a charge and enters an inquiry record or charge of discrimination into IMS.

- **Walk-in Contact with an EEOC Office**

  PCPs come into an EEOC office for in-person interviews. The PCP may be interviewed by an Investigator or an Investigator Support Assistant. In-person intake can be handled through an open walk-in process, through appointments, or through a combination of the two methods. Staff interview and counsel the individual using the models of proof and charge procedures as a guide to help the individual make an informed decision whether to file a charge. Staff enters an inquiry record or charge of discrimination into IMS.

- **Mail in Correspondence (Includes correspondence received via e-mail and fax)**

  PCPs contact the EEOC through the mail, e-mail or fax by sending in letters, various versions of the Intake Questionnaire, written documentation, or attorney-prepared charges (in letter form or completed on a Charge Form 5). Field staff reviews the written communication to see if it constitutes a charge. Field staff interviews and counsels the individual using the models of proof and charge procedures as a guide and enters an inquiry record or charge of discrimination into IMS.

- **EEOC Website – Assessment Tool**

  PCPs may also find out about the EEOC through our website, which provides an online Assessment Tool. You should note that the EEOC does not accept charges online. The Assessment Tool helps individuals decide if the EEOC is the correct Agency to assist them. At the end of the Assessment Tool, individuals may complete an Intake Questionnaire, print it out, and either bring or mail it to the appropriate EEOC field office to begin the process of filing a charge. The Assessment Tool can be found at https://egov.eeoc.gov/eas/

- **Online Inquiry System**

  EEOC's new Online Information and Scheduling System is currently being piloted in some EEOC offices. It is likely to be fully implemented in FY2018. You will receive training on this in advance of its deployment.

  With the Online Information and Scheduling System, PCPs can access a link on the EEOC's website to allow them to determine if their complaint is within the EEOC's jurisdiction and to schedule an appointment for an intake interview. Once PCPs answer a few simple questions and it appears that EEOC has jurisdiction, they will register into the EEOC's public portal and assign themselves unique log-in credentials. They then can access an appointment calendar for the office that would handle their inquiry. After they have scheduled the interview, they receive an email asking them to respond to questions that will help them and the EEOC staff prepare for the interview. The online system will create an inquiry record in IMS and populate PCPs information into IMS.

  Note that this new system, when fully launched, will replace the Assessment Tool described above.

- **Referrals from Other Agencies**

  Inquiries and charges may also come to EEOC from other federal agencies, as referrals or transfers. Several federal agencies act as the EEOC's agent for accepting charges, including, for example, the Department of Labor's Office of Federal Contract Compliance Programs (OFCCP), the Department of Justice (DOJ), and the Department of Health and Human Services (HHS). These other Agency referrals should be entered in IMS and the charging party counseled about charge processing.

- **Contacts from Outreach Events**

  PCPs may also learn about the EEOC and their rights to file a charge through our outreach activities. This includes our presence at job fairs, community events, presentations to civic groups, stakeholder organizations or their groups, or through the Agency's

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investigation.

For example, it is now EEOC policy that the charging party will generally receive a copy of the respondent's position statement and non-confidential attachments. (See "Operational Directive to Release Position Statements Upon Request During Investigations" at http://insite.eeoc.gov/OFP/upload/Position-Statement-Procedures-Directive-FINAL12-22-15_1.pdf and in the Appendix to this Section)

Also, see "Confidentiality of Enforcement Information" at https://insite.eeoc.gov/OLC/ethics.cfm and in the Appendix.

The Privacy Act prohibits the EEOC from disclosing any record in any EEOC system of records (including charge files) without the prior written consent of the individual to whom the record pertains unless disclosure is permitted by the Act. The Privacy Act applies to records maintained under all the statutes enforced by the EEOC.

Additionally, ethics regulations prohibit government employees from disclosing or using any non-public information to further their own private interests or that of another person.

Further information on confidentiality requirements for enforcement information can be found on the Office of Legal Counsel's inSite page. http://insite.eeoc.gov/OLC/ethics.cfm

Guidance on maintaining sensitive personal identifiable information can be found on inSite at http://insite.eeoc.gov/OIT/protecting-sensitive-info.cfm. All EEOC employees must be familiar with and act in compliance with this guidance.

What is a Charge?

A ***charge*** filed with the EEOC is a signed statement alleging that the individual has suffered a negative employment action (***issue***) because of a protected status (***basis***) covered by the statutes.

Issues include all aspects of employment, such as failure to hire, demotion, discipline, job assignment, training, discharge, layoff, denial of

benefits, harassment, wages or other forms of compensation, denial of reasonable accommodation, and other terms or conditions of employment. Generally, every action that could occur during an individual's application process or employment may be raised as an ***issue*** in a charge of discrimination.

The ***basis*** of the charge refers to the individual's protected status. Under Title VII, this includes race, color, religion, sex (including pregnancy, gender identity/expression or transgender status, or sexual orientation), and national origin. Under the ADEA, this includes age 40 and older. Under the Equal Pay Act, this includes gender. Under the Genetic Information Nondiscrimination Act (GINA), this includes genetic information and family medical history; and under the Americans with Disabilities Act, this includes disability. All the statutes we enforce include **retaliation** as a basis.

Note that under the ADA, a charging party may also file a claim of an improper disability-related inquiry or medical examination, or an improper disclosure of confidential medical information. Neither of these claims requires that the charging party be an individual with a disability.

What Information Is Included in a Charge?

A **"minimally sufficient"** charge must be filed with the EEOC to preserve an individual's right to file suit in Federal District Court (except in Equal Pay Act cases, where no charge is required before a lawsuit). By regulation, a minimally sufficient charge must:

- Be in writing
- Be signed
- Identify the parties
- Describe the action or practices complained of; and
- Reasonably be construed as stating that the individual wishes to file a charge

The Supreme Court's 2008 decision in *Federal Express Corp. v. Holowecki* addressed the requirements for a charge. In *Holowecki*, the Court adopted the Commission's position that any document constitutes a charge if, in addition to the information required by the regulations, it can be

"reasonably construed as a request for the Agency to take remedial action to protect the employee's rights or otherwise settle a dispute between the employer and the employee."

In guidance following *Holowecki*, the EEOC reiterated that any signed document, whether a letter or Intake Questionnaire, which contains the following five elements, is to be treated as a charge. The information is entered in IMS as an inquiry and, when formalized, as a charge based on the assessment that the elements below have been met. Its number is denoted as a charge with the "C" suffix automatically in the IMS. The charge is formalized if the document:

(1) identifies the potential charging party (same as the regulations);

(2) identifies the respondent by name or circumstances (same as the regulations);

(3) describes a covered matter that could be employment discrimination (same as the regulations);

(4) does not express concerns about confidentiality or retaliation (by policy); and

(5) can be reasonably construed as a request for the Agency to take remedial action (by policy).

This information is often included in a written inquiry from a potential charging party. It may also be included in the pre-charge questionnaire filled out before the Intake interview. The Intake Questionnaire contains a section in which the individual is asked to state whether he or she wants the Intake Questionnaire to be considered a charge. However, sometimes a potential charging party will mail a lengthy letter, which must be read to determine if it contains the five elements of a charge and if so must be accepted as a charge.

In these instances, the Agency typically **"perfects"** the charge, clarifying the allegations and completing a standardized charge form ("Form 5") for the charging party's signature.

Title VII requires that charges be filed "under oath or affirmation," which also applies to ADA and GINA charges. This is referred to as a **"verified"** charge. The ADEA does not require that charges be verified, but it is the

EEOC's practice to have all charges taken under oath or affirmation. The EEOC investigators are authorized to administer oaths. There are two alternative statements in the signature blocks on the EEOC charge form which meet the requirement for a charge filed under oath or affirmation. The statements are:

"I declare under penalty of perjury that the foregoing is true and correct"

and

"I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief."

If the Agency receives a charge that is signed but has not been sworn to or affirmed (an "unverified" charge) the Investigator should obtain the charging party's affirmation as soon as possible. This is done by having the charging party sign the Form 5 under oath or affirmation, i.e., after the statements set forth above. **The Supreme Court has held that an otherwise timely filed charge can be sworn to or affirmed after the filing deadline. The EEOC's procedural regulations (29 C.F.R. § 1601.12(b)) specifically provide that the date the charge was first received is the date it was filed, even though it may have been verified later.**

Investigators must ensure that the charging party has read and signed the final version of the charge after all corrections have been made.

(There is no requirement under federal law for a charge to be notarized. However, since some of our State and local FEPA partners may have that requirement for charges they process, Form 5 provides space for this documentation of a notarized signature for the FEPA's use.)

DRAFTING A CHARGE

In addition to the information required to be "minimally sufficient," a charge should contain **information appropriate to commence an investigation.** The charge provides "notice" to the employer of the date, place and

circumstances of the alleged discrimination. Charges must contain a "clear and concise statement of the facts, including pertinent dates, constituting the alleged unlawful employment practices." 29 C.F.R. § 1601.12(a).

The narrative allegations of the charge are called the "charge particulars." They are entered in IMS for inclusion on the charge form ("Form 5") when it is printed. There is a special function in IMS that allows you to prepare, and revise if necessary, the narrative particulars of a charge. You will receive additional information about IMS later in this training.

In this training, we will focus on the basic information that should be included in every charge, not on a specific format. Every charge should provide the following:

• **Specific statement of harm.** The statement is the charging party's testimony and as such, should be written in the first person. It will include information such as:

- Charging party's date of hire and current position
- Specific actions that caused the charging party harm
- Specific acts found objectionable in a harassment allegation
- Dates of harm
- In addition, if identifying the name and title of the decision-maker, harassers, and other involved officials, enables the Respondent to provide a more precise response that benefits the investigation, that information should be included on the face of the charge.

Example: I have been employed as a packer since March 2002. On May 29, 2017, Juan Sanchez, the foreman, issued me a written letter of reprimand. On June 19, 2017, I was discharged.

- If the charge alleges retaliation, specify the activity which is the basis for the retaliation claim and when it occurred.

Example: I complained to Human Resources about the letter of reprimand on February 5, 2017, and told them I thought it was discrimination. On March 19, 2017, I was discharged.

Avoid Agency jargon (e.g., respondent), and value-laden terms (e.g., "unjustly," "wrongfully," "unfairly").

• In addition, include a **statement that identifies the appropriate basis(es).**

Example: I believe I have been discriminated against because of my race, Asian/Pacific Islander, and my national origin, Filipino.

The specific statute(s) alleged to be violated should be included on the face of the charge. If there is more than one statute alleged to have been violated, you should ensure that all applicable statutes are included on the charge. Thus, you would add, at the end of the above example, "*in violation of Title VII of the Civil Rights Act of 1964, as amended.*"

SAMPLE CHARGE

I have been employed by Acme Bank as a Teller since September 9, 2010. On July 10, 2017 I was denied a promotion to the position of Senior Teller. A less qualified male teller in his 30s was promoted.

I believe that I was denied the promotion because of my sex, female, in violation of Title VII of the Civil Rights Act of 1964, as amended, and my age, 56, in violation of the Age Discrimination in Employment Act, as amended.

What Happens after a Charge of Discrimination is Filed with the EEOC?

- **Charge Served – Notice Provided**

The EEOC is required to notify the employer of the charge within 10 days of its filing. Only a copy of the charge is provided to the employer – not the Intake Questionnaire, notes, or any documents provided by the charging party.

Note that there are instances when the perfected (signed) Form 5 charge is not served along with the Notice of Charge. This happens when the *Holowecki* elements of a charge have been met, but there is no actual Charge Form 5 signed by the Charging Party. Only the Notice of Charge

is served and the Respondent is not required to take any action at that time. Once the signed Form 5 is received, another Notice of Charge is served on the Respondent along with a copy of the Form 5. In such instances, the Respondent may be asked to submit a position statement (PS) and/or a response to a request for information (RFI). On this Notice, the Respondent may also be asked to indicate its willingness to resolve the matter through the EEOC mediation program.

- **Digital Charge System – Phase 1**

As of January 2016, all EEOC offices use the Digital Charge System (DCS) to serve charges on Respondents. (http://insite.eeoc.gov/OIT/act-digital.cfm.) Currently, only formalized and perfected charges are uploaded into the DCS (not *Holowecki* charges). Once the charge is uploaded, the DCS transmits the Notice of Charge to the employer. The Respondent is provided login credentials to a secure internet portal to download the charge (Form 5 Charge), verify contact information, review an invitation to mediate and submit a position statement and RFI responses. This is done through the Respondent Portal. Our website gives respondents information about what to expect in the charge process and how to use the portal.

The Digital Charge System creates an electronic charge file. When the Digital Charge System is fully expanded to cover all components of the charge investigation, all charge files will be electronic. The Digital Charge System will improve customer service, expedite internal collaboration and reviews, ease the administrative burden on staff, and reduce the use of paper submissions and files. For more information and the Digital Charge System User Manual, see the ACT Digital page on inSite:

- During the current transition to the Digital Charge System, for all charges resolved after March 31, 2016, charge files will continue to consist of both paper and digital records. These are called **"mixed charge files."** They are comprised of both paper documents not uploaded into IMS and digital documents uploaded into IMS by any user.
- Please read and follow the specific requirements for maintaining mixed charge files in the memorandum "Maintaining Charge Files (Digital and Paper Documents) – Records Management Interim

Guidance." (See Appendix)

- This will help you organize a charge file, including identifying the documents to place in the paper file to reflect those digital documents and actions taken using the Digital Charge System.
- You should pay special attention to the requirements for saving emails – in Attachment 3 to the memorandum.
- Review Section 28 of the Compliance Manual, Volume 1, "Content of the Investigative File," for general principles for organizing files into Tabs by type of content, which also apply to digital files. (See Appendix)

- **Charge Sent to FEPA**

If a state or local Fair Employment Practice Agency ("FEPA") handles the type of discrimination claimed by the charging party, the EEOC also sends a copy of the charge to the FEPA. Depending on the work sharing agreement, the charge could be sent to the FEPA for informational or investigatory purposes.

INTAKE

The Intake interview is the first step in the investigation and should be a thorough inquiry into information that is relevant to the allegation(s). The Intake interview will also enable you to clarify the allegations of the charge and ensure that you draft the charge accurately.

Although interviewing a potential charging party in person is an effective means of preparing and taking a charge, potential charging parties are not always able to visit an office for several reasons, such as geographic distance, job demands, child care, etc. Consequently, offices must be flexible in how they conduct Intake interviews. Depending on the circumstances, this may mean conducting Intake interviews by phone.

Make sure charging parties have the intake handout, "What You Should Know Before You File a Charge With EEOC," and review that information with them. (See Appendix)

Charging parties should be informed of the steps in the process. This should include, as noted in the intake handout and website, that if their charge is not sent to mediation, or if mediation doesn't resolve the charge,

we usually ask the employer to give us a position statement, and they may request a copy of the position statement and respond. It is also good to note that how we investigate a charge depends on its facts and the kinds of information we need to gather. In some instances, we visit the employer to hold interviews and gather documents. In other instances, we interview witnesses and ask for documents. After we finish our investigation, we let the charging party and the employer know the result.

We cannot overstate the importance of informing PCPs that we prioritize charge investigations (to be discussed in the **Priority Charge Handling Procedures (PCHP)** section in this Manual), the steps in an investigation, and the information and evidence they need to provide to meet the standards/elements of proof necessary to show unlawful discrimination.

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Investigators should also make sure charging parties understand their obligations to keep all potentially relevant documents, including both paper and electronic evidence, and to mitigate damages by looking for employment if they are out of work.

Investigators should discuss with charging parties what information needs to be retained. See the Handout for Charging Parties, "What You Should Do After You Have Filed a Charge with EEOC," in the Appendix.)

As part of your explanation of the charge process, you should inform them of the EEOC's **Online Charge Status System** so that they can find out about the status of their charge at any time. We hope this will reduce the number of contacts they make with you to ask about the status of the charge. A copy of the Online Charge Status Tip Sheet is generated with other documents when the charge package is provided to the CP. You may also want to show them how to access the system from our webpage, using the "How To" column on the right side of the page, and selecting "Check the Status of a Charge." You can also go over the charge process flow chart, "What Happens to Your EEOC Charge," on our website.

These handouts are in the Appendix to this section.

Once the Intake staff has received the necessary information from the PCP

during the interview, it is vital to convey fairly and honestly, the potential strengths and weaknesses to proving the claim and provide the PCP with a sense of where their claim would stand given the EEOC's priorities so that the PCP generally knows what they can expect to happen after the charge is filed. A fully informed charging party will have a much better understanding of the outcome of the investigation – how we reached our decision on the merits and why.

Following the Intake interview, Investigators or ISAs make their first assessment of the potential merits of charging party's charge. Therefore, it is very important to use the interview to gain an understanding of the basic facts that underlie the charging party's complaint and the types of evidence that may or may not be available to support the charging party's allegations.

Intake interviews are an integral part of the charge process. While there are limited circumstances in which an interview may not be needed before an individual files a charge, it is the EEOC's experience that an intake interview generally benefits the charging party and the investigation. All EEOC offices are required to have walk-in hours each work day. The walk-in hours may vary by office.

At Intake, you should expressly inform the PCP that s/he has a right to file a charge and that filing the charge is necessary to preserve the right to file a private suit under Title VII, GINA, ADA or the ADEA. You should also explain to the individual that if a formal charge is filed, the EEOC must provide notice of the charge to the respondent. You should inform the individual about the risk of retaliation, that retaliation is itself a violation of federal discrimination law, and that a CP may file a charge alleging retaliation.

Intake Notes

It is important to make notes of information provided by the charging party during the Intake interview. Your Intake notes are the record of your interview with the charging party. They contain the details surrounding the allegations of the charge as well as a description of charging party's supporting evidence.

It is also important to put the intake notes into IMS. This will ensure

that essential information about the charge is recorded for review and future reference as the case progresses.

The following information should be obtained and included either on the prepared Intake Questionnaire or in supplemental Intake notes. While the EEOC's Intake Questionnaire (in the Appendix) asks for all of the following information, some charging parties may need assistance in providing the information.

Information that should be in notes BUT NOT ON THE FACE OF THE CHARGE:

- **Witness** names, titles, contact information, and the specific information they can provide;

- Information as to the **motive** other than discrimination that respondent may have had (e.g., qualifications, personality conflicts, favoritism, nepotism, union activity);

- ADA charges - Specific information about charging party's disability and how s/he is substantially limited in a major life activity (including the operation of a major bodily function). See Interview Questions for Assessing Disability under ADAAA and Draft Interview Questions for Assessing GINA Violations in Appendix

In a separate memo include:

- Settlement information

- The EEOC staff credibility assessment or any observation or opinion

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CHARGE PRIORITIZATION

Charge prioritization is the cornerstone of the Commission's Priority Charge Handling Procedures (PCHP). The EEOC typically receives about 90,000 charges each year and charge prioritization enables the Agency to **focus its resources** on those charges that are most likely to result in a cause finding.

PCHP established three categories for prioritizing charges:

• Category "A" - charges where cause is likely. These charges receive priority treatment;

• Category "B" charges need more information to determine their relative merit; and

• Category "C" charges where cause is unlikely. These are dismissed without further investigation.

PCHP is based on an assessment of the **likely merit** of a charge. The PCHP categories signify how likely it is that an investigation will result in a determination of "reasonable cause" to believe discrimination occurred.

Category "A" charges are defined as those in which further investigation will likely result in a finding of reasonable cause. Category "A" charges are further classified based on their strategic significance and litigation potential:

- "SA" charges are those in which a cause determination is likely **and** government enforcement has **strategic significance.**

- "A-2" charges are those in which cause is likely but litigation by the EEOC is not likely.

    - A-2 charges include Title VII, ADA and GINA charges that are filed against a State or local government. The Department of

Justice has the sole authority to litigate those cases. State or local government cases that raise priority issues should be coordinated with DOJ for investigation.

Charge prioritization selections are captured in the IMS database.

The importance of charge prioritization will be discussed further under the Priority Charge Handling Procedures Section.

STRATEGIC ENFORCEMENT PLAN

The Commission's Strategic Enforcement Plan for FY 2017 - 2021 (SEP) identifies certain **issues** of discrimination or **types of claims** that are priorities for enforcement. Charges are evaluated at intake (and as the investigation progresses) to see if they raise any of these priority issues.

The **SEP priorities** are as follows:

1. **Eliminating Barriers in Recruitment and Hiring.** The EEOC will target class-based recruitment and hiring practices that discriminate against racial, ethnic and religious groups, older workers, women, and people with disabilities. Under this priority, we look for barriers to diversity in hiring in the tech industry, policing, and the temporary workforce. We may analyze how companies are using big data and online job application processes that may pose arbitrary barriers in hiring members of particular groups.
2. **Protecting Immigrant, Migrant and Other Vulnerable Workers.** The EEOC will target disparate pay, job segregation, harassment, trafficking and discriminatory policies affecting vulnerable workers who may be unaware of their rights under the equal employment laws, or reluctant or unable to exercise them. While immigrants and migrants may be vulnerable workers from the national perspective of the Commission, in particular localities, there may be a need to focus on other vulnerable groups or underserved communities. The current SEP allows for that.
3. **Addressing Emerging and Developing Issues.** The EEOC will target emerging issues in equal employment law, including issues associated with significant events, demographic changes, developing theories, new legislation, judicial decisions and administrative interpretations. Current issues include accommodating pregnancy-related limitations that fall

under the ADA; protecting members of the LGBT communities from sex discrimination; qualification standards and inflexible leave policies under the ADA. Within this priority, the EEOC is looking at how complex employment relationships (i.e. temp workers, independent contractors, on-demand economy) may pose arbitrary and significant issues for particular protected groups. Also, under this priority, the EEOC is targeting backlash discrimination against members of the Muslim or Sikh religions, people of Arab, Middle Eastern or South Asian descent as well as those who may be perceived to be from these areas or off these religions.

4. **Enforcing Equal Pay Laws.** The EEOC will target compensation systems and practices that discriminate based on gender, race, national origin, disability, age, etc.
5. **Preserving Access to the Legal System.** The EEOC will target policies and practices that discourage or prohibit individuals from exercising their rights under the employment discrimination statutes, or that impede the EEOC's investigative or enforcement efforts. With this priority, we focus on overly broad waivers, releases and provisions in arbitration agreements, as well as record-keeping violations and significant retaliatory practices that "effectively dissuade others from exercising their rights."
6. **Preventing Harassment Through Systemic Enforcement and Targeted Outreach.** The EEOC will pursue systemic or pattern and practice investigations and litigation and conduct a targeted outreach campaign to deter harassment in the workplace.

+Strategic Impact Priority

The **"Strategic Impact"** priority was added to the current SEP. Specifically, cases that will have a significant effect on the development of the law or in promoting compliance across throughout a large corporation, community or industry are identified as strategic impact cases and should be treated as priority cases.

Additionally, each district has its own District Complement Plan (DCP) that sets forth local priority issues that should be identified at Intake. Your local management will provide detailed information and criteria for evaluating charges using your district's DCP.

If charges raise SEP or DCP issues, the information is recorded in IMS by

staff, by the selection of the SEP or DCP priority(ies) involved.

Category "A" charges raising SEP or DCP priority issues are the Agency's central focus, along with charges categorized as having strategic significance ("SA" charges). The topic of Charge Prioritization, the SEP Priorities, and the DCPs will be covered in greater detail in the PCHP section of the training.

TOPICS OF INTEREST TO THE EEOC –CODED IN IMS

Charges are also reviewed for specific areas of emphasis or focus that have been designated by the Agency. These topics allow the Agency to capture information that is not available in the Basis and Issue selections, but which provides further elaboration of the specific matters raised in the charge. Some topics provide greater focus for some of the SEP categories noted above while others are used to track specific issues of concern or emphasis by the Agency. Over time, additional topics categories may be added as needed. It is important to select all applicable topics from the list provided in IMS.

QUALITY ENFORCEMENT PRACTICES (QEP)

The Commission approved a plan for Quality Practices for Effective Investigations and Conciliations, or "QEP" in 2015. The QEP evolved from the EEOC's Strategic Plan for FY 2012 – 2016 directing the Agency to develop a Quality Control Plan. The Commission adopted and published the plan to reflect its commitment to delivering excellent and consistent service in investigating charges and engaging in conciliation. The QEP establishes clear expectations for staff and the public that reflect the Agency's commitment to **timely investigations** for all charges, to ensure the continued **quality** of enforcement activities, and to **focus the Agency's resources on investigations that have the most law enforcement potential.**

The QEP informs the public that:

> *The EEOC is committed to delivering excellent and consistent service in investigating charges and engaging in conciliation. As a*

> *national law enforcement Agency, the EEOC must also make strategic decisions about which investigations will have the most law enforcement potential.*
>
> *The EEOC uses Priority Charge Handling Procedures (PCHP) to make determinations regarding the extent of resources committed to different investigations. The Commission's Strategic Enforcement Plan (SEP) supplemented by District Complement Plans (DCPs), sets forth the issues and types of charges that are the priorities for the Commission.*

The QEP reiterates the EEOC's longstanding policy on intake and investigations, emphasizing that:

> *EEOC staff should ensure that charging parties and respondents have appropriate expectations about investigations, in light of the PCHP framework and the cooperation of the parties. In investigations, the EEOC's role is to gather facts to objectively determine whether there is reasonable cause to believe that discrimination occurred. The cooperation of the parties and witnesses to provide timely and meaningful information has a significant impact on the progress and effectiveness of the EEOC's investigation. The EEOC encourages the parties to promptly and fully share relevant information with the Agency.*

There are four key practices outlined in the QEP for investigations:

1. The EEOC identifies the bases, issues, and relevant allegations of the alleged unlawful employment action in a charge.

2. The EEOC conducts investigations consistent with its Priority Charge Handling Procedures and applies the law to the facts in its findings.

3. The EEOC communicates with the charging party, respondent, and their representatives to facilitate the progress of the investigation.

4. The EEOC communicates its resolution of the investigation to the parties.

These practices and their component elements are spelled out in the QEP. They have been key practices of our investigations for some time, and the QEP now serves to communicate these key practices to the public. The QEP is in the Appendix.

The QEP states that these practices may be accomplished in different ways based on the extent of the investigation and the investigative tools and techniques utilized, which are within the discretion of the EEOC.

The QEP principles are an integral part of our work and our communications with charging parties and respondents.

The QEP also has specific provisions regarding effective conciliations, which are discussed in a later section of this training manual.

EXERCISE:

SAMPLE INTAKE SCENARIOS AND QUESTIONS

Read each of the following scenarios. Brainstorm at your table about the type of information you should seek in each case. Record possible intake questions for each scenario, being careful to consider the statute(s), issue(s), and basis(es) implicated and the type of evidence, if available, that would be relevant to our investigation of charging party's charge.

~~Scenario 1~~

Ronald is an African American male employed as a cashier in a grocery store. He is the only African American male in that position. He has received positive performance reviews for two years, but the situation changed recently when the store placed a new manager, a white female, over his department. Since she came on board, Ronald has been given written warnings for being late to work and for not keeping his work station clean. After the new manager had been there for two months, she held a meeting with each employee to do an evaluation and she told Ronald that he had several areas that needed improvement. The raises and bonuses for this year were announced last week and Ronald did not get a raise. He believes the new manager does not like African American men and that she is trying to force him to quit.

Statute: Basis: Issue:

Intake Questions:

~~Scenario #2~~

Judy is a subway station manager. She says her supervisor has sexually harassed her for the past year but she has always refused his advances. Last month he reassigned her to a less desirable station.

Statute: Basis: Issue:

Intake Questions:

~~Scenario #3~~

Joseph is employed as a computer programmer and has been on a modified work schedule because of a disability. Last Monday he called in sick because he was really in pain due to his herniated disk. His supervisor told him that the company could no longer accommodate his modified work schedule and that it needs people who can work 100%. Joseph believes that the company intends to fire him if he takes any more time off.

Statute: Basis: Issue:

Intake Questions:

***Note**: that this charge raises a potential SEP issue under SEP Priority 3, Emerging and Developing Issues (ADA reasonable accommodation issues related to maximum leave policies and requirements that employees be "100% healed" to work) and should be reviewed with your supervisor to ensure proper designation if applicable.*

The EEOC and Customer Service

The people who come to this Agency are looking for assistance from a federal Agency that enforces the federal laws. Without your assistance, discrimination in the workplace will affect many workers who otherwise have no avenue for redress.

Likewise, many of the employers that you encounter may feel that the charge filed against them indicates they may have violated the law. They need your assistance to understand the investigation of a charge.

Quality customer service is a key component to the Commission's Quality Enforcement Practices.

Please note that such things as being responsive to the parties, clearly explaining our process, clearly explaining the evidence, allowing rebuttal, and exercising active listening skills, are essential to providing the quality customer service expected from all EEOC staff.

We will discuss much more about quality practices and proper customer service throughout this training.

After the Intake Assessment

If assessment at Intake indicates dismissal is warranted, the EEOC's practice is to dismiss the charge. Charging party will receive a dismissal notice and a Notice of Right-to-Sue. S/he may pursue the matter in federal district court.

If the charge appears to have merit but more information is needed to determine that, the EEOC decides whether the charge should be sent to mediation or for further investigation. If the EEOC decides a charge is appropriate for mediation, charging party and respondent are offered the opportunity to mediate the dispute by participating in the Commission's alternative dispute resolution ("ADR") program. Both parties must agree to mediation in order for mediation to take place. If the EEOC determines

that the charge is not ripe for mediation, it bypasses ADR and goes straight to investigation. Cases that do not go to mediation are EPA cases and class or systemic cases. However, there are other cases, depending on how the EEOC assesses them, that also may not go to mediation.

- *A note about the **Online Charge Status System**:*

  It is also helpful to explain to the Charging Party how to use the Online Charge Status System to access current information about the status of the charge and to track the progress of the charge through the various stages of the charge. You will want to also set the expectation that while the information reflects the latest actions on the charge, the status will not change or have new information on a daily or even weekly update, but whenever key actions occur, this will be displayed in the status display.

  The system also reflects what the possible next steps are so that the Charging Party can be prepared for what is coming next in the handling of their charge. You can also share with them that the overall flow of the charge process is available for display within the status screen, so that they can track the progress of their charge along the normal steps in the process.

  Sharing this information after the filing of a charge is good customer service and can also have the added benefit of reducing the contacts the CP has with you for status information on their charge.

  While the Online Charge Status system is available to provide this information, it is not intended to replace all interaction with the Charging Party and you are encouraged to maintain contact, as needed, throughout the investigative process, when the Charging Party's input is needed or additional information is sought.

To recap, the initial stages of the charge system include:

- Screening Interview – to determine whether the individual has raised a matter that is covered by the laws enforced by EEOC. This may be done by the EEOC's Intake Information Group (IIG) or someone in a field office.

- Intake Interview – intake questionnaire or other correspondence completed by the potential charging party (PCP). Intake staff interviews the individual, assesses the allegation(s) and counsels the individual on the merits of the allegations.

- Charge filed, unless the PCP declines to file.

- Identification of any SEP and/or DCP issues present in the charge

- Charge assessment under PCHP

- Notice of the charge sent to the employer within 10 days of filing, usually with a copy of the charge.

- Charge forwarded to mediation or investigation, if not dismissed at Intake stage.

- Charge re-assessed at every stage in investigation as appropriate. (See PCHP Assessment Points Flow Chart in the Appendix)

MEDIATION

Mediation is a form of alternative dispute resolution (ADR) that the EEOC offers as an alternative to the traditional investigative process. All EEOC offices offer mediation, typically before the investigative phase, in charges the Agency deems appropriate for mediation.

If a charge is appropriate for mediation, we invite the parties to participate in a mediation session. Remember mediation is voluntary. If both charging party and respondent agree to participate, the EEOC assigns the charge to a neutral mediator who meets with the parties in an attempt to resolve the charge.

Mediation sessions are conducted by either EEOC mediators or by contract mediators. In either case, mediators have training and experience in the area of conflict resolution. The sole purpose of mediation is to discuss the issues that led to the filing of the charge and to try to resolve them to the mutual satisfaction of the parties. If the parties reach an

agreement, it is reduced to writing and the EEOC agrees to terminate its investigation of the charge.

If the parties are unable to reach an agreement during mediation, the charge is assigned for investigation. All parties to the mediation sign a confidentiality agreement and information discussed during the mediation process is kept in strict confidence.

The information is kept in a separate file or separate section of the DCS charge file and may not be disclosed by mediation staff to investigative staff. This is referred to by the EEOC as a "fire wall." Sometimes a charging party may want to raise statements made by respondent during the mediation session as evidence of discrimination. The Investigator must advise the charging party that statements made during the mediation process are confidential and cannot be used as evidence during the investigation.

Charges that are not appropriate for mediation, or charges where one of the parties does not want to attend a mediation session, or in which mediation fails, are assigned for investigation based on the EEOC's current enforcement priorities. The charge should be re-assessed under PCHP to guide further investigative actions.

INVESTIGATION—AN OVERVIEW

Now that you have brought a charge into the system and decided its priority, what happens next? If it's an "A" charge, or a "B" charge that has failed mediation, you will investigate, recommend whether a finding of discrimination should be made, and, if appropriate, conduct settlement and conciliation negotiations. You will also need to give high priority to charges identified as having SEP or DCP issues and charges where the Regional Attorney and the Director agree to prioritize a case as a "SA". Note that the PCHP category may change throughout the investigation.

What Happens During an Investigation?

The sequence of investigative steps and tools and techniques used for any investigation depends on the facts of the charge.

Once a charge is assigned to you, the **first thing** you should do is to notify

the charging party that the charge has been assigned to you for investigation. This is good customer service.

Your job is then to **determine the best strategy and methods** you should use to gather and analyze evidence relevant to the allegation(s). You will need to decide when, where and how you will conduct witness interviews and collect documents and other data. Remember you may not necessarily engage in the same steps in each case. Some cases will not require an on-site visit or a fact-finding conference, while others may. Below is a brief overview of the steps and techniques an Investigator may use to conduct an investigation. We will discuss each of these steps over the next several days.

- The Investigator **reviews the charge file**, which contains initial correspondence, Intake Questionnaire and/or Intake notes, the Charge, and the Notice of the Charge served on the respondent. Generally, for cases that have not been referred to the mediation unit, the charge has been served on the respondent with a request for a **position statement** responding to the allegations of the charge.

- Generally, the Investigator **prepares a written Investigative Plan** (**"IP"**), which includes the scope of the investigation, the documents necessary to conduct the analysis, and the tools/methods that will be used. The Investigator uses the Models/Elements of Proof to help draft an IP. The IP may be discussed with the supervisor. In some cases, the IP may be developed more informally. Whether formal or informal, there should be a plan for every investigation and it should be considered a working document to be referred to/updated throughout the investigation. There is more discussion on IPs in the following Tools & Techniques section of this chapter.

- With the initial IP completed, the Investigator will **interview the charging party** to discuss the charge, review the position statement, and ask the charging party to respond to the position statement. EEOC's policy is to release **respondent position statements** to a charging party or her representative upon request. Staff should generally grant requests from charging parties or their representatives for the release of respondent's position statement and non-confidential attachments, because provision of this information may advance the investigation. (There are limited

exceptions.) EEOC staff may use the model transmittal letter at https://insite.eeoc.gov/ofp/position-statements.cfm and included in the Appendix to share the position statement and inform the charging party that this is her opportunity to provide additional information to support the charge. The charging party has 20 calendar days to respond verbally or in writing.

- For more information on sharing position statements, please review the 2016 "Operational Directive to Release Position Statements on Request During Investigations" and accompanying guidance at https://insite.eeoc.gov/ofp/position-statements.cfm. (See Appendix)
- If the Position Statement provided by the Respondent contains information within the categories EEOC deems to be confidential, staff should notify the Respondent that it should resubmit the Position Statement with the confidential information in a separate attachment and upload the documents via the Respondent Portal within a specified timeframe.

- At this point, based on an analysis of all of the evidence, the Investigator makes a decision to conduct further investigation, pursue settlement, or dismiss the charge.

- If the Investigator decides it is unlikely that further investigation will result in a finding of discrimination, the Investigator should conduct the Determination Interview (DI) with the charging party and explain the reason for the dismissal.

- If the Investigator decides to conduct further investigation, s/he must decide the scope of the investigation. Is it limited to this individual or is it a possible class case? Is it limited to one location/facility or several? The Investigator must also decide what tools/ techniques to use to conduct the investigation. Update the IP as needed.

- The Investigator may prepare a **Request for Information** ("**RFI**"). Each RFI should be **customized** for the specific allegations in the charge. If a position statement is not in the file, it should be requested in conjunction with the RFI. It is often helpful to contact

the respondent before drafting an RFI to obtain information relevant to the charge. For example, in a failure to hire case, an Investigator may need to know how many positions were filled, how large the applicant pool was, etc. This information may also guide you in making the determination whether to request copies or review documents on-site.

- Note: If an employer refuses to cooperate with an EEOC investigation, **EEOC can issue a subpoena** to obtain documents and testimony or gain access to facilities. You may include a paragraph regarding subpoena authority in the RFI. Subpoena authority extends to documents, electronic data, and other records of the employer, as well as testimony of witnesses. The procedures for subpoena issuance are set forth in Section 24 of Volume I of the EEOC Compliance Manual on subpoenas. (See Appendix)

- The Investigator may **conduct witness interviews** with respondent management officials, witnesses identified by the charging party, and other witnesses identified by the Investigator as having relevant testimony. When and how to conduct witness interviews will depend on the charge. In many cases, the Investigator may need to conduct witness interviews early in the investigation, even before sending the RFI and/or conducting a fact finding conference or on-site investigation. Non-management employees may need to be interviewed before or after working hours. See the section of this manual on "Investigative Interviewing."

- The Investigator **analyzes documents** submitted by the respondent in response to the RFI and determines if additional documents or witnesses are needed.

- After receiving the response to the RFI, the Investigator will analyze the evidence, refer back to the IP and the Models of Proof, and determine next steps. If it appears that there may be some additional investigation necessary, the Investigator will take the next steps. There is no rule that requires a particular next step. This will depend on the actual case and evidence gathered at that point. In some cases, it may be necessary to **go over the gathered evidence with the charging party after the RFI response is received** and analyzed. This occurs usually when there does not appear to be a violation, however, there may be some additional

relevant information that the charging party can provide that would warrant additional investigation. This is referred to as a **pre-determination interview (PDI).** At this point, based on the analysis of the evidence, the Investigator makes a decision to conduct further investigation, pursue settlement or dismiss the charge. If the Investigator determines that further investigation will not result in a finding of discrimination, it is essential that the Investigator explain to the charging party the reason for the dismissal. Look for more detail in the following Tools & Techniques section of this chapter.

- The Investigator may conduct an **on-site** investigation or a fact **finding conference** to further define the issues of the charge, determine **what is undisputed, clarify disputed issues, and determine what other evidence is needed**.

- **Settlement** may be considered at any point in the investigation. Early settlement is encouraged by the EEOC in most cases. The Agency may settle - at any point before a determination is made - for appropriate relief consistent with the statutes and acceptable to the charging party and the respondent. However, if the evidence of record is sufficient to establish reasonable cause to believe that a violation has occurred, the Agency may seek more substantial relief.

- If no further investigative or settlement action is appropriate, the EEOC makes a **determination** on the merits of the charge.

- If the charge has merit and a violation is found, the EEOC issues a **"reasonable cause" determination** and attempts to conciliate the matter. A "reasonable cause" determination is issued by the director of the office and states that the EEOC has found reasonable cause to believe that a violation of the statute or statutes has occurred.

- To recommend a reasonable cause determination, the investigator must prepare an **investigative memorandum (IM)**, which sets forth the evidence and the factual and legal analysis supporting the determination. The IM may be reviewed by your supervisor and the legal unit.

- Before the issuance of the reasonable cause LOD, a PDI may be conducted with the Respondent after consultation with your supervisor and the legal unit.

- The Letter of Determination ("LOD") states that the EEOC will attempt to eliminate the alleged unlawful practices by informal methods of **conciliation** and invites the parties to join in discussions to reach a just resolution of the matter. If conciliation fails, the EEOC may file a lawsuit. For Title VII, ADA or GINA claims against state or local government entities, we refer the charge to the U.S. Department of Justice (DOJ) for possible litigation. If efforts to conciliate have been unsuccessful and the government decides not to litigate, a Notice of Right to Sue ("Form 161-A") is issued to the charging party.

- If further investigation of the charge is not likely to lead to a cause finding, a **dismissal** notice is issued and the charging party is given a Notice of Right to Sue ("Form 161"), stating that based on the investigation, the EEOC is "unable to conclude that the information obtained establishes violations of the statutes." You should note that a dismissal does not constitute a determination that the respondent is in compliance with the statutes. Rather, it is a determination that the evidence gathered was insufficient to establish that a violation occurred.

- **In all cases, before issuance of the Notice of Right to Sue, the Investigator must conduct a Pre-determination or Determination Interview (PDI or DI) so that charging party is aware of his or her rights following dismissal of the charge.**

INVESTIGATIVE TOOLS AND TECHNIQUES

The tools and techniques used for any investigation will vary depending on the type of case. An Investigator may use a combination of techniques depending on the scope of the investigation and the allegations raised by the charging party. In addition, factors such as location, availability of witnesses, and budgetary constraints may influence the choice of investigative tools used in any investigation.

What Are Some of the Investigative Tools and Techniques Used by Investigators?

- Investigative Plan
- Interviews
- Requests for Information/Examination of Records and Documents
- Fact Finding Conferences
- On-site Investigations

Let's take these one at a time.

Investigative Plans

What is the Purpose of an Investigative Plan (IP)?

The Investigative Plan (IP) is intended to lay out each allegation (basis/issue) and the theory and elements of proof and allow the Investigator to keep track of the actions taken and evidence obtained, and identify what still needs to be done. The IP is a working document that is modified as the case develops. The IP answers three main questions. What do I have? What do I need? How am I going to get what I need? Investigators create the IP before commencing an investigation. The IP is an essential tool for Investigators, especially New Investigators. An IP will help guide the Investigator through the investigation and is especially helpful in the more complex cases.

The Investigator should draft the IP and update it as evidence is received and analyzed. For example, after the initial interview with charging party, the Investigator may need to update the IP to indicate how the information obtained relates to each allegation and to determine whether and what additional evidence and/or investigative steps need to be taken.

What Should You Include in an Investigative Plan?

Two (2) model IPs are in the Appendix. An IP should include the following:

- Identifying information about the charge
- Bases and issues and information needed separately for each basis and each issue;
- Appropriate theory of discrimination;
- Investigative methods (on-site, witness interviews, fact finding

conference, RFI);

- Conclusions from analysis of data;

- Sources and description of the observable, documentary, testimonial, and statistical evidence required.

The IP is a great tool to have when it is time to brief/discuss your case with your supervisor or legal. This allows you to stay on track and provide a clear and succinct explanation of your case. Note also that when you use the discussion format found in the **Briefing Technique** (See Appendix) along with your IP, you are sure to cover all aspects of the case during case discussions.

Interviews

Why Do Investigators Conduct Interviews and Document Them?

Investigators conduct interviews to obtain testimony regarding the charging party's allegation of discrimination. An interview allows full exploration of the allegations and underlying facts of a charge. This testimony is documented in interview notes to preserve them for the record. Interviews may be conducted in person or by telephone.

What are the Objectives of an Interview?

The objectives of an interview may include:

- testing various theories of discrimination and respondent defenses
- gaining an understanding of employment records
- testing accuracy and validity of those employment records
- corroborating evidence
- addressing credibility of a witness
- obtaining information from witnesses regarding alleged discriminatory statements, events, policies or practices
- obtaining information on the qualifications and job performance of employees and job applicants
- resolving issues about job similarity in sex/wage investigations
- follow-up, which can be accomplished more easily than through written questions or documents

Who Might an Investigator Interview during an Investigation? Why?

- Charging party – to clarify the allegations and obtain specifics about the alleged discrimination, explore possible respondent defenses, determine other sources of evidence (e.g., witnesses or documents). If the charging party was not interviewed prior to the filing of the charge, staff should make every effort to interview them after the charge was filed.

- Charging party witness – to obtain corroboration of charging party's evidence and to test the theory of discrimination applicable to the case

- Respondent management official – to determine the specific facts pertaining to the defenses raised by the employer

- Respondent witnesses – to determine the overall employment process or practice being challenged and aspects of the employment process affecting individual employees

- Other witnesses – to obtain evidence pertaining to the allegations and to test the theory of the case

A model Interview Plan is in the Appendix.

Request for Information (RFI)

What Information is Typically Sought in an RFI?

An RFI is a written request for **documentary evidence.** The RFI should be tailored to the scope of the investigation and the appropriate time period to be addressed by the investigation. Typically, the RFI is addressed to the respondent. However, there are instances when the EEOC may request documentary evidence from other entities, such as contracted human resources entities, state or local job services organizations, etc. In all instances, the RFI should seek information relevant to the case, including, for example:

- factual, documentary and statistical evidence indicating how charging party, members of charging party's allegedly aggrieved class, and others who are similarly situated, are treated under or affected by the policy or practice being reviewed as compared to the non-aggrieved individuals;

- policies, practices, procedures and regulations that govern the process that is the subject of the charge.

Note that for some cases, it may be necessary to first determine how the Respondent maintains employment records. Are the applications online? Does Respondent use a particular central database to house employment records for all employees and something else to track applications? For analysis purposes, we may want to have the information electronically in order to manipulate it easily to analyze it in different ways. In order to determine the best way or format in which to request the evidence, it may be necessary to draft a "Step One RFI" where you are trying to determine the various ways the Respondent maintains information. Once the requested information is provided, then a "Step Two RFI" may be drafted to specifically requests data in one or more of the formats in which the Respondent is able to provide--- usually electronically.

Note: In some cases involving statistical analyses, it may be necessary to seek the assistance of EEOC staff in the Office of Research and Information Planning (ORIP) or other Headquarters departments. Please consult with your supervisor and possibly the legal unit before seeking such assistance.

In all instances, carefully review the RFI to ensure that the items being requested are relevant and necessary. Review and analyze documents submitted in response to an RFI to determine if additional documents or witness interviews are needed.

A checklist for an RFI is in the Appendix

Fact Finding Conference

A fact finding conference is an informal investigative forum. It is not an adversarial proceeding. A fact finding conference is a useful mechanism to further define the allegations, determine what facts are undisputed, clarify disputed issues, and determine what other evidence is needed.

Both parties and other relevant witnesses may attend a fact finding conference.

Fact finding conferences allow the parties to hear both sides in a non-adversarial setting. Frequently, a fact finding conference may encourage settlement of the charge.

A fact finding checklist is in the Appendix.

On-Site Investigation

An on-site investigation is an examination of the physical environment where the charge arose. An on-site allows an Investigator to obtain a general understanding of the employer's operations at that location, conduct interviews of the respondent's managers and employees, and examine records and documents first-hand.

On-site investigations are almost always conducted in cases where there is strong evidence of a violation. In addition, on-site investigations are used where they appear to be the most efficient method of investigation.

On-sites are especially useful in ADA and EPA charges where an understanding of the content of a job is important, and can best be learned by seeing it performed.

A checklist for an on-site is in the Appendix.

Pre-Determination Interview (PDI)

• PDIs are conducted with charging parties when the evidence indicates that a dismissal is likely, but before a final determination is reached.

The purpose of the PDI is to review the evidence with the charging party and provide him or her with an opportunity to rebut that evidence.

As already mentioned, if the Charging Party has requested a respondent's position statement, make sure the position statement and non-confidential attachments have been shared with the Charging Party or his or her attorney and they have been allowed 20 days to respond verbally or in writing before you make a final recommendation regarding the

determination.

• A PDI is an efficient investigative tool, as it gives the aggrieved party the opportunity to provide investigative leads focused on the respondent's position.

• Additionally, PDIs provide charging parties with a measure of customer service that reduces complaints and ultimately saves the EEOC time that would otherwise be spent responding to requests for reconsideration and Congressional inquiries.

• PDIs also ensure that charges are not dismissed prematurely.

• The best practice is to conduct the PDI either in person or over the phone.

• When it is not possible to reach the charging party to conduct the PDI in person or by phone, the PDI may be accomplished by a letter that explains the evidence.

• When the evidence indicates a finding of reasonable cause, PDIs may be conducted with the respondent after consultation with your supervisor and the legal unit.

RESOLUTION OF THE CHARGE

Reasonable Cause Determinations and Conciliation

If the Agency finds that there is reasonable cause to believe a violation of the law has occurred, the Investigator prepares a Letter of Determination, which summarizes the allegations, respondent's defenses, and the evidence which proves the allegation. A **Reasonable Cause Determination** is then issued.

When a reasonable cause finding is issued, the EEOC will attempt to eliminate the practice(s) by informal methods of conference, **conciliation**, and persuasion. If conciliation is successful, a binding agreement is reduced to writing and signed by all the parties.

On June 1, 2015, former Chair Jenny Yang issued a memorandum, titled "*Mach Mining* Decision and Conciliation Efforts." (See Appendix). As the memorandum indicates, all field staff engaged in conciliation efforts should undertake the following steps set forth in the *Mach Mining* United States Supreme Court decision:

1. The LOD must inform the Respondent about the specific allegations upon which we are issuing a finding of reasonable cause that discrimination occurred, and the LOD must describe which employees (or class of employees) have been affected by the discrimination.

2. Careful consideration should be given to the description of the nature and scope of the unlawful practice(s) and to the description of the affected individuals or group(s). The LOD should identify the statute(s) that the Respondent has violated and identify the basis and issue of the violation(s), e.g., "Respondent A violated Title VII by failing to hire Charging Party X on the basis of her sex, female." When cause is found on behalf of a group of aggrieved individuals, the LOD should identify the group aggrieved by reference to their protected group status, e.g., "Charging Party and other female applicants." The LOD should further describe the group of aggrieved individuals by describing the temporal and geographical scope of the cause finding and the jobs at issue, e.g., "Respondent A failed to hire, because of their sex, a group of qualified female applicants who applied to work as managers in any of Respondent's stores located in Texas from 2012 to the present."

3. We must also show that we gave the employer "a chance to discuss and rectify a specified discriminatory practice." As is our practice, all cause LODs should invite the Respondent to engage in conciliation discussions regarding how the discrimination alleged could be rectified.

It should be noted that the EEOC's QEP, which is a public document, sets forth four steps that the EEOC should follow in conciliating a charge of discrimination:

1. "EEOC invites the respondent to participate in conciliation efforts.

- The Letter of Determination invites the respondent to engage in conciliation efforts in order to eliminate the alleged unlawful employment practices and reach a just resolution of the matter.
- The conciliation request is based on the findings of the investigation and informs the parties of the relief sought.

- The conciliation request provides the respondent with a reasonable amount of time to respond to EEOC's conciliation proposal or to submit its conciliation proposal.

2. The conciliation request seeks meaningful relief for the victims of discrimination and seeks to remedy the discriminatory practices.

- The conciliation request provides meaningful remedies to the aggrieved individuals.
- The relief sought in conciliation explicitly addresses the discriminatory employment practices at issue in the case.
- The request typically seeks targeted equitable relief in order to prevent similar violations in the future.

3. EEOC considers offers made by the respondent.

- Staff considers offers made by the respondent in a timely fashion.
- When the Agency determines that further conciliation efforts would be futile or non-productive, it notifies the charging party and respondent in writing.

4. EEOC attempts to secure a resolution acceptable to the Agency.

- Staff timely communicates with the charging party and the respondent (or their representatives) as the conciliation warrants.
- Communications between the EEOC and the parties are clear and respectful to facilitate productive efforts in conciliation toward a resolution acceptable to the EEOC and the parties."

Documenting conciliation efforts is important. Staff should include in the charge file documentation of communications with respondent, including the date and method of communication and the name and title of respondent's representative with whom we communicated.

If the conciliation phase does not result in an agreement, the Agency decides whether to litigate the matter. If the respondent is a state or local entity, a Title VII, ADA or GINA charge is referred to the U.S. Department of Justice for possible litigation.

- When conciliation is unsuccessful, include in the file a statement of the reasons for failing conciliation.

(Conciliation will be covered in more detail later in this class.)

EEOC files about 130 new employment discrimination lawsuits every year. Because of limited resources, EEOC cannot file a lawsuit in every case where we have found discrimination.

If the EEOC decides not to litigate the matter, it will issue a **Notice of Right to Sue (Conciliation Failure) ("Form 161-A")** to the charging party. (See Appendix). The DCS will soon permit staff to generate closure notices and Notices of Right to Sue, replacing the closure forms.

What Remedies Are Available When Discrimination Is Found?

The "relief" or remedies available for employment discrimination may include:

- back pay
- attorney's fees
- damages
- hiring
- promotion
- reinstatement
- front pay
- reasonable accommodation
- the employer also may be required to take **corrective or preventive actions** to cure the source of the identified discrimination and minimize the chance of it happening again, such as giving training to all employees, and stopping the discriminatory practices

  - Such benefits are referred to as **Targeted Equitable Relief**, or TER. When TER is obtained by the EEOC, we record that fact in IMS.
  - Selection of TER benefits does not require additional action on the part of staff when they choose the appropriate items noted as "TER" in IMS, except for the category of training. In order of for training to be identified as TER training, the specific training that is provided by the respondent must be focused on the particular issues in the charge that are being resolved. If the training is general in nature and does not specifically address the issues in the charge, then it would be designated as non-TER training.
  - Specific guidance about TER and other benefits reporting is available on OFP's inSite page.

Dismissals and Notice of Rights

If the Commission is unable to conclude that the information obtained during the investigation establishes reason to believe a violation of the law has occurred, **a Dismissal and Notice of Rights** is issued and the charging party can pursue the matter in federal court. This notice is also commonly called a "Notice of Right to Sue" or "NRTS." It protects the charging party's right to seek relief in court. Charging party must file the lawsuit within 90 days of receipt of the Notice. An example of the Notice (Form 161) is in the Appendix. The DCS will soon permit staff to generate closure notices and Notices of Right to Sue, replacing the closure forms.

Determination Interview

It is essential to explain the evidence and finding to the charging party in a no cause case and to the respondent in a cause case. This is a crucial aspect of good customer service.

If we have made a decision to dismiss the charge because further investigation is not likely to lead a finding of reasonable cause to believe discrimination occurred, the Investigator must effectively communicate to the charging party the reason for the determination, the realities and limitations of EEOC's investigative capacity, and his or her private enforcement (lawsuit) options.

The information that must be communicated to the respondent in cause cases will be discussed in detail when we cover the conciliation process.

Withdrawals and Other Dismissals

In addition to dismissals for lack of evidence of discrimination, the Agency may also dismiss charges for the following reasons:

- Charging Party files a private lawsuit or requests a NRTS, which allows the individual to proceed to federal court
- Withdrawal upon the request of the charging party
- The Agency lacks jurisdiction

Can an Individual File an Employment Discrimination Lawsuit?

Yes. All of the federal employment discrimination laws give charging parties the right to file a lawsuit in court regardless of what the EEOC finds in its investigation. Most employment discrimination lawsuits are brought by people who are represented by private attorneys. More than 14,000 private lawsuits were filed in federal court in 2016 and many more are filed in state courts. The EEOC office where the charge is filed may be able to provide a list of attorneys in the area who handle employment discrimination cases.

Withdrawals

- Withdrawal without benefits: An individual may wish to withdraw his/her charge for many reasons – the length of time it takes to conduct the investigation, they have moved on with their life, they have relocated, they have lost interest, etc. When this happens, the Investigator should have the charging party complete a withdrawal form, explaining the reason for the request for withdrawal.

- Withdrawal with benefits: Sometimes, a charging party will request withdrawal of his/her charge as a result of a private settlement agreement with the respondent. The Investigator must ensure that the charging party was not "forced" to withdraw the charge. The Investigator should attempt to determine whether the charging party received any benefits as a result of the private agreement and if so, what those benefits were.

Note: charging parties should be advised that EEOC may decide not to dismiss a charge at their request, but may decide to continue investigating the matter because of an overriding public interest.

Request for Reconsideration

What Happens If the Charging Party or the Respondent disagrees with the Determination?

Some parties **request reconsideration** of the resolutions of their charges.

The EEOC is not mandated, by statute or regulation, to act on these requests. The EEOC District Director may decline to review such requests unless the party presents substantial new and relevant evidence or a persuasive argument that the Agency's determination is contrary to law or the facts. The EEOC offices generally reconsider dismissals only when one of the following standards has been met:

- misconduct by an Agency representative which may have affected the outcome;
- substantial new and relevant evidence that was not previously considered and which may have affected the outcome; or
- an error in the interpretation of the law, which may have affected the outcome.

Upon receipt of a request for reconsideration from a charging party, the Investigator or other Agency representative MUST let the charging party know that the 90-day time limit for filing a private suit continues to run while the office decides whether to reopen the investigation.

Conclusion

This is just a brief overview of the EEOC's charge process. We will be going into more detail on each of these steps over the next several days.

QUIZ

TEST YOUR KNOWLEDGE OF THE CHARGE PROCESS

1. Do I need an attorney to file a charge?

2. I want to file a charge against the company I used to work for in New Jersey, but I live in California now. Which EEOC office will investigate my charge?

3. Will my employer know if I talk to the EEOC?

4. Will my case go to mediation?

5. Will the information discussed during mediation be kept confidential?

6. How will I know what is happening on my case?

7. Does EEOC have a time limit to complete the investigation of my charge?

8. Will EEOC visit the place where I work if I file a charge?

9. Can EEOC force my employer to cooperate with its investigation?

10. Can I change my mind and drop the charge/stop the investigation?

11. If the EEOC finds discrimination, does the Agency take the case to court?

12. If the EEOC finds that I was discriminated against, what remedy is available to me?

APPENDIX

1. Intake Checklist
2. Operational Directive to Release Position Statement Upon Request
3. Confidentiality of Enforcement Information
4. Maintaining Charge Files (Digital and Paper Document)-Records Management Interim Guidance
5. CM Section 28—Content of the Investigative File
6. What You Should Know Before You File a Charge with EEOC
7. What You Should Do After You Have Filed a Charge with EEOC
8. EEOC Online Charge Status System Tip Sheet
9. What Happens to Your EEOC Charge Flow Chart
10. Intake Questionnaire
11. Interview Questions for Assessing Disability Under ADAAA
12. Draft Interview Questions for Assessing GINA Violations
13. Quality Practices for Effective Investigations and Conciliations
14. PCHP Assessment Points Flow Chart
15. Model Transmittal Letter Sending Position Statement to CP
16. CM Section 24-Subpoenas
17. Investigative Plan #1
18. Investigative Plan #2
19. Briefing Technique
20. Interviews—Model Checklist
21. Request for Information—Model Checklist
22. Fact Finding Conferences—Model Checklist
23. On-sites---Model Checklist
24. *Mach Mining* Decision and Conciliation Efforts—Yang Memo 6/1/2015
25. Form 161-A NRTS Conciliation Failure
26. Form 161 NRTS

SLIDE SHOW

INTAKE CHECKLIST

Areas To Cover During Intake

PCP COUNSELING

General

____Intent to file
____PCP received uniform brochure

Jurisdiction

____Timely (signed document within 180/300 days from date of harm
____Employee/employer relationship or applicant for job
(includes Labor Organizations & Employment Agencies)
____Number of employees (15 for TVII & ADA; 20 for ADEA)
____Tangible harm/negative job action/discriminatory policy or practice
____Geographical ownership (if discrimination occurred in the jurisdiction of another Field Office, explain that the charge will be taken and transferred. Provide contact information for the appropriate office)

Merit

____Covered basis identified
____Harm described (specific dates and circumstances)
____Comparators (if applicable)
____Witnesses (and type of information they might have)
____ADA Interview ("qualified individual with a disability" screening, to extent applicable at intake)
____Potential Technical Violations
____EEOC Posters Displayed in Workplace?
____Co-mingling of medical/health records with personnel/employment records?
____ADEA: Signed release that precludes filing a charge?

Miscellaneous Critical Issues

____Counsel regarding coverage or non-coverage and strengths and weaknesses
____Counsel regarding Notice of Charge to respondent within 10 days
____Counsel regarding retaliation, especially if still employed by respondent (coverage for complaining, filing charge, serving as witness)
____Explain right to file
____Explain when EEOC may dismiss quickly (self-defeating claims/legitimate non-discriminatory reason or motive, etc.)
____What EEOC expects from PCP and due dates, if appropriate
____Additional information needed
____Specific evidence needed to substantiate the claim
____What relief is PCP requesting?
____Damages information/explain mitigation and need for documentation
____Notify EEOC of changes in address, telephone and/or e-mai

Process (*Explain and describe to PCP)*

____Timelines/service of charge, mediation, investigation, etc.
____Mediation process
____Investigative process, including possible settlement efforts and opportunities
____Types of resolutions (settlements, administrative dismissals and findings)
____No Cause Findings
____ At any point during the investigation

____ Results in Dismissal and Notice of Rights (90 days to file a lawsuit in federal court)

____Cause Findings
____Conciliation successful (ends all processing/no RTS issued)
____Conciliation unsuccessful
____Notice of Right to Sue issued (90 days to file in court)
____If Title VII or ADA charge against state or local government, DOJ issues NRTS
____Litigation Review
____EEOC decides to litigate (of the 80,000 charges filed yearly, only 300 suits filed per year)
____EEOC decides not to litigate (NRTS issued – 90 days to file in federal district court)

____NRTS Request (administrative closure granted after 180 days – 90 days to file in court)
____Disclosure rights within the 90 days after closure of charge
____General timeliness for contact
____EEOC contact directions
____Procedures unique to the Office

Charge Development
____Draft Form 5
____Verify charge accuracy with PCP
____Obtain PCP signature on Form 5

Follow-up
____Answer any questions
____Copy of date-stamped charge to CP

INTERNAL PROCESSING

IMS Data Entry
____CP, R, allegations and general data entered
____IMS notes updated
____Communication method identified
____Respondent local list utilized/updated
____EEO-1 data imported
____Noose/KKK/swastikas/related symbols and words identified
____N-word identified

Internal Procedures
____Complete PCHP Assessment form
____CP credibility assessment
____Other procedures unique to the Office, identify below

Operational Directive to Release Position Statements Upon Request During Investigations

Summary of New Procedure

The agency will implement a consistent, nationwide procedure of releasing Respondent position statements to a Charging Party or her representative upon request. Non-confidential attachments may also be released to facilitate a more informed understanding of the Respondent's positions. Charging Parties will be asked to provide a response to the Respondent's submissions.

We expect this procedure to assist investigations by providing Charging Parties the opportunity to directly review and respond to the Respondent's position on their allegations, which should give investigators more specific information to assess the credibility of the parties and their positions. This procedure also provides a consistent practice in all EEOC offices to improve our service to the public and the effectiveness of our investigations. This Operational Directive sets forth the procedure to be applied in all investigations in which a position statement is received.

Background

There has been considerable discussion about the agency's practices with respect to the release of the Respondent's position statement to Charging Parties and their representatives. Surveys of the practices in our 53 field offices have revealed varying practices between and within offices on the handling of position statements and attachments, and the sharing of the Respondent's position with the Charging Party or Charging Party's representative.[1]

The EEOC districts that release position statements to Charging Parties during the investigation report positive results in more expeditious movement of investigations, more fulsome disclosure and rebuttal of the facts, and a more complete record. They also report that complaints from Charging Parties and congressional inquiries have decreased.

Offices that do not routinely provide Respondent position statements to Charging Parties have raised concerns about investigative neutrality, control over access to information, and resources required to provide position statements. After careful consideration, we believe that many of these concerns can be addressed through effective case management and clear communications with Charging Parties and Respondents about the agency's nationwide procedure.

Procedures for Releasing Position Statements and Non-Confidential Attachments

a. Standards for Releasing Documents

If a Charging Party or her representative requests a Respondent's position statement and attachments, EEOC's policy is to release the position statement and non-confidential attachments promptly. Respondents will be instructed to segregate confidential information into separate

[1] Currently, for example, some offices release position statements without any request. Other offices routinely grant requests for their release based on the premise that the release of the information advances the investigation. Some offices provide verbal summaries of position statements, but do not release any documents to Charging Parties or their representative. Some offices allow Charging Parties to review the position statement and/or attachments in the EEOC office, but do not release any documents.

attachments to minimize any redaction that would be necessary to comply with the Trade Secrets Act, and to protect sensitive medical information, confidential commercial and financial information, and non-relevant personal information.[2] We will request that the Charging Party provide a response to the Respondent's submissions. This provides the investigator with more specific information from both parties to assess the facts, their positions, and credibility.

Staff should generally grant requests from Charging Parties or their representatives for the release of the Respondent's position statement and non-confidential attachments, based on the premise that provision of this information may advance the investigation. In some instances, staff may postpone the release of the position statement to the Charging Party to gather additional information relevant to the decision to release.[3] In limited instances, a request may be denied when staff, in consultation with their supervisor, determines that release of the position statement may impede the investigation. Investigators will be in the best position to exercise judgment in making this determination in consultation with their supervisors.

Non-confidential attachments from the Respondent may also be released, when the provision of such information to the Charging Party or the Charging Party's representative is likely to facilitate a more informed, pointed or thorough response from the Charging Party. Position statements and non-confidential attachments may also be released even when a request has not been made, when the provision of this information will enhance our enforcement efforts or customer service.

b. Notice to the Respondent Requesting a Fact-based Position Statement and the Submission of Confidential Information in Separate Attachments.

The notice to the Respondent requesting a position statement will inform Respondent that EEOC may release the position statement to the Charging Party or the Charging Party's representative. The notice will advise Respondent to segregate confidential information into separate attachments and label them as such. Respondents will upload position statements and attachments into the Respondent Portal of the Digital Charge System. If the charge is not entered into the Digital Charge System, the Respondent will be asked to provide a duplicate copy of their submission.

A revised resource guide for Respondents on "Effective Position Statements" will emphasize the following points to Respondents to facilitate the implementation of this new procedure:

- Fact-based position statements - The position statement should set forth all of the facts relevant to respond to the allegations in the charge.

[2] It is EEOC policy not to release confidential or sensitive personal identification information, such as Social Security Numbers, to the parties.

[3] For example, staff may determine that questioning the Charging Party prior to release of the position statement to the Charging Party, will allow the investigator to assess the Charging Party's credibility without information the Charging Party would have learned from the Respondent's position statement.

- Segregate confidential information in separate attachments - If Respondent relies on confidential information in its position statement, it should provide such information in separately labeled attachments and justify the confidential nature of the information.
- 30 day due date - The notice provides a due date for submission of the position statement and attachments (usually 30 days from the date the notice is sent).
- Signed by an authorized representative - The Commission requests that the Position Statement be signed by an authorized officer or agent of the Respondent.
- Extensions - A request for an extension should be made at the earliest possible time in advance of the due date, setting forth good cause for the extension and the amount of additional time necessary in a statement signed by an authorized representative.

This should minimize the redaction necessary under our legal obligations. Offices that provide position statements report that they spend minimal time redacting confidential information from position statements because employers routinely segregate confidential information into separate attachments, as it is in their interest to do so.

c. Review Position Statement and Non-Confidential Attachments and Redact Information as Required.

An investigator's review of the position statement and attachments is a critical step in the investigation, which this procedure reinforces. Nonetheless, staff should review the documents prior to release to determine if any redaction is required to protect confidential information, including:

1. Sensitive medical information (except for the Charging Party's medical info).
2. Social Security Numbers.
3. Confidential commercial or financial information.
4. Trade secrets information.
5. Non-relevant personally identifiable information of witnesses, third parties, comparators, witnesses, etc., for example, dates of birth in non-age cases, home addresses, and personal phone numbers, etc.
6. Any reference to other charges filed against the Respondent or to other charging parties, unless the other charges are by the Charging Party.

d. Disclosure to the Parties During the Investigation is Permitted by Title VII, ADA and EEOC's Regulations

The confidentiality provisions of Title VII §§706(b) and 709(e), and ADA §107 do not apply to disclosures to the parties during the investigation. Offices shall ensure that staff clearly understands the confidentiality requirements of Title VII and the ADA, and that providing information to the parties does not violate these provisions because it is deemed to be a "nonpublic disclosure." EEOC's regulations expressly permit disclosure of information to the parties during the investigation where disclosure is deemed necessary for securing appropriate relief. *See* 29 CFR §1601.22. Section 83 does not apply to the disclosure of information during the investigation. Nor does the Privacy Act preclude the release of information in the charge file to the Charging Party or the Charging Party's representative.

e. Releasing Position Statements to the Charging Party or Her Representative

EEOC staff should inform Charging Parties at the beginning of the investigation that they may request non-confidential position statements and attachments submitted by the Respondent, and advise them to read the informational materials about EEOC's procedures and what they can expect from EEOC during an investigation of the charge.[4]

A PDF of the documents may be emailed to the Charging Party or Charging Party representative in an encrypted format or mailed if we do not have an email address.

The transmittal notice to the Charging Party or Charging Party's representative will request that the Charging Party respond within 20 days from the date the notice is sent. Requests for an extension should be considered, based on a statement from the Charging Party or her representative explaining the need for an extension. The transmittal notice shall state:

> *By accepting these documents, you agree that you will only share the contents with persons in a privileged relationship, such as a spouse, clergy, or legal, medical, or financial advisor.*

Implementation Date: EEOC's Requests for Position Statements Made to Respondents On or After January 1, 2016

These procedures take effect for all EEOC requests for position statements made to Respondents on or after January 1, 2016. Beginning January 1, 2016, a revised Request for Position Statement will be sent to Respondents via the Respondent Portal or via mail/email if the charge is not in the digital charge system.

Outreach to the employer and employee communities will also inform them of the EEOC's new procedure. This will provide advance notice to Respondents that their non-confidential submissions may be released to Charging Parties or their representatives and allow Respondents to segregate confidential information in their submissions.

Offices that currently release position statements may continue their current practice up to the effective date. In offices that do not currently provide position statements but have received requests for them prior to the implementation of this new procedure, the office should consider whether to grant such requests on a case-by-case basis, balancing the Charging Party's interests in this information, the Respondent's interests, and the resources necessary to redact confidential information.

[4] The documents advising Charging Parties of EEOC's procedures and what they can expect during an investigation of the charge will be updated to include this information.

CONFIDENTIALITY OF ENFORCEMENT INFORMATION

Summary of Requirements for EEOC Enforcement Staff

DISCLOSURE TO THE PUBLIC

The EEOC's charge process is confidential. EEOC employees are subject to strict confidentiality requirements by law. Unauthorized public disclosure of information is subject to criminal penalty.

(1) Prior to the Filing of a Lawsuit Based on the Charge

Title VII, ADA, and GINA prohibit the EEOC from making public, *prior to the institution of court proceedings involving the charge:*

- **the charge** of employment discrimination,
- **any information** obtained during the investigation of the charge,
- **any information** obtained from records required to be kept or reports required to be filed, such as **EEO-1 survey reports**, and
- **anything** said or done during and as part of a **conciliation** without the written consent of both the Charging Party and Respondent.

During the course of the investigation and in conciliation, information about whether a charge has been filed, information about the Charging Party and the Respondent, and any information gathered in the investigation or in the conciliation process will be kept confidential by EEOC and will not be disclosed to the public unless EEOC determines the disclosure is necessary for securing appropriate relief or to carry out the Commission's functions. If inquiries are made by a member of the public or the media about a charge, the EEOC may neither confirm nor deny the existence of the charge.

Sections 706(b) and 709(e) of Title VII make it a criminal offense for any employee of the Commission "to make public in any manner whatever" any such information prior to litigation. The statute provides for a fine of up to $1,000 or imprisonment of up to one year. The Title VII/ADA/GINA confidentiality regulations are at 29 C.F.R. §§ 1601.22 and 1601.26. The confidentiality requirements above do not apply to ADEA and EPA charges. However, the Privacy Act applies to the disclosure of records in ADEA and EPA charge files (see below).

(2) After the Filing of a Lawsuit Based on the Charge

If a lawsuit is filed based on the charge, information may be disclosed about the charge that became public because of the litigation, subject to the Privacy Act and other restrictions on disclosure of agency information (see below). Nothing said or done during and as a part of conciliation of the charge may be made public or used as evidence without the written consent of the parties (*see* 29 C.F.R. § 1601.26).

DISCLOSURE TO THE PARTIES

The parties to a charge are not usually considered members of the public to whom disclosure is prohibited by the confidentiality provisions of Title VII, ADA, and GINA. Nevertheless other considerations affect when disclosures will normally be made to the parties.

(1) Initiation of a Charge

Information obtained prior to the filing of a charge will not be disclosed to the employer or its representative(s) unless and until a charge is filed.

Once a charge is filed, notice of the charge to the Respondent employer is required by statute. The Charging Party's name and basic information about the allegations of discrimination will be disclosed to the Respondent.

(2) During the Investigation and Conciliation Stage

The Charging Party and the Respondent are *not considered members of the public* during the investigation. Information may be provided to them at EEOC's discretion, or to witnesses, where disclosure is deemed necessary for securing appropriate relief (*see* 29 C.F.R. § 1601.22).

Disclosure of Respondent's Position Statement and Attachments:

Respondents' position statements are generally disclosed to Charging Parties upon request. Non-confidential attachments also may be released to facilitate a more informed understanding of the Respondent's position. These procedures are set forth in the internal "Operational Directive to Release Position Statements Upon Request During Investigation" (December 22, 2015) and internal Questions and Answers, which are posted on inSite. The

following discussion summarizes and highlights the Directive's procedures with regard to confidentiality issues.

In the resource guide "Effective Position Statements," Respondents are advised not to include confidential business information or other information protectable from release to the Charging Party in the position statement, but to put it in a separate attachment labeled "confidential." Although we expect that most Respondents will follow this advice, it is still possible that Respondents will include some confidential or protectable information in the position statement or in attachments that are not identified as "confidential." Other Respondents may label some information (or even the entire position statement) as "confidential," "privileged," or "restricted" when it is not.

Because EEOC staff, not Respondent, will make the ultimate determination of what is, or is not, confidential, it is critical to review the entire position statement carefully before providing it to the Charging Party. Also review any attachments designated "non-confidential" if they are being provided to the Charging Party. Only the information EEOC deems non-confidential will be released to Charging Party.

Confidential information submitted by Respondents in position statements:

The position statement information that should be redacted before disclosure to the Charging Party includes:

- Sensitive medical information, except for the Charging Party's medical information;
- Social Security Numbers;
- Confidential commercial or financial information, e.g., possibly certain pay data, organizational charts, competitive contracts information, etc.;
- Trade secrets information (very unlikely—includes secret formulas, computer code, etc.);
- Non-relevant personally identifiable information of witnesses, third parties, comparators, and others, for example, dates of birth in non-age cases; home addresses; and personal phone numbers and email addresses;
- Non-relevant personal information about comparators, third parties, witnesses or their family members; and
- Any reference to charges filed by other Charging Parties.

Note: If the redactions will be more than minimal, you should ask the Respondent to place this information in a separate attachment marked

"confidential." If there is other information that the investigator believes should be redacted, she should check with her supervisor for guidance.

Generally, anything that would be redacted or withheld under FOIA or Section 83 should be redacted from the position statement before it is shared.

If the Respondent has labeled its entire position statement as "confidential," "privileged," or "restricted," review it to see if it, in fact, contains information that should be redacted. If it does not, it should be shared.

If you have questions about whether particular information from the Respondent's position statement or its attachments is protected by Title VII, ADA, or GINA confidentiality, you should consult with your supervisor or the Office of Legal Counsel. If you have any questions about whether information should be redacted for other reasons, you should consult your supervisor.

Preventing inadvertent public disclosure of position statements transmitted to Charging Parties:

When you share a position statement and any non-confidential attachments with a Charging Party, you need to take these steps to ensure that this information is not made public by EEOC:

- In the transmittal letter or email, include the following statement:

  "By accepting these documents, you agree that you will only share the contents with persons in a privileged relationship to you, such as a spouse, clergy, or legal, medical or financial advisor."

  A model transmittal letter is on inSite

- If you are sending the position statement by email, the transmission will be encrypted automatically by EEOC's email system. If the position statement or a non-confidential attachment happens to contain highly sensitive information, such as a Social Security Number or financial account information, you must make sure to redact this information before emailing the document.

- Take care in all cases to ensure that all email and postal mail is accurately addressed. These precautions are necessary with regard to any charge-related communications that may contain personally identifiable information (PII) about the Charging Party.

(3) After the Investigation

Disclosures of information in the charge file to the parties may be made pursuant to the procedures in Section 83 of the Compliance Manual and the Freedom of Information Act. However, once the charge has been closed, and if the 90-day suit filing period has expired and no lawsuit has been filed, the *Charging Party and the Respondent are then considered members of the public* and cannot receive information from the closed file.

PRIVACY ACT AND ETHICS REGULATIONS

The **Privacy Act** prohibits the EEOC from disclosing any record in EEOC's Title VII, ADA, GINA, EPA, or ADEA charge files without the prior written consent of the individual to whom the record pertains, unless disclosure is specifically permitted by the Act. The Privacy Act applies to records maintained under all of the statutes enforced by EEOC.

- The Privacy Act does not preclude the release of information in the charge file to the Charging Party or the Charging Party's representative.
- The Privacy Act does not prohibit the release of information in the charge file to the Respondent when a lawsuit is filed on the charge.

Additionally, **ethics regulations** prohibit government employees from disclosing or using any information that has not been made available to the general public to further their own private interests or that of another person (5 C.F.R. § 2635.703).

FOR MORE INFORMATION

Further information on confidentiality and ethics requirements for enforcement staff can be found at: http://insite.eeoc.gov/OLC/ethics.cfm.

Guidance on maintaining sensitive personally identifiable information can be found at http://insite.eeoc.gov/OIT/protecting-sensitive-info.cfm. All EEOC employees must be familiar with and act in compliance with this guidance.

For questions regarding charge file disclosures or redactions of Respondent position statements, staff should consult their office supervisors or managers. The Office of Legal Counsel should also be consulted for advice on specific questions regarding confidentiality, ethics, and Privacy Act requirements.

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Withheld pursuant to exemption

(b)(7)(E)

of the Freedom of Information and Privacy Act

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Withheld pursuant to exemption

(b)(7)(E)

of the Freedom of Information and Privacy Act

Attachment 4

Questions and Answers on Mixed Charge Files

Q. When a charge is closed that is a Mixed Charge File and subsequently a FOIA is received, how can we ensure all charge documents are reviewed?

A. Records Disclosure staff will rely on various items in the paper portion of the Mixed Charge File to identify the Digital Charge documents associated with the charge. This can be identified by the presence of a Digital Charge Log, the annotation of certain paper documents as duplicates of electronically saved documents, and by the (b)(5) prominently marked on the front of the charge file.

Q. When a redacted position statement has been provided to the Charging Party during the course of the investigation, how should this document be retained in the charge file?

A. Both the original position statement as well as the redacted position statement should be retained under Tab A. The documents retained in digital format should include the word "redacted" in the document name and if the documents are in paper format, an annotation should be made on top of the original position statement so that future reviewers are aware that a redacted version has already been developed and to ensure consistency in responding to future requests under FOIA or Section 83.

Q. What if I have a charge file that is paper based except for an email sent to the Respondent and the charge is categorized as (b)(5) for quick closure. Is this file classified as a Mixed Charge File? Is it permissible to print the email rather than create it as a digital document, so that the charge file is only comprised of paper documents?

A. One of the goals in moving to a digital system is to save staff's time and agency resources. If you save time by printing the email for inclusion in the file, then do so and classify it as an All-Paper Charge File, with a "P" marked on the front of the charge. If it's more efficient for you to upload the email and print the log of Digital Charge Documents, then do that.

Additional Questions:

If staff have additional questions that arise in organizing or maintaining a Mixed Charge File, they should first consult with their supervisor. If further guidance is needed, questions can be submitted to the GroupWise email box: MixedChargeFile@eeoc.gov. A response will be provided to the staff who sent the email as well as their Director, and when appropriate, additional guidance or answers to questions received will be provided to all staff and updated on inSite.

SECTION 28
CONTENT OF THE INVESTIGATIVE FILE

28.1 Introduction - The investigative file contains all material gathered in a charge, complaint or directed investigation: EEOC forms related to the case, in-house memoranda, notes, etc. A file's contents vary depending on the nature of the case, but must include all evidence submitted by the parties, affidavits, correspondence, investigative notes and analyses, brochures, union documents, and other relevant material. The file format described below may be modified to accommodate the unique requirements of particular cases, e.g., pattern or practice cases. However, in any modified format arrange the evidence in logical sequence so that users of the file may readily locate required information.

28.2 Arranging the Material - Organize the file materials into five sections (see §§ 28.3 thru 28.7). Filing materials chronologically is recommended and preferred, but is not mandatory as long as another logical and consistently utilized alternative is used. When arranging file materials chronologically, place documents in each section by date of receipt or preparation by the investigator, preferably with the most recent documents on top. Include original copies of documents. Do not alter or mark documents except as described in (a) below. Cover sheets can be used when the volume or type of evidence would benefit from an explanation (see §26.14(j)). However, any analysis of evidence on the cover sheet should not serve as a substitute for a thorough analysis of the relevant facts in the IM.

(a) Marking Exhibits and Tabbing the File - Letter and number each file exhibit in the bottom right-hand corner, using the appropriate section letter (e.g., A-1, A-2, B-1, B-2). When a file contains voluminous evidence, use tabs to separate each of the five sections and sub-tabs to separate materials within each section. Ordinarily prepare a table of contents for placement on top of Section A (see sample at Exhibit 28-A). Use the words "confidential witness" in place of the names of confidential witnesses (see §§ 23.7 and 23.8) in the table of contents (see § 83.5(a)). If a case is being closed without much evidence having been gathered, e.g., for lack of jurisdiction, a table of contents and tabs are normally not needed. When the file data is particularly voluminous, e.g., systemic cases, separate files for one or more sections of items may be set up. In those unusual cases where volume dictates the use of separate files for certain evidence, clearly mark each sub-file as to its contents, e.g., Section D - Promotion Issue, Section E - Wage Issue. Similarly, where extensive data compilation as to one or more issues requires the use of separate files, attach analyses of data within a section over the items being analyzed.

(b) Duplication of Information from Other Files - If an investigation covers more than one charge, a separate file which contains a copy of all investigative information common to the allegations (e.g., a union agreement, plant rules, etc.) may be set up for each charge. As an alternative, a central investigative file containing all documentary, statistical, and testimonial evidence relating to respondent's general policies and practices may be set up. Do not place information identifying specific persons as charging parties in the central file. If a central file is used, individual charging party (CP) files should contain jurisdictional information relating specifically to each CP. If any communication consists of a document signed by more than one party, place a copy of it in each file.

28.3 Tab A: Field Office Work Product - Include under this tab intra- and inter-agency deliberative memoranda and other documents regarding the subject matter of a case, procedural issues, investigative techniques, etc. Include in this section the investigative plan, the investigator's memorandum, LOD, backpay computations, conciliation/settlement agreement, legal unit memoranda,

all documents relating to requests for preliminary relief and subpoenas, and all closure documents (see Exhibits 28-A and 28-B).

28.4 Tab B: Jurisdictional Items - See Exhibit 28-B and the following:

(a) Charge - Include all documents relating to deferral or referral.

(b) Notification of Charge - Include a copy of Form 131/131-A, Notice of Charge, and items relating to Title VI/IX federal agency referrals.

28.5 Tab C: Complaining Party's Evidence - Include here all evidence received directly from the charging party/complainant. This would encompass affidavits and notes from telephone or in-person interviews with the party at any stage of the investigation, e.g., intake or PDI notes. Also, include any information provided by witnesses identified by charging party, e.g., affidavits and interview notes, and copies of any correspondence with them. Also, include documents submitted by charging party, e.g., payroll records, disciplinary notices, evaluations, commendations (see § 26). Attach documents provided during an interview to the interview notes or affidavit. If documents are mailed separately, attach the transmittal letter and envelope. If there is no letter accompanying the documents, attach a brief note indicating the date received. In Commissioner charge cases, include all documentation which led to the filing of the charge.

28.6 Tab D: Respondent's Evidence - Include here all information submitted by respondent attached to the specific RFI or notes of the in-person or telephonic request which prompted the submission. Any package of documents the respondent submits should remain intact. Individually mark each of the documents/groups of documents submitted as part of a package in the bottom right-hand corner as described in § 28.2(a). The sequential marking of documents should track the breakdown used by the respondent in its submission. It is not necessary, however, to mark each piece of paper attached to a position statement unless there is some particular reason for doing so. For example, it would be sufficient to note as separate items "Personnel File for CP", "Personnel File for Mr. X" etc. Also, include in this section information provided by witnesses identified by respondent (e.g., affidavits, interview notes, documents) and copies of correspondence with them.

28.7 Section E: Other Evidence/Miscellaneous Materials - Include here the information gathered other than that provided by the respondent, charging party or witnesses identified by either of them. This could include affidavits from witnesses identified by the investigator; notes of on-site investigative activity, e.g., plant tour; charts, graphs, diagrams, statistical analyses; EEO and labor market data; computations of backpay or monetary benefits; and the respondent's compliance history (see Exhibits 28-A and 28-B).

28.8 Left Side of the File - Place the case log on the left side of the file. Enter on the log the date and nature of all actions and all in-person and telephonic contacts with the parties and witnesses (see § 29.6). Report case management review activities on the case log as well. The case log documents that an activity or contact has taken place but does not contain analyses of documents or summaries of meetings or calls. See Exhibit 28-B for additional items to be placed on the left side of the file.

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SAMPLE TABLE OF CONTENTS
Exhibit 28-A

A. Field Office Work Product

1. Conciliation/Settlement Agreement
2. Form 161, Notice of Right to Sue, or Form 256, Transmittal to DOJ
3. Charging Party's request for Notice of Right to Sue
4. Letter informing Charging Party that case is being forwarded to DOJ
5. Investigator's Memorandum and LOD/Decision
6. Form 291, Recommendation for Dismissal, and dismissal documents
7. Form 154, Request for Withdrawal of Charge, and written reply to request
8. Form 411-A, Substantial Weight Review
9. Intra- and inter-agency memoranda and letters
10. Form 136, Subpoena
11. Form 378, Summary of Relief, and computations of backpay, monetary benefits

B. Jurisdictional Items

1. Form 5, Charge of Discrimination, and any prior correspondence
2. Form 151, Third Party Certification of Charge
3. Form 212-A, Charge Transmittal, and other deferral/referral documents
4. Title VI/IX/Rehab. Act federal agency referral documents
5. Form 131/131-A, Notice of Charge
6. Respondent Coverage and Exemption Documentation

C. Charging Party's/Complainant's Evidence (Include notes of all CP contacts)

1. Notes of Pre-Determination Interview
2. Copies of correspondence (except closure documents) with CP or attorney
3. CP's Affidavit, Form 283, Charge Questionnaire, and documents submitted
4. Affidavits, interview notes, documents from witnesses identified by CP

D. Respondent's Evidence

1. Notes of Pre-Determination Interview
2. Position Statement and documentary and statistical evidence submitted
3. Copies of RFIs and notes of in-person and telephonic data requests
4. Other corresp. (except closure documents), notes of discussions with R, R's atty.
5. Affidavits, interview notes, documents from witnesses identified by respondent

E. Other Evidence/Miscellaneous Materials

1. Affidavits, interview notes, documents from witnesses identified by investigator
2. Notes of on-site investigative activity, investigator's observations
3. Investigator's charts, graphs, diagrams, and statistical analyses.
4. EEO and labor market data, Respondent's compliance history

Left Side of File

1. Form 159, Case Log
2. Form 379, Receipt for Benefits, or other evidence of payment
3. Form 167, Non-disclosure Agreement
4. Form 341, Agreement to Represent
5. Case management review documents

CONTENTS OF INVESTIGATIVE FILE BY SECTION/TAB

Exhibit 28-B

WHAT YOU SHOULD KNOW BEFORE YOU FILE A CHARGE WITH EEOC

WHAT DOES THE EEOC DO?
The EEOC is a law enforcement agency that investigates or looks into claims that employers, employment agencies or labor organizations discriminated against employees or applicants because of their race, color, religion, sex, national origin, age (40 or older), disability, or genetic information. The EEOC often tries to settle charges with the help of a mediator. Sometimes, the EEOC takes cases to court. The EEOC does not charge a fee to investigate, mediate or litigate charges. The EEOC also educates the public about job discrimination.

WHAT IS THE FIRST STEP?
If you believe you have experienced job discrimination, you should contact us. We will ask you why you believe the employer discriminated against you. We may ask you to fill out an intake questionnaire. Be sure to give us any evidence you have to show that discrimination occurred. Based on your answers and the information you give us, we will tell you if your claim fits within the laws we enforce. In any case, you have the right to file a charge of job discrimination to keep your right to file in federal court.

WHAT IS A CHARGE?
A charge is a signed, written complaint about a negative job action based on race, color, religion, sex, national origin, age or disability that requests that the EEOC or a state or local government agency with similar laws take action to remedy the discrimination. EEOC has a charge form to use to make sure you give us the specific information needed in a charge. EEOC staff will assist you in drafting your charge. We will ask you to read and sign it. You will receive a copy of the charge with a charge number.

IS THERE A TIME LIMIT TO FILE A CHARGE?
You have either 180 or 300 days from the day you knew about the negative job action to file a charge. It depends on whether the employer is located in a place where a state or local government agency has laws similar to the EEOC's laws. We can help you figure out how much time you have. Act quickly to keep your rights by signing and filing a timely charge.

DO YOU HAVE THE RIGHT TO A LAWYER?
You have the right to bring a lawyer with you when you talk to the EEOC but you do not have to have one. If you would like to have a lawyer speak for you with the EEOC, your lawyer must give us a letter that tells us he or she represents you. The EEOC cannot provide a lawyer for you and cannot pay for the cost of your lawyer.

WHAT HAPPENS WHEN YOU FILE A CHARGE?
When you file a charge, the EEOC must give the employer accused of discrimination a copy of the charge, which includes your name. If you contact the EEOC but decide not to file a charge, we will not tell the employer that you contacted us. If you do not file a charge, you will not be able to file suit in federal court based on the laws we enforce, with one exception: individuals with Equal Pay Act (EPA) claims may go to court without filing a charge but must do so within two years of the

negative job action. If the EEOC does not have jurisdiction, or if your charge is untimely, we will close the investigation of your charge quickly. We may also close your charge if we decide that we probably will not be able to determine if the law was violated. Then we will give you a letter or notice of your right to file suit in federal court within 90 days. If we do not close your charge quickly, we may send it to mediation or to investigation.

WHAT IS MEDIATION?

Before we look into your claims, the EEOC sometimes asks if you and the employer would like to try to settle your case with the help of a mediator. Both you and the employer must agree to mediate for mediation to occur. The mediator does not decide who is right or wrong. Instead, the mediator tries to help you and the employer settle your claims. What you talk about in mediation is private. If you and the employer agree on how to settle your case, the EEOC will close your case. If you and the employer do not agree on how to settle your case, we will send your case to investigation.

HOW DO WE INVESTIGATE?

If your charge is not otherwise resolved, the EEOC will assign an investigator as soon as we can to look into your claims. The investigator does not take sides. The investigator may ask you for the names of people who have information about your claims of discrimination, and may talk to some or all of them. You should give the investigator anything you have in writing that helps to prove your claims. The investigator will usually ask the employer to tell their side of the story as well and ask for your response. We may also request a written position statement from the employer. If so, you may request a copy of the employer's position statement. You will have an opportunity to respond to what the employer says.

We will review the information you provide and the information provided by the employer to make a decision in your case. If the information we have does not support your claims, the EEOC may stop investigating and close your case. The time it takes to resolve a charge can vary greatly, depending on the facts of the case and the size of our workload. It may take six to nine months or even longer to process your charge.

CAN YOU FILE A LAWSUIT BEFORE WE FINISH OUR INVESTIGATION?

If you want to file a lawsuit in federal court before we finish our investigation, you may ask us in writing for a letter or a notice of your right to sue. If you ask more than 180 days after filing a charge, the law requires us to give it to you. If you ask before 180 days have passed, we can give you the notice only if we cannot finish our investigation within 180 days. In most cases, once we give you a notice of your right to sue, we close the case. If you file an age discrimination charge, however, you can file a suit in court after 60 days without such a notice. An individual with an EPA claim may go to court directly without filing a charge.

WHAT HAPPENS AFTER THE INVESTIGATION?

After we finish looking into your claims, we let you and the employer know what we decide. Sometimes, the information is not enough to show that the employer violated the law. In that case, we will dismiss your charge and give you a letter or notice of your right to file suit in federal court within 90 days. If you do not file a suit within 90 days, you will lose your right to sue in court. When the information shows that the employer probably violated the law, we try to settle the case in conciliation.

WHAT IS CONCILIATION?
When the EEOC determines that the employer violated the law, we invite you and the employer to try to settle the case. If the EEOC, you and the employer agree on how to settle your case, we will close the case. If the EEOC, you and the employer do not agree, we will decide whether to file a lawsuit in federal court or whether to provide you with a letter or a notice of your right to sue so that you can file your own lawsuit. You then have 90 days to file suit in federal court.

WHEN DOES THE EEOC LITIGATE?
In some cases, when the EEOC determines that the employer violated the law and we have been unable to reach a voluntary settlement, we file a lawsuit in federal court. We get about 90,000 charges of discrimination each year, and we file about 150 lawsuits each year. When the EEOC decides whether to file a lawsuit, we look at how serious the violation is, what the legal issues are, and whether other people would benefit from the lawsuit. If we decide not to sue in your case, we will give you a right to sue letter so that you can file your own lawsuit in court. You then have 90 days to file suit.

IS RETALIATION AGAINST THE LAW?
It is against the law for an employer to retaliate against you because you complained about job discrimination, because you gave evidence in a job discrimination matter, or because you filed a charge of job discrimination with the EEOC. If this happens to you, you should contact us as soon as possible to talk about whether you should file a retaliation charge.

KEEP US INFORMED
Once you file a charge with the EEOC, you must tell us if you move or get a new phone number or e-mail address. We may need to talk to you to get more information. If the EEOC cannot reach you to get necessary information, your charge may be dismissed.

KEEP YOUR DOCUMENTS – BOTH PAPER AND ELECTRONIC
If you file a charge, you must keep anything that might be evidence related to your charge. This includes ***all*** documents, communications, and electronic information that are potentially related to your EEOC charge, including the harm caused by the discrimination, and all records of your communications with the EEOC. Please see the EEOC Handout, "What You Should Do After You Have Filed a Charge," at www.eeoc.gov for additional information.

DO YOU HAVE MORE QUESTIONS?
You can find the answers to many of your questions on our website, www.eeoc.gov. You can also access an interactive questionnaire at https://apps.eeoc.gov/eas to help you decide if the EEOC is the right agency to assist you. You can also find information on where to file an employment discrimination charge through the interactive questionnaire. For more information about wage claims, please see https://www.eeoc.gov/laws/types/equalcompensation.cfm.

1-800-669-4000 (Voice)
1-844-234-5122 (ASL Video Phone)
1-800-669-6820 (TTY)
info@eeoc.gov
www.eeoc.gov
https://apps.eeoc.gov/eas

WHAT YOU SHOULD DO
AFTER YOU HAVE FILED A CHARGE WITH EEOC

➢ *KEEP YOUR DOCUMENTS – BOTH PAPER AND ELECTRONIC*

Now that you have filed an EEOC charge, you must keep anything that might be evidence related to your charge. This includes ***all*** documents, communications, and electronic information that are potentially related to your EEOC charge, including the harm caused by the discrimination, and all records of your communications with the EEOC. Even if you are not sure whether the information is relevant to your discrimination claim, please do not throw it away or delete it.

➢ *WHAT INFORMATION MUST YOU KEEP?*

- **Paper documents**, such as:
  - Employee manuals, pay stubs, work schedules
  - Letters, memos, your notes
  - Pictures, drawings, charts, whether or not they contain words
- **Electronic information**, such as:
  - E-mails, text messages, tweets, and social media posts and pictures
  - Voice messages, video and sound recordings
  - Word processing documents, electronic calendar entries
- **Electronic memory on devices or the devices themselves**, such as:
  - Memory on computers, laptops, tablets, cell phones
  - Computers, laptops, tablets, cell phones
  - Do not delete, replace, alter, "wipe," or "clear" your computer hard drive, electronic tablet, or cell phone, and do not change or remove Internet posts, without retaining an electronic copy. If you dispose of any old computers, phones or devices, make sure you make and keep an electronic copy of all potentially relevant information on the device.
- These are some examples and not a complete list.
- If you have questions about what you should or should not do, please contact your investigator.

Why must you keep this information? It might be evidence related to your charge. We are required by the courts to ensure that all potentially relevant information is retained. **Please note that failure to keep these records may cause you to lose your case, or to lose the right to recover money lost due to the discrimination.**

What happens to your information? Your investigator will discuss with you what information is needed by the EEOC to investigate your charge. Information that you provide that happens to be private or personal in nature will not be disclosed by the EEOC during its investigation, and if the EEOC files suit on your charge, we will do our best to keep such information out of the court proceedings.

Please see page 2 for additional important information.

➢ *LOOK FOR WORK IF YOU ARE OUT OF WORK*

If you lost your job or were not hired due to discrimination, you may be entitled to the pay or wages you lost. However, you cannot receive lost wages unless you can show that you looked for another job to replace the one you lost or were denied due to discrimination. In order to prove you searched for work, you must keep copies of all letters, emails, or other evidence of your job search. If you succeed in finding a new job but it pays less than the job you lost, you may be entitled to the difference in pay. Therefore, it is necessary to keep all evidence of your job search even if you find another job.

In addition to looking for work, you should keep good records of your job search so you can prove that you have tried to find a comparable job. If you are out of work because of discrimination, be sure to save ***all*** documents and communications, including e-mails, relating to your job search.

➢ *WHAT ARE RECORDS OF YOUR JOB SEARCH?*

The following types of information can prove that you have tried to find work:

- copies of job applications and resumes
- a list of all the companies you contact about jobs by phone, letter or in-person
- copies of e-mails or letters that you send to or receive from companies where you have asked about work or submitted an application
- a list all of the places where you apply and for each one,
    a. the date of the application;
    b. the position you were seeking;
    c. the response you received from your application, such as rejection letters or invitations to interview;
    d. whether you were interviewed and the date of the interview;
    e. the results of the interview;
    f. whether you turned down a job offer, and if you did, why
- notes about what you did to look for work (for example, searching the newspaper or Internet or contacting employment agencies) and the dates that you conduct the search
- copies of your pay stubs or earnings records if you find another job.

If you have questions about what you are required to do, please contact your investigator.

➢ *KEEP US INFORMED*

Once you file a charge with the EEOC, you must tell us if you move or get a new address, telephone number, or e-mail address. We may need to talk to you to get more information. If the EEOC cannot reach you to get necessary information, your charge may be dismissed.

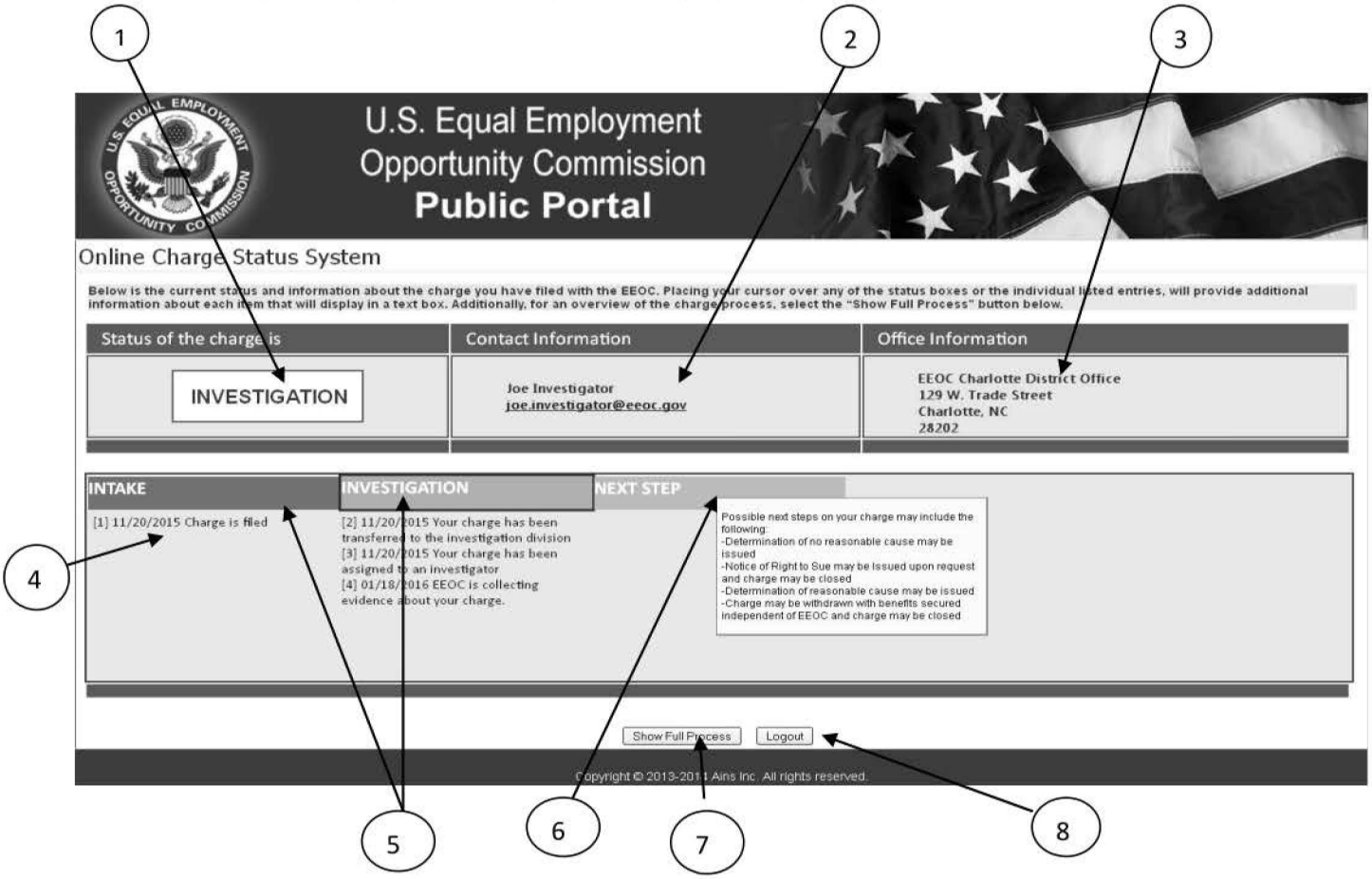
➢ *CALL IF YOU HAVE QUESTIONS*

Your investigator will discuss with you the documents and other evidence we need to investigate your charge. If you have any questions, or for inquiries about the status of your case, please contact your investigator directly or call 1-800-669-4000.

EEOC Online Charge Status System Tip Sheet

Find out about the status of your charge of discrimination any time, day or night, using the EEOC Online Charge Status System. The system is available for charges that were filed on or after September 2, 2015.

- Access the Online Charge Status System via this link https://publicportal.eeoc.gov/portal/ or select the "My Charge Status" button on www.eeoc.gov.
- Enter your assigned charge number (found in the upper right hand corner on your discrimination charge form) and your zip code (as it appears on your discrimination charge form) to sign in. (If you have provided a new address and zip code to EEOC, use the new zip code.) You will be asked to enter a security code displayed in a box on the sign-in screen that is provided to assure additional security for the system.
- After you have signed into the Online Charge Status System, you will see the screen display pictured below. The numbers on the screen shot refer to the features explained beneath it.*

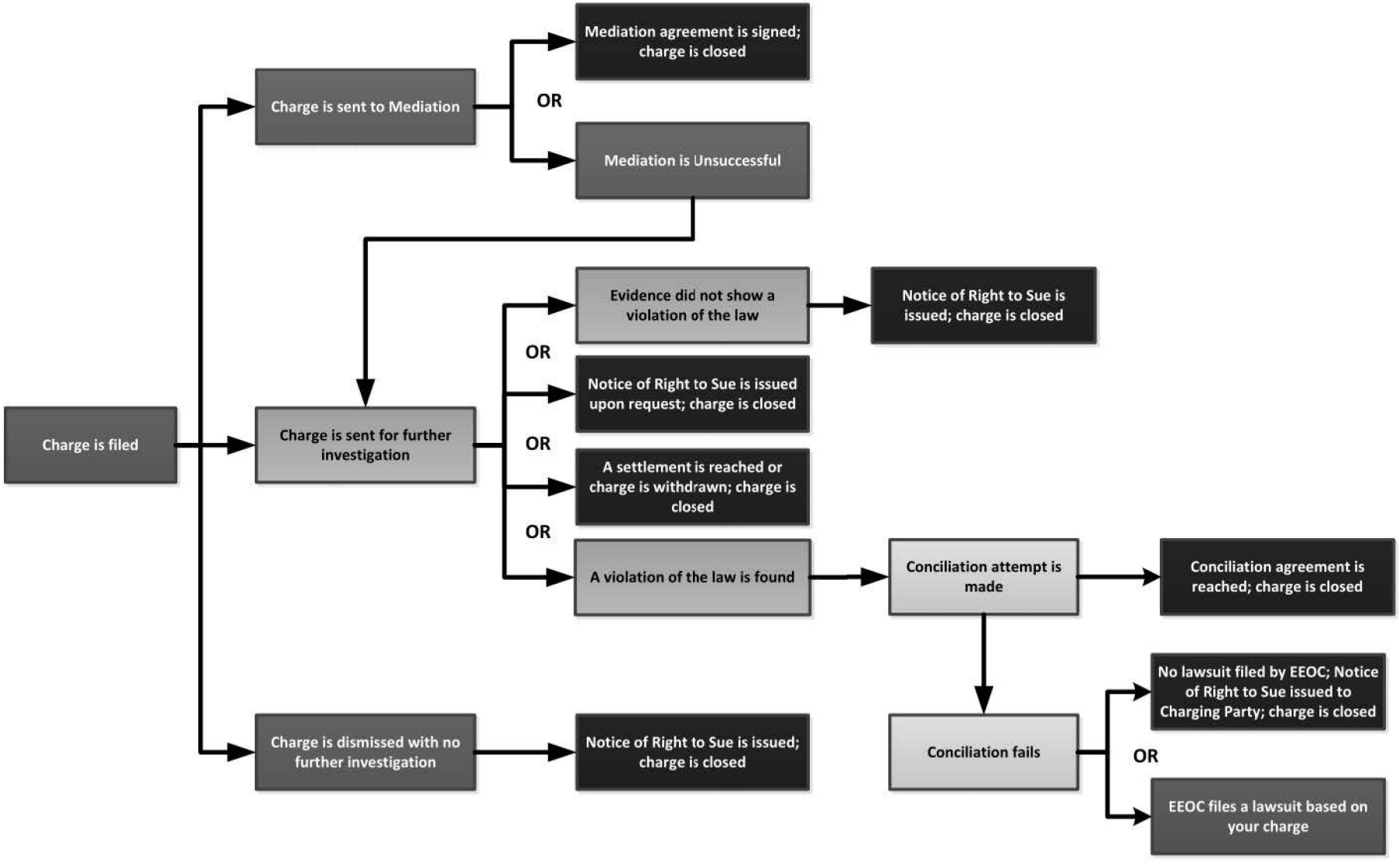


1. A quick view of the stage in the process at which your charge is currently.
2. The name and contact information of the EEOC staff member assigned to your charge or a note that your charge is pending assignment.
3. The EEOC office (and its address) that is handling your charge.
4. The specific actions the EEOC has taken on your charge, numbered sequentially, and the date of each action. (hold cursor over each action to read further details about the task).
5. The general steps in the process, with additional explanations that display when you hold your cursor over a colored box.
6. The range of next steps possible in the investigative process, which pops up when the cursor is held over this box.
7. The flow of the overall investigative process, which comes up when you click on this box.
8. Ends your session on the Online Charge Status System.

**Not every stage of the enforcement process will display for every charge, as each charge follows the process most appropriate to the facts in the charge and the stages of the investigation.*

Keep in mind that the EEOC process takes time, so there will be gaps between entries about your charge in the Online Charge Status System. Even when you do not see any change in the status of your charge, EEOC staff are hard at work.

What Happens to Your EEOC Charge



This is a general overview of the possible paths a charge of discrimination may take. There may be differences in the path based on many factors.

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
INTAKE QUESTIONNAIRE

Please immediately complete this entire form and return it to the U.S. Equal Employment Opportunity Commission ("EEOC"). **REMEMBER**, a charge of employment discrimination must be filed within the time limits imposed by law, within 180 days or in some places within 300 days of the alleged discrimination. When we receive this form, we will review it to determine EEOC coverage. **Answer all questions completely, and attach additional pages if needed to complete your responses. If you do not know the answer to a question, answer by stating "not known." If a question is not applicable, write "N/A." (PLEASE PRINT)**

1. Personal Information

Last Name: _____ First Name: _____ MI: _____

Street or Mailing Address: _____ Apt or Unit #: _____

City: _____ County: _____ State: _____ Zip: _____

Phone Numbers: Home: (____) _____ Work: (____) _____

Cell: (____) _____ Email Address: _____

Date of Birth: _____ Sex: ☐ Male ☐ Female Do You Have a Disability? ☐ Yes ☐ No

Please answer each of the next three questions. i. Are you Hispanic or Latino? ☐ Yes ☐ No

ii. What is your Race? Please choose all that apply. ☐ American Indian or Alaskan Native ☐ Asian ☐ White
☐ Black or African American ☐ Native Hawaiian or Other Pacific Islander

iii. What is your National Origin (country of origin or ancestry)? _____

Please Provide The Name Of A Person We Can Contact If We Are Unable To Reach You:

Name: _____ Relationship: _____

Address: _____ City: _____ State: _____ Zip Code: _____

Home Phone: (____) _____ Other Phone: (____) _____

2. I believe that I was discriminated against by the following organization(s): (Check those that apply)

☐ Employer ☐ Union ☐ Employment Agency ☐ Other (Please Specify) _____

Organization Contact Information (If the organization is an employer, provide the address where you actually worked. If you work from home, check here ☐ and provide the address of the office to which you reported.) **If more than one employer is involved, attach additional sheets.**

Organization Name: _____

Address: _____ County: _____

City: _____ State: ____ Zip: _____ Phone: (____) _____

Type of Business: _____ Job Location if different from Org. Address: _____

Human Resources Director or Owner Name: _____ Phone: (____) _____

Number of Employees in the Organization at All Locations: Please Check (✓) One

☐ Fewer Than 15 ☐ 15 – 100 ☐ 101 – 200 ☐ 201 – 500 ☐ More than 500

3. Your Employment Data (Complete as many items as you are able.) **Are you a federal employee?** ☐ Yes ☐ No

Date Hired: _____ Job Title At Hire: _____

Pay Rate When Hired: _____ Last or Current Pay Rate: _____

Job Title at Time of Alleged Discrimination: _____ Date Quit/Discharged: _____

Name and Title of Immediate Supervisor: _____

If Job Applicant, Date You Applied for Job _____ Job Title Applied For _____

4. What is the reason (basis) for your claim of employment discrimination?

FOR EXAMPLE, if you feel that you were treated worse than someone else because of race, you should check the box next to Race. *If you feel you were treated worse for several reasons, such as your sex, religion and national origin, you should check all that apply. If you complained about discrimination, participated in someone else's complaint, or filed a charge of discrimination, and a negative action was threatened or taken, you should check the box next to* Retaliation.

☐ Race ☐ Sex ☐Age ☐ Disability ☐ National Origin ☐ Religion ☐ Retaliation ☐ Pregnancy ☐ Color (typically a difference in skin shade within the same race) ☐ Genetic Information; circle which type(s) of genetic information is involved: i. genetic testing ii. family medical history iii. genetic services (genetic services means counseling, education or testing)

If you checked color, religion or national origin, please specify:_____

If you checked genetic information, how did the employer obtain the genetic information?_____

_____

Other reason (basis) for discrimination (Explain): _____

5. What happened to you that you believe was discriminatory? Include the date(s) of harm, the action(s), and the name(s) and title(s) of the person(s) who you believe discriminated against you. **Please attach additional pages if needed.**
(Example: 10/02/06 – Discharged by Mr. John Soto, Production Supervisor)

A. Date: _____ **Action**: _____

_____

Name and Title of Person(s) Responsible: _____

B. Date: _____ **Action**: _____

_____

Name and Title of Person(s) Responsible _____

6. Why do you believe these actions were discriminatory? Please attach additional pages if needed.

_____

_____

7. What reason(s) were given to you for the acts you consider discriminatory? By whom? His or Her Job Title?

_____

_____

8. Describe who was in the same or similar situation as you and how they were treated. For example, who else applied for the same job you did, who else had the same attendance record, or who else had the same performance? Provide the race, sex, age, national origin, religion, or disability of these individuals, if known, and if it relates to your claim of discrimination. For example, if your complaint alleges race discrimination, provide the race of each person; if it alleges sex discrimination, provide the sex of each person; and so on. Use additional sheets if needed.

Of the persons in the same or similar situation as you, who was treated *better* than you?

Full Name	Race, Sex, Age, National Origin, Religion or Disability	Job Title	Description of Treatment

A._____

_____

B._____

_____

Of the persons in the same or similar situation as you, who was treated *worse* than you?

Full Name	Race, Sex, Age, National Origin, Religion or Disability	Job Title	Description of Treatment

A. _____

_____

B. _____

_____

Of the persons in the same or similar situation as you, who was treated the *same* as you?

Full Name	Race, Sex, Age, National Origin, Religion or Disability	Job Title	Description of Treatment

A. _____

_____

B. _____

_____

Answer questions 9-12 only if you are claiming discrimination based on disability. If not, skip to question 13. Please tell us if you have more than one disability. Please add additional pages if needed.

9. Please check all that apply:

- ☐ Yes, I have a disability
- ☐ I do not have a disability now but I did have one
- ☐ No disability but the organization treats me as if I am disabled

10. What is the disability that you believe is the reason for the adverse action taken against you? Does this disability prevent or limit you from doing anything? (e.g., lifting, sleeping, breathing, walking, caring for yourself, working, etc.).

_____

_____

_____

11. Do you use medications, medical equipment or anything else to lessen or eliminate the symptoms of your disability?

☐ Yes ☐ No

If "Yes," what medication, medical equipment or other assistance do you use?

_____

_____

12. Did you ask your employer for any changes or assistance to do your job because of your disability?

☐ Yes ☐ No

If "Yes," when did you ask? _____ How did you ask (verbally or in writing)? _____

Who did you ask? (Provide full name and job title of person)

_____

Describe the changes or assistance that you asked for: _____

_____

_____

How did your employer respond to your request? _____

_____

13. Are there any witnesses to the alleged discriminatory incidents? If yes, please identify them below and tell us what they will say. (Please attach additional pages if needed to complete your response)

	Full Name	Job Title	Address & Phone Number	What do you believe this person will tell us?
A.				
B.				

14. Have you filed a charge previously on this matter with the EEOC or another agency? ☐ Yes ☐ No

15. If you filed a complaint with another agency, provide the name of agency and the date of filing: _____

16. Have you sought help about this situation from a union, an attorney, or any other source? ☐ Yes ☐ No
Provide name of organization, name of person you spoke with and date of contact. Results, if any?

Please check one of the boxes below to tell us what you would like us to do with the information you are providing on this questionnaire. If you would like to file a charge of job discrimination, you must do so either within 180 days from the day you knew about the discrimination, or within 300 days from the day you knew about the discrimination if the employer is located in a place where a state or local government agency enforces laws similar to the EEOC's laws. **If you do not file a charge of discrimination within the time limits, you will lose your rights. If you would like more information before filing a charge or you have concerns about EEOC's notifying the employer, union, or employment agency about your charge, you may wish to check Box 1. If you want to file a charge, you should check Box 2.**

BOX 1 ☐ I want to talk to an EEOC employee before deciding whether to file a charge. I understand that by checking this box, I have not filed a charge with the EEOC. **I also understand that I could lose my rights if I do not file a charge in time.**

BOX 2 ☐ I want to file a charge of discrimination, and I authorize the EEOC to look into the discrimination I described above. I understand that **the EEOC must give the employer, union, or employment agency that I accuse of discrimination information about the charge, including my name.** I also understand that the EEOC can only accept charges of job discrimination based on race, color, religion, sex, national origin, disability, age, genetic information, or retaliation for opposing discrimination.

_____ **Signature**

_____ **Today's Date**

PRIVACY ACT STATEMENT: This form is covered by the Privacy Act of 1974: Public Law 93-579. Authority for requesting personal data and the uses thereof are:

1) FORM NUMBER/TITLE/DATE. EEOC Intake Questionnaire (9/20/08). **2) AUTHORITY.** 42 U.S.C. § 2000e-5(b), 29 U.S.C. § 211, 29 U.S.C. § 626. 42 U.S.C. 12117(a)

3) PRINCIPAL PURPOSE. The purpose of this questionnaire is to solicit information about claims of employment discrimination, determine whether the EEOC has jurisdiction over those claims, and provide charge filing counseling, as appropriate. Consistent with 29 CFR 1601.12(b) and 29 CFR 1626.8(c), this questionnaire may serve as a charge if it meets the elements of a charge. **4) ROUTINE USES.** EEOC may disclose information from this form to other state, local and federal agencies as appropriate or necessary to carry out the Commission's functions, or if EEOC becomes aware of a civil or criminal law violation. EEOC may also disclose information to respondents in litigation, to congressional offices in response to inquiries from parties to the charge, to disciplinary committees investigating complaints against attorneys representing the parties to the charge, or to federal agencies inquiring about hiring or security clearance matters. **5) WHETHER DISCLOSURE IS MANDATORY OR VOLUNTARY AND EFFECT ON INDIVIDUAL FOR NOT PROVIDING INFORMATION.** Providing this information is voluntary but the failure to do so may hamper the Commission's investigation of a charge. It is not mandatory that this form be used to provide the requested information.

ANNOTATED INTERVIEW QUESTIONS FOR ASSESSING DISABILITY UNDER THE AMERICANS WITH DISABILITIES ACT AMENDMENTS ACT (ADAAA)

1. What is the condition that you believe was the basis for the employer's alleged discrimination? [Note: tailor the questions to "record of" or "regarded as" disability, as necessary.] Do you have any documentation (e.g., medical records or a doctor's note) showing that you have this condition?

Explanation: The ADA prohibits discrimination on the basis of disability. The term "disability" is defined in the statute as a physical or mental impairment that substantially limits a major life activity, a record of such an impairment, or being regarded as having such an impairment. Discrimination includes failing to provide a reasonable accommodation for someone with a substantially limiting impairment or a record of a substantially limiting impairment. Individuals covered only under the "regarded as" prong of the definition of "disability" are not entitled to reasonable accommodation.

The ADAAA reinstated Congress' intent that the definition of the term "disability" be interpreted broadly. The ADAAA explicitly rejected certain Supreme Court interpretations of the term "disability" and a portion of the old EEOC regulations that Congress found had inappropriately narrowed the definition of disability.

By asking this first question, you are determining whether the CP has a physical or mental impairment, a record of an impairment, or has been regarded as having an impairment. A "physical or mental impairment" can include a health condition, a disease, a congenital disorder, disfigurement or anatomical loss, sensory loss, etc.

Note: If the condition is one of those listed at 29 C.F.R. 1630.2(j)(3)(iii), the condition should easily be found to be a disability. These conditions are: Deafness; blindness; partially or completely missing limbs; mobility impairments requiring the use of a wheelchair; intellectual disability (formerly termed mental retardation); autism; cerebral palsy; major depressive disorder; bipolar disorder; post-traumatic stress disorder; obsessive compulsive disorder; schizophrenia; cancer; diabetes; epilepsy; HIV infection; multiple sclerosis; and muscular dystrophy. Even though much of the information in this questionnaire will not be necessary to establishing disability if the condition is on the (j)(3)(iii) list, the questions below should be asked for the purposes of intake and as the law under the ADAAA develops.

2. What did the employer do or say that makes you think that your condition is the reason for the employer taking the action you think is discrimination?

Explanation: The ADA prohibits discrimination "on the basis of" disability. This question helps establish whether there is a nexus between the employer's action and the CP's condition. This will be important for establishing a violation of the ADA.

In addition, under the "regarded as" prong of the definition of disability, an employer "regards" an individual as having a disability if it takes an action prohibited by the ADA (e.g., failure to hire, termination, or demotion) based on an individual's impairment or on an impairment the employer believes the individual has. This question can help establish coverage under the regarded as prong.

Note: This new formulation of "regarded as" having a disability is different from the original ADA

formulation, which required an individual seeking coverage under this part of the definition to show that a covered entity believed the individual's impairment (or perceived impairment) substantially limited performance of a major life activity. The ADAAA amended the ADA's "regarded as" prong so that there is no need to show that the impairment that was the basis for the employer's allegedly discriminatory action actually substantially limits a major life activity.

3. How long have you had this condition? How long is your condition expected to last?

Explanation: An individual will be covered under the "regarded as" prong of the definition of "disability" if the impairment on the basis of which an employer takes an allegedly discriminatory action is not BOTH transitory and minor. "Transitory" is defined as lasting or expected to last for six months or less. This question helps establish whether the impairment is transitory. Note, however, that even short term impairments, even those lasting fewer than six months, can be disabilities under the "actual" or "record of" prongs of the ADA.

4. If your condition comes and goes, please explain. If your condition is in remission (i.e., is not currently active), please explain.

Explanation: Under the ADAAA, episodic impairments or impairments that are in remission are disabilities if they are substantially limiting when *active*. These questions are helpful in understanding whether the condition is episodic or in remission and what the condition is like in its active state.

5. Does your condition affect a major bodily function? If yes, please explain. (You may need to provide examples, such as diabetes affects endocrine function, HIV affects the immune system, and asthma affects respiratory function.) Below are some examples of major bodily functions.

___immune system function	___special sense organs and skin	___bowel function
___digestive functions	___genitourinary function	___brain function
___bladder function	___neurological function	___respiratory function
___circulatory function	___cardiovascular function	___lymphatic function
___endocrine function	___hemic function	___reproductive function
___musculoskeletal function	___normal cell growth	___ other

Note: The operation of a major bodily function includes the operation of an individual organ within a body system (e.g., liver function, kidney function).

For example:

- a coronary blockage (an impairment) decreases blood flow to the heart (a circulatory or cardiovascular function);
- asthma (an impairment) makes it difficult to breathe (a respiratory function);
- rheumatoid arthritis (an impairment) makes it painful to move joints (a musculoskeletal function);
- hypothyroidism (an impairment) adversely affects the ability of the thyroid to produce thyroid hormone (an endocrine function);
- monocular vision (an impairment) makes seeing difficult (a function of a special sense organ); and
- Parkinson's disease (an impairment) makes it difficult to control hands, arms and legs (a

neurological function).

The ADAAA specifically defines "major life activities" as including "major bodily functions." As a result, if an impairment substantially limits a major bodily function, the impairment is a disability under the ADAAA. In many cases it will be easier to establish coverage under the ADAAA through evidence that the CP's condition substantially limits a major bodily function, rather than a traditional major life activity. In addition to asking the CP questions, evidence can also be obtained from the CP's health care provider, medical reference books, or reputable medical sites on the internet (e.g., www.nih.gov; www.cdc.gov)

6. Which of the following activities are affected by your condition? (These are traditional major life activities. Note that the condition has to substantially limit only ONE major life activity in order to be a disability. Also note that working is the major life activity of last resort. See Question 9 below for a discussion of the major life activity of working. But check all that apply.)

– walking	– speaking	– learning
– standing	– breathing	– thinking
– sitting	– lifting	– concentrating
– seeing	– reaching	– interacting with others
– hearing	– sleeping	– reproduction or sexual relations
– eating	– caring for self	– eliminating/controlling bodily waste
– bending	– reading	– performing manual tasks
– communicating	_ working	– other

Explanation: While the ADAAA added "major bodily functions" to the list of major life activities, "traditional" major life activities like those listed above may still be relevant in assessing whether an individual's impairment is substantially limiting.

Where CP does not describe limitations in terms of the specifically listed MLAs, an investigator should determine whether the limitations described would add up to limitations of one of the listed activities (e.g., where someone finds it difficult to do shopping, work around the house, cook, etc., the CP may be describing a substantial limitation in caring for self).

Examples of impairments that may substantially limit traditional major life activities include:

- "slipped disc" (a back impairment) that causes pain when sitting;
- carpel tunnel syndrome (impairment) that makes it difficult for the individual to perform manual tasks such as tying shoes, gripping, and keyboarding; dyslexia (impairment) that makes reading slow or difficult;
- torn ligament in knee (impairment) that causes difficulty in walking.

7. Is it harder for you to do these activities than it is for most people (when your condition is active)? If so, how? (Note: ask if the individual can do the activity for less time or to a lesser extent, needs more time to perform the activity, experiences pain or performs the activity in a different way than most other people).

Explanation: In assessing whether a person is substantially limited in a major life activity, including a

major bodily function, it may be helpful to consider the "condition, manner, or duration" under which the major life activity can be performed or the major bodily function operates. Assessing the condition, manner, or duration under which a major life activity can be performed may include consideration of the difficulty, effort, or time required to perform a major life activity; pain experienced when performing a major life activity; the length of time a major life activity can be performed; and/or the way an impairment affects the operation of a major bodily function.

Where the impairment is episodic or in remission, focus on what limitations exist or would exist if the impairment is active.

8. Do you take any medications, receive any treatment, or use any assistive devices for your condition? Or have you developed any coping behaviors to modify the effects of the impairment? If yes, please explain how they affect you? What would happen if you did not take your medications, receive this treatment, use your coping behaviors, or use your assistive device? (Note: assess impact on the major bodily function, or the impact on the individual's ability to perform a major life activity, in light of the person NOT USING any mitigating measures).

Explanation: Medications, treatments, and assistive devices are collectively called "mitigating measures." The ADAAA directs that the positive (or ameliorative) effects from an individual's use of one or more mitigating measures should be ignored in determining if an impairment substantially limits a major life activity. In other words, if a mitigating measure eliminates or reduces the symptoms or impact of an impairment, that fact cannot be used in determining if a person meets the definition of disability. Instead, the determination of disability must focus on whether the individual would be substantially limited in performing a major life activity ***without*** the mitigating measure. This may mean focusing on the extent of limitations prior to use of a mitigating measure or on what would happen if the individual stopped using a mitigating measure.

For example:

- an individual with anxiety disorder who did not take medications might be substantially limited in brain function and sleeping;
- an individual with emphysema who did not use supplemental oxygen might be substantially limited in respiratory function and breathing; and
- an individual who did not use hearing device might be substantially limited in the function of special sense organs and hearing.

Additionally, negative effects of a mitigating measure may be taken into account in determining whether an individual meets the definition of disability. Establishing substantial limitation as the result of negative effects of mitigating measures generally should be unnecessary, but negative effects will sometimes be relevant in determining whether a CP needed a reasonable accommodation.

Note: The rule concerning mitigating measures does not, however, apply to people whose vision is corrected with ordinary eyeglasses or contact lenses.

9. Is your condition something that adversely affects you only at work? If so, how does or did your condition interfere with doing one or more jobs or job duties? How long has this been the case?

Explanation: In certain situations, an impairment may limit a person's ability to perform some aspect of his or her job, but otherwise not substantially limit any other major life activity of that person. This will be a ***rare*** situation, given how broadly the amended ADA defines major bodily functions and major life activities. However, in these rare situations, the individual may be substantially limited in the major life activity of working.

To determine a substantial limitation in working, assess the difficulty the person has in performing either a "class of jobs" or a "broad range of jobs in various classes." Demonstrating a substantial limitation in performing a unique element of a single specific job is not sufficient to establish that a person is substantially limited in the major life activity of working. Rather, a person needs to show that he or she is substantially limited in a "class" of jobs because of the nature of the work -- e.g., the person cannot do any commercial truck driving or any assembly line jobs, or is unable to perform specific job-related requirements due to his or her impairment -- e.g., extensive walking, prolonged standing, or repetitive or heavy lifting -- that would apply to more than just a single, particular job.

As noted above, given all of the changes made by the ADAAA, it should generally be ***unnecessary*** to determine whether someone is substantially limited in working. Most people who have limitations at work will probably also have a significant limitation on a major bodily function or some other major life activity. **The major life activity of working should be analyzed only as a last resort.**

10. Is your employer aware of your condition, and if so, how? Has your employer received any records or documents, including doctor's notes, which discuss your condition or any limitations resulting from your condition? If yes:

What records were given to your employer and when?

What did those records say and whom were they from?

Explanation: Information in records given to an employer may contain evidence regarding substantial limitation of a major bodily function or a traditional major life activity.

11. If we need additional information regarding your condition, may we contact your health care provider? If so, please provide us with your health care provider's contact information and fill out an authorization to release medical information.

Explanation: As noted above, in many cases, coverage will most easily be achieved through medical evidence that the CP is substantially limited in a major bodily function. It will be easiest to get the CP's permission to contact his or her health care provider during the intake process. If necessary, this will allow you to subsequently contact the health care provider, ask questions, request medical records, and/or request confirmation that CP's condition substantially limits a major bodily function.

DRAFT INTERVIEW QUESTIONS FOR ASSESSING GINA VIOLATIONS[1]

Notes to Interviewer:
These questions are designed to be used during an in-person or phone interview. They will often require some explanation for potential charging parties to understand and thus can not be used as a handout for potential charging parties to fill in blanks.

Also, remember, GINA prohibits use of genetic information, restricts acquisition, and has strict confidentiality rules. In other words, if an employer acquires or even asks for genetic information, it has violated GINA unless a specific exception applies, even if the employer did not use the genetic information to make an employment decision.

1. Did you provide or were you asked to provide to the employer (an owner, a manager or a supervisor) any information relating to the following (indicate which one(s)):

   - that you or someone in your family had taken a genetic test?
   - that you or someone in your family requested or received genetic services (genetic testing, counseling or education)?
   - your family medical history (i.e., whether someone in your family, such as a parent, child, sibling, aunt, or uncle, has or had a disease or disorder).

2. If yes, when did you provide or when were you asked to provide that information?

Note to Interviewer: The questions in Item 3, below, are intended to help you obtain some of the information you need to determine if one of GINA's six exceptions to the prohibition against acquisition applies to the situation at issue. They are not intended to fully explain how the six exceptions work. If you need additional information on how the exceptions work, contact OLC.

3. If you provided or were asked to provide any of the information discussed in question 1 to the employer, was the information requested:

   - as part of health services or genetic services?

     - If so, was it your choice to participate or receive the health services or genetic services?
     - Did the employer get your permission in writing before you provided the genetic information?
     - If the employer did get your permission in writing, do you have a copy of that document?

Note to Interviewer: Permission to acquire the genetic information in the context of health or genetic services must be evaluated to determine whether it was in writing, obtained prior to the individual giving the information to the employer, and was given knowingly and voluntarily.

[1] These questions are subject to revision upon approval of the final EEOC regulation implementing the provisions of GINA.

- after you requested leave? If so, was the leave request:

    - to care for a relative with a serious health condition under the Family and Medical Leave Act (FMLA)? Under a similar state or local leave law? or under company policy?
    - to address your own serious health condition under the FMLA? or under a similar state or local law?
    - for some other reason? Please explain.

- as part of a genetic monitoring program of the biological effects of toxic substances in the workplace?

    - If so, was the monitoring program required by law or regulation?
    - Did the employer give you notice of the monitoring in writing? If so, do you have a copy of that notice?
    - If the monitoring program was not required by law or regulation, did the employer get your permission in writing before you provided the genetic information?
    - If the employer did get your permission in writing, do you have a copy of that document?

Note to Interviewer: Permission to acquire the genetic information in the context of a genetic monitoring program must be evaluated to determine whether it was in writing, obtained prior to the individual giving the information to the employer, and was given knowingly and voluntarily.

- as part of a medical or fitness-for-duty examination after you were offered a job?
- during a job interview or during employment (e.g., a question from a supervisor or manager)?
- in response to your request for a reasonable accommodation for a disability?
- for some other purpose?

4. If you answered "yes" to any part of question 3:

    - Describe what the employer told you about the reasons for requesting the information.

        - Was the explanation provided orally or in writing?
        - If it was provided in writing, do you have a copy of the document?

    - Did you disclose or were you asked to disclose this information in a document or orally in conversation with someone?

        - If you were asked to disclose this information in a document, do you have a copy?
        - If you discussed this information with someone in conversation, who was it?
        - Did you disclose this information voluntarily or because you were told you had to disclose it?

Note to Interviewer: Items 5 and 6, below, are intended to capture information about GINA charges that stem from an employer's acquisition of genetic information through means other than a specific request for that information. Depending on the answers to these questions, the inadvertent acquisition exception or commercially and publicly available documents exception may apply.

5. If the employer did not ask you for genetic information, did the employer obtain the genetic information:

   - By overhearing a conversation?
   - Because you volunteered it (e.g., in response to a question such as "how are you" from a supervisor)?
   - Through a newspaper or the internet, or through some other source that is available to the public?

     - If so, do you believe that the employer searched these sources to find your genetic information? Why do you believe that?
     - If the employer obtained the information through the internet, do you know what search words the employer used?

6. If the employer asked you for information about a current condition you have, did the employer tell you or your doctor (health care professional) that the response should not include genetic information?

   - For example, if you requested a reasonable accommodation for a disability, and the employer asked for supporting documentation, did the employer notify you or your health care professional that you should not provide genetic information, such as family medical history, in your supporting documentation?
   - If the employer did provide such notice, was it in writing? If so, do you have a copy of the notice?

7. Do you believe that the employer used genetic information to make an adverse employment decision about you? If so, explain why you believe this to be the case.

8. Who in the same or similar situation was treated better? Who was treated worse? Who was treated the same?

9. Did your employer disclose your genetic information to someone? If so, explain the circumstances of this disclosure.

September 30, 2015

QUALITY PRACTICES FOR EFFECTIVE INVESTIGATIONS AND CONCILIATIONS

This Quality Control Plan[1] is issued pursuant to the Equal Employment Opportunity Commission's Strategic Plan for Fiscal Years 2012 – 2016, to provide guidance concerning the EEOC's investigations and conciliations of charges of discrimination.[2] In its Strategic Plan, the Commission stated that "it is a significant Commission priority to improve the timeliness and ensure the continued quality of its enforcement activities."[3] The Commission sets forth the following practices for investigations and conciliations to advance the plan's objectives of strategic law enforcement and delivering excellent and consistent service.

I. Background

The EEOC has statutory authority to investigate and conciliate charges of discrimination filed under Title VII,[4] the Age Discrimination in Employment Act (ADEA),[5] the Equal Pay Act (EPA),[6] the Americans with Disabilities Act (ADA),[7] and the Genetic Information Nondiscrimination Act (GINA).[8] Title VII states that the

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[1] The practices set forth in this Quality Control Plan (QCP) have been developed and disseminated by the EEOC exclusively to provide guidance and practical support to EEOC staff. The QCP shall not be construed as creating any right or benefit, substantive or procedural, enforceable at law or in equity against the EEOC or its employees. The QCP shall not be construed to create any right to judicial review involving the compliance or noncompliance of the EEOC or its employees with any matter dealt with in the QCP. The QCP is not intended and should not be construed by any party to judge whether a particular investigation or conciliation was adequate, or whether a particular determination was justified.

[2] This plan applies only to investigations and conciliations of charges of discrimination within the private and public sector enforcement system. The development of a QCP for the federal sector has been predicated upon development and approval of a private sector plan.

[3] EEOC Strategic Plan for Fiscal Years 2012-2016, p. 28.

[4] 42 U.S.C. § 2000e-5(b).

[5] 29 U.S.C. § 626(a).

[6] 29 U.S.C. § 206(d). The EPA does not contain a charge filing, investigative or conciliation requirement.

[7] Section 107 of the ADA, 42 U.S.C. § 12117, incorporates the procedural provisions of Title VII into the ADA.

[8] Section 207 of GINA incorporates the procedural provisions of Title VII into GINA.

Commission "shall make an investigation"[9] of a charge filed with the Commission, but "does not define 'investigation' or prescribe the steps that the EEOC must take in conducting an investigation."[10] Courts have generally recognized that the nature and extent of an EEOC investigation into a discrimination claim is a matter within the discretion of the agency.[11]

Title VII's conciliation provision instructs the Commission to "endeavor to eliminate [an] alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion."[12] The Supreme Court concluded that this language granted "expansive discretion" to the EEOC "to decide how to conduct conciliation efforts and when to end them,"[13] in holding that the precondition of conciliation must be satisfied before the EEOC can file suit.[14]

In contrast, an individual's right to file suit under the statutes enforced by EEOC is conditioned only upon the filing of a charge of discrimination with the EEOC,[15] and receipt of a notice of right to sue.[16] Congress gave individuals the right to file suit in

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[9] See 42 U.S.C. § 2000e-5(b). The ADEA states that the EEOC "shall make an investigation" of a charge filed with the agency, 29 U.S.C. §626(a), and requires the EEOC to "promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion." 29 U.S.C. § 626(d)(2).

[10] *EEOC v. Sterling Jewelers Inc.*, 2015 WL 5233636, *3 (2d Cir. 2015).

[11] *Id.* In *Sterling Jewelers*, the Second Circuit held that "courts may not review the *sufficiency* of an investigation --- only whether an investigation occurred" in determining whether EEOC met this requirement prior to filing suit.

[12] 42 U.S.C. §2000e-5(b).

[13] *Mach Mining v. EEOC*, ___ U.S. ___, 135 S.Ct. 1635, 1656 (2015).

[14] *Id.* at 1651. *Mach Mining* addressed the Commission's statutory obligation to engage in conciliation prior to the Commission's initiation of litigation under Title VII §706, 42 U.S.C. §2000e-5(f). It does not apply to conciliations that precede suit by a private party, which constitute the majority of investigations and conciliations conducted by the EEOC each year.

[15] While Title VII, ADEA, ADA and GINA require the filing of a charge prior to the initiation of a lawsuit by an individual, the EPA does not require the filing of a charge.29 U.S.C. §206(d).

[16] *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 798-99 (1973) ("Green satisfied the jurisdictional prerequisites to a federal action (i) by filing timely charges of employment discrimination with the Commission and (ii) by receiving and acting upon the Commission's statutory notice of the right to sue, 42 U.S.C. §§ 2000e-5(a) and 2000e-5(e). The Act does not restrict a complainant's right to sue to those charges as to which the Commission has made findings of reasonable cause, and we will not engraft on the statute a requirement which may inhibit the review of claims of employment discrimination in the federal courts.").

court, without regard to the nature or outcome of an EEOC investigation or conciliation.[17]

In exercising the broad discretion that Congress gave the EEOC to decide how to conduct and when to conclude investigations and conciliations, the Commission issues the following guidance to its staff. This guidance is not a description of legal requirements, but rather is intended to assist the Commission's field staff by providing an overview of effective investigative and conciliation practices. This guidance will also inform the public of the practices that support effective investigations and conciliations.

II. Framework for Investigations and Conciliations

The EEOC is committed to delivering excellent and consistent service in investigating charges and engaging in conciliation. As a national law enforcement agency, the EEOC must also make strategic decisions about which investigations will have the most law enforcement potential.

The EEOC uses Priority Charge Handling Procedures (PCHP) to make determinations regarding the extent of resources committed to different investigations. The Commission's Strategic Enforcement Plan (SEP) supplemented by District Complement Plans (DCPs), sets forth the issues and types of charges that are the priorities for the Commission.

EEOC staff should ensure that charging parties and respondents have appropriate expectations with regard to investigations, in light of the PCHP framework and the cooperation of the parties. In investigations, EEOC's role is to gather facts to objectively determine whether there is reasonable cause to believe that discrimination occurred. The cooperation of the parties and witnesses to provide timely and meaningful information has a significant impact on the progress and effectiveness of the EEOC's investigation. The EEOC encourages the parties to promptly and fully share relevant information with the agency.

Once the EEOC has determined there is reasonable cause to believe discrimination occurred, the agency's role is to attempt to eliminate the unlawful employment

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The ADEA permits individuals to file suit without receiving a notice from the EEOC, as long as 60 days have passed since the filing of a charge with the EEOC. 29 U.S.C. § 626(d)(1).

[17] *See McDonnell Douglas Corp. v. Green*, 411 U.S. at 798-99.

practice through "informal methods of conference, conciliation, and persuasion."[18] The efforts of all involved are critical to effective conciliations. The EEOC has a strong commitment to securing resolutions through conciliations. The EEOC encourages respondents to respond to or submit conciliations proposals in a timely fashion and, encourages both respondents and charging parties to assist in the resolution of the case through conciliation.

III. Quality Practices for Effective Investigations

The practices outlined below may be accomplished in different ways based on the extent of the investigation and the investigative tools and techniques utilized, which are within the discretion of the EEOC.

1. EEOC identifies the bases, issues, and relevant allegations of the alleged unlawful employment action in a charge.

- Staff attempt to interview a potential charging party prior to the filing of a charge. When an intake interview is conducted, staff's intake notes reflect the salient facts and issues identified during the interview, including potential discriminatory systemic practices or policies, based on the information received from the charging party.
- The charge identifies the issue(s), basis or bases, and relevant allegations of the alleged unlawful employment action.
- If new or additional allegations arise during the course of the investigation, staff assess whether the charge should be amended, a new charge should be filed, or the investigation should be expanded. Staff take appropriate action and notify the parties.

2. EEOC conducts an investigation consistent with its Priority Charge Handling Procedures and applies the law to the facts in its findings.

- Based on the charge's prioritization, staff take investigative actions within a reasonable amount of time given the type of investigation, the resources available in the office, the complexity of the case, the need for legal advice and assistance, and the cooperation of the parties.
- Staff utilize investigative tools to obtain information necessary to determine whether discrimination likely occurred.

[18] 42 U.S.C. §2000e-5(b).

- Staff address new issues in the investigation, including potential systemic issues, as warranted.
- Staff attempt to interview the charging party prior to reaching a determination on the charge.
- EEOC's analyses and conclusions are supported by the evidence obtained and contained in the investigative file, reflect a reasonable application of the law and current Commission policy, and are informed by consultation with its legal personnel, as warranted.

3. EEOC communicates with the charging party, respondent, and their representatives to facilitate the progress of the investigation.

- Staff inform charging party of his or her rights and explain how EEOC conducts its investigation of charges.
- EEOC provides notice to the respondent of the charge and identifies the issues, bases, and relevant allegations regarding the alleged unlawful employment action(s).
- EEOC may request that the respondent provide a position statement with supporting documentation to respond to the facts in the charge.
- EEOC may request that the charging party provide a response to the position statement submitted by the respondent.
- Staff timely communicate with the charging party, the respondent, or their representatives, as the investigation warrants.
- Communications between the EEOC and the parties are clear and respectful to facilitate the progress of the Commission's investigation.
- EEOC may also require the respondent to provide access to evidence and to produce information or evidence relevant to the charge.

4. EEOC communicates its resolution of the investigation to the parties.

- When the agency concludes that further investigation is unlikely to lead to a finding of reasonable cause to believe discrimination occurred, staff convey this determination to the charging party and advise the charging party of the right to file a lawsuit and the time limits for filing, and notify the respondent.
- When the agency determines there is reasonable cause to believe discrimination occurred, it will issue a "Letter of Determination" that will inform the respondent of a) the actions/practice/policy EEOC alleges to have been in violation of the law(s); b) the person(s) or description of the class harmed by the violation(s); and c) the time period. If EEOC intends to seek relief for multiple facilities or locations, the Commission shall identify the geographic scope. EEOC also notifies the charging party of its determination.

IV. Quality Practices for Effective Conciliations

EEOC has a strong commitment to resolving charges through conciliation as such resolutions are one of the most effective means for bringing employers into compliance with the statutes the agency enforces. Effective conciliation depends on the efforts of all involved to attempt to remedy and eliminate the alleged discrimination. Successful conciliations ensure that unlawful employment practices are resolved more quickly, thus conserving the agency's and the parties' resources. Conciliation agreements also serve an important role in improving workplace policies and preventing discrimination from occurring.

1. EEOC invites the respondent to participate in conciliation efforts.

- The Letter of Determination invites the respondent to engage in conciliation efforts in order to eliminate the alleged unlawful employment practices and reach a just resolution of the matter.
- The conciliation request is based on the findings of the investigation and informs the parties of the relief sought.
- The conciliation request provides the respondent with a reasonable amount of time to respond to EEOC's conciliation proposal or to submit its conciliation proposal.

2. The conciliation request seeks meaningful relief for the victims of discrimination and seeks to remedy the discriminatory practices.

- The conciliation request provides meaningful remedies to the aggrieved individuals.
- The relief sought in conciliation explicitly addresses the discriminatory employment practices at issue in the case.
- The request typically seeks targeted, equitable relief in order to prevent similar violations in the future.

3. EEOC considers offers made by the respondent.

- Staff consider offers made by the respondent in a timely fashion.
- When the agency determines that further conciliation efforts would be futile or non-productive, the agency notifies the charging party and respondent in writing.

4. EEOC attempts to secure a resolution acceptable to the agency.

- Staff timely communicate with the charging party and the respondent (or their representatives) as the conciliation warrants.
- Communications between the EEOC and the parties are clear and respectful to facilitate productive efforts in conciliation toward a resolution acceptable to the EEOC and the parties.

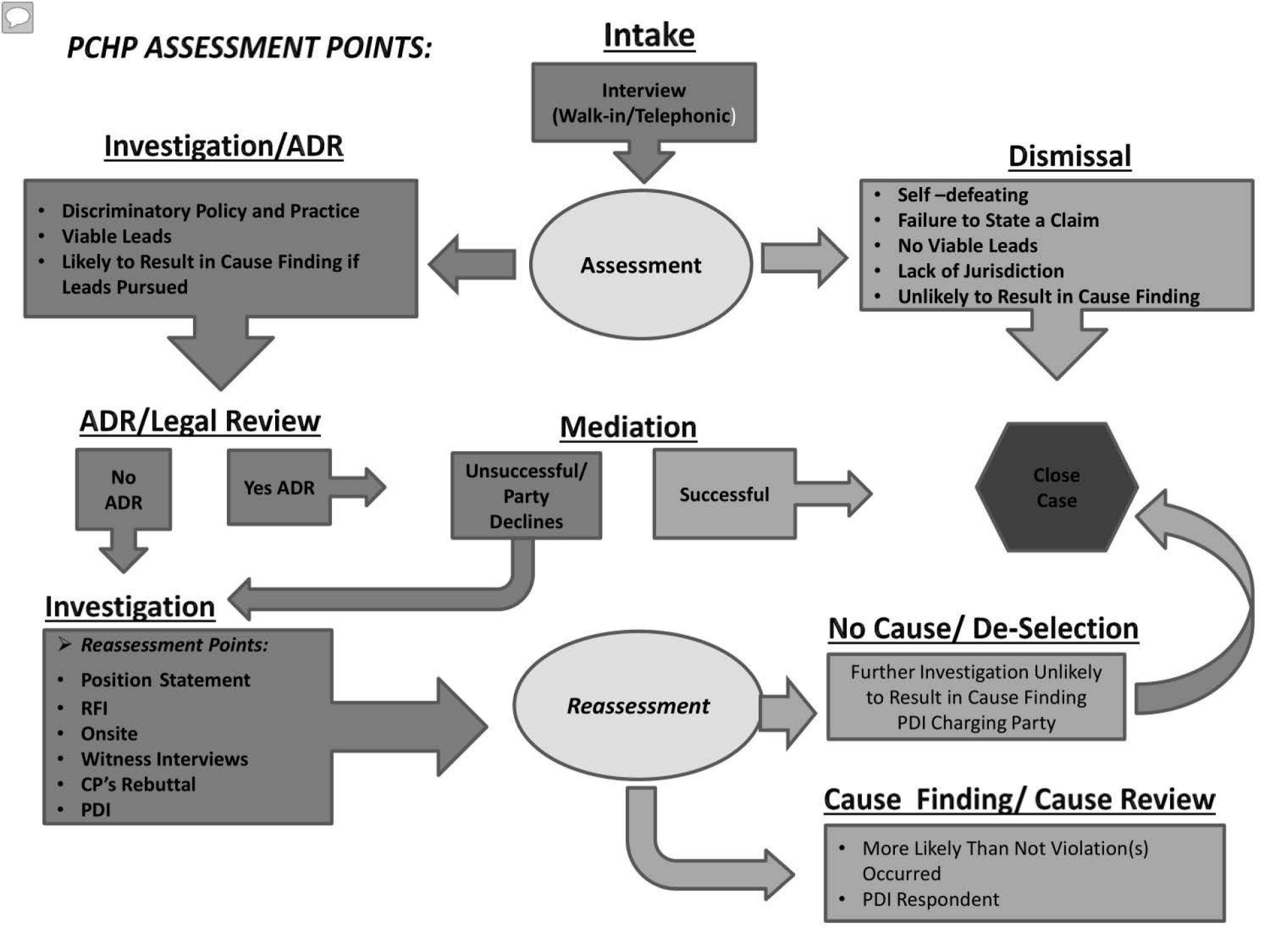
Appendix

Development of a Quality Control Plan

The U.S. Equal Employment Opportunity Commission's Strategic Plan for Fiscal Years 2012 – 2016 provides for the development of a Quality Control Plan (QCP) that establishes criteria for evaluating the quality of EEOC investigations and conciliations and a peer review system to conduct assessments of investigations and conciliations. To ensure that the QCP was developed by those with in-depth knowledge of the agency's administrative enforcement program, former Chair Jacqueline A. Berrien appointed an internal work group of EEOC front-line staff and managers to develop a draft plan for the Commission's review and approval. The work group was led by Commissioner Chai R. Feldblum, former Dallas District Director Janet Elizondo, and former Chicago District Director John P. Rowe.

The Commission also solicited recommendations for quality indicia from EEOC staff, the National Council of EEOC Locals, No. 216, AFGE/AFL-CIO, and external stakeholders. In February 2013, the Commission solicited written input, and in March 2013, the Commission held a public meeting with three roundtables of experts familiar with the agency's administrative enforcement program: EEOC front-line staff and a union representative, private practitioners representing charging parties and respondents, and EEOC senior managers. In May 2013, the work group requested public input on a set of principles for the QCP. To allow for additional Commission review and input by the full Commission, a vote on the QCP was postponed until the second quarter of fiscal year 2014. After careful review, Chair Berrien decided to extend the postponement of a vote on a Quality Control Plan.

A renewed effort in fiscal year 2015 by Chair Jenny R. Yang to reach consensus on a Quality Control Plan sought extensive input from Commissioners and staff. While this effort was underway, Chair Yang prioritized the development of training modules and revisions to relevant sections of the Compliance Manual with the objective of strengthening the quality of the agency's investigations and conciliations.


PCHP ASSESSMENT POINTS:
Intake
Interview (Walk-in/Telephonic)
Assessment
Investigation/ADR
Discriminatory Policy and Practice
Viable Leads
Likely to Result in Cause Finding if Leads Pursued
Dismissal
Self –defeating
Failure to State a Claim
No Viable Leads
Lack of Jurisdiction
Unlikely to Result in Cause Finding
ADR/Legal Review
No ADR
Yes ADR
Mediation
Unsuccessful/ Party Declines
Successful
Close Case
Investigation
Reassessment Points:
Position Statement
RFI
Onsite
Witness Interviews
CP's Rebuttal
PDI
Reassessment
No Cause/ De-Selection
Further Investigation Unlikely to Result in Cause Finding PDI Charging Party
Cause Finding/ Cause Review
More Likely Than Not Violation(s) Occurred
PDI Respondent

Model Transmittal Letter Sending Position Statement to Charging Party

NOTE: Once the Charging Party Portal is up, this letter will be replaced by a message thru the CP Portal to the CP and they will be told to upload their response.

[Date]

[Charging Party]
[Address]

[add if applicable]: **By E-mail**

Re: Charge No. [number]

Dear [Charging Party Name]:

Enclosed with this letter is a copy of the Respondent's Position Statement *[add if applicable]:* with non-confidential attachments. **By accepting these documents, you agree that you will only share the contents with persons in a privileged relationship to you, such as a spouse, clergy, or legal, medical or financial advisor.**

This is your opportunity to provide additional information you feel is relevant to support your charge. If you would like to respond to what the Respondent says in its Position Statement, please do so no later than **20 calendar days from the date of this letter.**

There is no specific format required for your response. You may respond in writing or by phone. If you respond in writing, be sure to include your charge number on your correspondence. If you disagree with any of the information the Respondent has submitted, please point out specifically what you believe is incorrect and explain what you believe to have happened. Also, please give us any additional evidence or information that you have not already provided that you believe supports your case. For example, if applicable, identify any additional witnesses, their contact information, and a brief summary of what you think they will say.

Any information you provide will be taken into consideration during the investigation of your charge. We encourage you to contact us promptly with your response. Our address is listed in the letterhead and my email address is _____. My direct telephone number is _____ and I am available [*insert days and times*].

Thank you for your cooperation.

Sincerely,

Investigator

SECTION 24
SUBPOENAS

24.1 Introduction - This section contains subpoena procedures for all cases (see § 24.2 for specific statutory and regulatory authority). EEOC may subpoena for access to documents or facilities or to obtain testimony and/or production of documents or other evidence. EEOC may subpoena any person who has custody or control of relevant evidence. Subpoenas are issued only to obtain evidence needed by EEOC and not at the demand of a charging party or respondent (see e.g., 29 CFR § 1601.16(a)). In the event of non-compliance with a subpoena on which an appeal is not pending, refer the subpoena to the RA for enforcement.

Ordinarily, use subpoenas only after other investigative methods have been attempted (however, see §§ 24.4(d) and 25.2(b)). Explore other alternatives such as pursuit of the direct suit option (see § 24.4(e)). Subpoenas are often more expensive than diligent pursuit of the evidence by other means (e.g., see § 25.3(c) regarding on site investigation as an alternative to RFIs in some cases) and can cause additional investigative delays. Therefore, follow (a) - (e) below in attempting to obtain evidence without issuing subpoenas. Thoroughly document all such attempts on the case log.

(a) Obtain the Respondent's Cooperation - A respondent's initial reluctance to provide evidence can often be overcome by determining its reasons for refusal and attempting to resolve these concerns. If this reluctance is based on a belief that EEOC is charging party's advocate, stress that EEOC seeks to obtain and objectively analyze all relevant data, including that which may not support charging party's allegations. Explain why the data is required, unless this would adversely affect the investigation (see, e.g., § 25.3(d)). Inquire whether the data could be obtained in another format or from other sources. As the investigation develops, other evidence may eliminate the need for the requested information.

(b) State Privacy Act - When a state privacy act or similar state or local law or regulation is cited as authority for refusal to produce evidence, explain that generally federal law supersedes state law in such matters. Also advise the respondent of EEOC's policy not to make investigative information public, with reference to the appropriate statutory citations and regulations. EEOC should issue a subpoena, and enforce it, if necessary, when a state or local agency respondent fails to respond.

(c) Investigator's Role - When requesting evidence, preface the request with remarks such as, "EEOC requires copies of ____," or "...testimony from ___," rather than, "I would find it helpful if you would supply copies of ____." If a respondent is reluctant to comply, explain EEOC's investigative authority, and subpoena authority, if needed (see §24.2). Confirm the request in writing as necessary either to establish the fact of the request or as a reminder of the specific evidence sought and the terms of its production. If the required data cannot be obtained, consult with the supervisor. Prepare a memorandum as necessary summarizing EEOC's efforts and detailing the respondent's reply to each specific request.

(d) Supervisor's Role - A call from the supervisor may persuade a reluctant respondent. If the respondent persists in its refusal, the supervisor may make a second, more formal written request. However, upon a review with the legal unit, it may be agreed that a second request is unnecessary, as when the respondent has unequivocally refused to produce and is clearly aware of EEOC's authority. If a second request is sent, it should cite EEOC's investigative and subpoena authority (see § 24.2); describe the evidence sought and EEOC's efforts to date to obtain it; set a date for submission of the evidence; and explain that failure to comply will result in issuance of a subpoena. If all or most of the data is not provided

within the prescribed timeframe, and conditions for exercise of the direct suit option do not apply (see § 24.4(e)), make a written subpoena request to the District Director (see sample at Exhibit 24-A).

(e) District Director's Role - In reviewing a subpoena request, after consulting with the RA, determine whether adequate time was provided for compliance with a specific data request (if one is made - see § 24.4(d)) and that the request was not complied with; whether additional efforts to obtain necessary information without resorting to a subpoena are advisable; and whether the subpoena should contain all items sought (i.e., that all items requested are relevant and necessary to a finding).

(f) Subpoena Issuance Versus Direct Suit Option - Generally, a subpoena is used when a respondent fails to produce or provide access to evidence and there is not enough evidence to make a finding. The direct suit option (see § 24.4(e)) may be used when the respondent has been uncooperative, the evidence already obtained would support a cause finding, and there is some evidence of pretext. The decision to use this option should be based on a willingness to recommend litigation if conciliation fails. The file must clearly justify EEOC's enforcement actions. It must contain an accurate and complete record of attempts to obtain the evidence and the respondent's refusal to produce. Include copies of information requests in the file. In some cases, explanatory memoranda to the file may be appropriate. It is also important to maintain an accurate record and analysis of the evidence received in support of a cause recommendation.

24.2 Statutory and Regulatory Authority for Investigations and Subpoenas

(a) Title VII/ADA - Investigations are authorized by § 709(a) of Title VII, 42 U.S.C. 2000e-8(a), and 29 CFR § 1601.15. Subpoenas are authorized by § 710 of Title VII, which incorporates § 11 of the National Labor Relations Act, as implemented by 29 CFR § 1601.16. ADA § 107 incorporates Title VII investigative and subpoena powers for ADA cases.

(b) ADEA - ADEA § 7(a), 29 U.S.C. § 626(a), incorporates the investigative and subpoena authority in §§ 11 and 9 of the FLSA (see EPA below). EEOC's investigative authority is set out at 29 CFR § 1626.15(a) and § 1626.16 covers subpoenas.

(c) EPA - Investigations are authorized by § 11 of the FLSA, 29 U.S.C. 211. Subpoenas are authorized by § 9 of the FLSA, which incorporates §§ 9-10 of the Federal Trade Commission (FTC) Act of 1914, as amended, 15 U.S.C. §§ 49 and 50 (this authority was not modified by the FTC Improvement Act of 1980). This authority is implemented by 29 CFR §§ 1620.30- .31 (see § 24.5).

24.3 Types of Subpoenas - Subpoenas may be issued for testimony, for production of evidence, and for access. In a pattern or practice case, one subpoena will often be used to obtain testimony, production of evidence, and access to evidence.

(a) Testimony - A subpoena for testimony compels the attendance and testimony of a witness and is addressed to the person whose testimony is sought. When the person subpoenaed is a respondent employee whose identity is unknown, address the subpoena to the respondent's chief executive officer. Subpoenas for testimony are a considerable expense. Thus, investigators are encouraged to seek documentary evidence whenever possible.

(b) Production of Evidence - A subpoena compels the production of evidence including, but not limited to, books, records, correspondence or documents and is addressed to persons who have evidence in their possession or under their control, including evidence in undocumented form (see § 24.4(a)). EEOC is not liable for costs incurred by a respondent in producing such evidence.

(c) Access to Evidence - A subpoena compels persons who have control over evidence to permit EEOC to inspect that evidence. Such evidence includes, but is not limited to, inspection of facilities or documents and observation of operational procedures; and the right to access includes the right to copy evidence. Such subpoenas are addressed to persons who have evidence in their possession or under their control.

24.4 Considerations Relevant to Issuance of Subpoenas - EEOC's subpoena power is very broad, but a subpoena should only be issued when compulsory process is necessary to ensure that required evidence will be obtained. Basically, EEOC may obtain any evidence that is relevant and necessary to the resolution of any issue in an investigation, unless it would be unduly burdensome to provide the evidence.

(a) Evidence Not Currently in Documentary Form - A subpoena may require production of evidence which does not currently exist in documentary form. For example, in a case involving race discrimination in promotion, payroll and personnel records may contain the names, positions, and addresses of the candidates eligible for promotion but may not contain their telephone numbers and their racial identity. A subpoena may specify that lists be provided which contain these two items, since the information, while undocumented, is within the control of the respondent to produce. See also (c) below.

(b) Evidence Not Sought in Previous Data Requests - In some circumstances, typically in pattern or practice cases, the subpoena may be broader in scope than previous data requests (see § 24.1(d)). This approach, including a subpoena seeking all the evidence needed to complete the investigation, may be necessary to avoid the need for multiple subpoenas and the possibility of multiple, time consuming court enforcement proceedings.

(c) Tailor Subpoena to Respondent's Ability to Produce - The subpoena should conform, to the extent possible, to information known about the respondent's records or its ability to compile information currently in undocumented form, e.g., by naming specific documents or reports maintained by the respondent or requesting selected personnel information based on patterns or areas of underrepresentation identified during the investigation. The relevance of the evidence sought should have been explained (however, see §§ 24.1(a) and 25.3(d)) to the persons subpoenaed and their objections considered. Even if the person has refused all previous data requests, explore with the person the feasibility of providing the requested evidence so that the subpoena is appropriately framed. The subpoena may permit the respondent to produce source documents, or to provide access to source documents, as an alternative to lists, compilations or summaries which are not currently maintained. Objection on the grounds of burdensomeness can often be avoided by ensuring that when witnesses are required to testify, the subpoena specify a certain time; by having documents made available on site; and by use of sampling techniques.

(d) Uncooperative Respondent Is Reasonably Anticipated - Issuance of a subpoena before resorting to other investigative methods may only be done with the approval of TMC. Efforts to obtain evidence by other methods before issuing a subpoena are not required when there is a reasonable basis to conclude that the respondent will resist the investigation, e.g., EEOC had to issue a subpoena in a previous case under similar circumstances; or when advance issuance of a subpoena in conjunction with an on site investigation is necessary to preserve the evidence (see § 25.2(b)).

(e) Direct Suit Option - If the respondent fails to produce all the requested evidence but the file, while incomplete as a result, contains evidence of a prima facie case and some evidence of pretext (see §§ 24.1(f) and 26.1(c)), the Director may consider the option of approving a cause LOD as an alternative to a subpoena (this should be based on a willingness to recommend litigation if conciliation fails). Follow the procedure in § 40.3, including RA review. Proceed with conciliation, and litigation review, if necessary, as in any other case.

24.5 Issuing Officials - Title VII/ADA subpoenas may be issued by District Directors, the OPO Director, the Field Management Directors, or any representatives designated by the Commission. The District Director may, in his/her absence, authorize another person (e.g., the Area Director) to sign a subpoena on his/her behalf; in such a case, the District Director remains the issuing official. ADEA subpoenas may only be issued by the General Counsel, the OPO Director, and District Directors or their designees. Based upon the statutory provisions underpinning EPA subpoena authority, EPA subpoenas may only be issued by the Commission or a Commissioner (see §§ 24.1(e) & 24.2(c), and (b) and (c) below, for procedure).

(a) Discretion in Administering Subpoena Compliance - Issuing officials may grant an extension of time for complying with the deadlines set in the subpoena and may withdraw a subpoena once issued. However, avoid extensions of time in EPA cases and ADEA cases with pre-11/21/91 DOVs when the two or three year statute of limitations is running and/or about to expire on claims unless the respondent is willing to sign a waiver of the statute of limitations (Exhibit 60-B or 60-C).

(b) Issuance of EPA Subpoenas - When the District Director determines, pursuant to § 24.1(e), that an EPA subpoena is needed, send the proposed subpoena by memo with a copy of the file to SIICP. Outline the investigation to date; summarize the evidence, if any, pointing to possible violations; summarize efforts to obtain the evidence and why it is relevant and necessary; and state whether the statute of limitations on backpay liability is about to expire (if the statute is currently running on backpay liability, justify non-resort to the direct suit option). Refer to supporting documents in the file. SIICP, will review the request for relevance and necessity. Approved requests will be sent to the Executive Secretariat, normally within 10 days, for assignment to a Commissioner using the systemic rotational procedure. SIICP, will return the signed subpoena directly to the requesting office. When headquarters does not approve the request, SIICP, will notify the requesting office.

(c) Concurrent Charge Cases - In concurrent Title VII/EPA cases, issue a Title VII subpoena to obtain all evidence required. However, if the EPA statute of limitations is running on potential liabilities and the respondent may appeal the Title VII subpoena, a Title VII subpoena may be issued covering all matters at the same time that an EPA subpoena is sought from headquarters. In concurrent Title VII/ADEA cases, issue separate subpoenas under each law. All evidence which is necessary to an ADEA determination or to a concurrent determination under both laws should be sought in the ADEA subpoena. The above procedures permit EEOC to seek court enforcement of ADEA or EPA subpoenas even if a Title VII subpoena appeal is pending. Include notice of ADEA/EPA subpoena enforcement activity in the Title VII subpoena appeal package sent to headquarters (see § 24.13(b)).

24.6 Completing Form 136, Subpoena (Exhibit 24-B) - Prepare Form 136 after appropriate informal consultation with the legal unit (see § 12.5).

(a) Number the subpoena by entering the two-letter abbreviation for issuing office, a dash, the fiscal year in two digits, a dash, then number in sequence beginning from the first subpoena issued in that fiscal year.

(b) When testimony is required, enter the name, title, and business address of the person who is to testify. When evidence or access to evidence is required, enter the name, title, and business address of the person who has custody or control of the documents or facilities. The person so named is the addressee. However, when the identity of the person who is to testify or who has custody or control of the evidence or facilities cannot be determined, use corporate service; that is, address the subpoena to the "Chief Executive Officer, XYZ Organization" using the full legal name and address of the organization. When the subpoena is addressed to a third party, make service on the third party rather than on the respondent or charging party.

(c) Enter the charging party (the commissioner in a commissioner charge; EEOC in ADEA/EPA complaint and directed cases) and respondent names and the charge number.

(d) Check the proper boxes for requiring testimony, evidence, or access. When only documents or compilations are sought, check the "mail" box. The "produce and bring" box should normally be used in conjunction with the "testify before" box (such as when testimony is necessary to explain the documents).

(e) Enter the address where the testimony is to be given, evidence produced, or access provided. Enter the date and time for production, normally at least 10 calendar days from the date of actual service of the subpoena (enter "or before (date)" and "n.a." to specify date and time when the "mail" box is checked). The due date(s) should be reasonable in relation to the quantity of data sought. Describe the person before whom the evidence is to be given, e.g., the investigator.

(f) Describe all matters to be examined or evidence to be produced. When production of documents or other evidence covering a period of time is required, specify the dates. Avoid open ended requests. If the space is inadequate, insert the statement: "The **[documents, or other matter, as appropriate]** are described on the attached page(s)." If more than 1 page is attached, enter the number of pages attached. On separate typed pages headed "Attachment to Subpoena No. __, dated ___ in Charge No. ___," describe the subpoenaed evidence and provide the date, the signature, title, and office of the issuing official. Number each page, "page 1 of 10," etc. See Exhibit 24-C for sample subpoena attachment in single basis/issue investigations.

(g) Check the boxes for the appropriate statutes.

(h) Enter the typed name, title, and address of the issuing officials.

(i) The signature and date are self-explanatory.

24.7 Serving the Subpoena - When the respondent has retained an attorney, send a copy of the subpoena to the attorney. When corporate service is employed, serve the subpoena on an appropriate high ranking official (see § 24.6 and (a) below). When the person subpoenaed is not the respondent or its agents, serve the subpoena on the person who is expected to comply. The subpoena may be served in person or by certified mail. The person serving the subpoena must execute the Proof of Service on the reverse side of the file copy of Form 136. When service is by certified mail, rather than in person, affix the return receipt to the Proof of Service on the Form 136 in the file.

(a) Standard for Good Service - The test of good service is whether there is adequate evidence that the person subpoenaed has received notice of the subpoena (consult with the legal unit if in doubt about who is the appropriate agent for service for process). With respect to a subpoena served by mail, the notice requirement is satisfied by the use of certified mail, return receipt requested (the return receipt serving as proof of receipt by the addressee). When service is in person, simply ask to see the person to whom the subpoena is addressed. Ordinarily avoid stating the nature of the visit other than to say that it involves a case EEOC is investigating. If service is by personal delivery, the notice requirement is satisfied if the addressee or other responsible person is served. The notice requirement dictates who is a "responsible person." For example, in the regular course of business, clerical personnel receive and forward correspondence sent to corporate officials. Therefore, one may properly serve a corporate official by serving his/her secretary.

(b) Service on Respondent's Attorney - Do not serve a subpoena on a private attorney representing a respondent unless the person subpoenaed has so requested before issuance

of the subpoena. Service on such an attorney, or other representative not generally assumed to have control or custody of the evidence, should be based on a signed letter from appropriate respondent officials. However, still address the subpoena to the officer or official having custody or control of the desired documents and, where appropriate, to the corporation itself. Send a courtesy copy to the person subpoenaed in such cases.

(c) Preparing Proof of Service/Certificate of Attendance - Complete the Proof of Service and Certificate of Attendance found on the reverse side of the file copy of Form 136. The instructions below correspond to the numbered items on the sample at Exhibit 24-D:

Proof of Service

(1) Check the method of service used.

(2) Enter the name, position, and address of the responsible person with whom the copy was left (if the addressee is not personally served). A responsible person, such as a secretary or receptionist, is an adult who in fact lives or works at the same address as the addressee in the subpoena (in the illustration, the addressee was personally served, so this item did not require completion.)

(3) Enter month, day, and year of service.

(4) Signature and official title - self-explanatory.

(5) Enter the state and parish/country/city in which the Proof of Service was signed.

Certification of Attendance

(6) Enter the full address at which the subpoenaed person appeared to give testimony or produce records.

(7) Enter the date(s) of the appearance.

(8) Signature and official title - self-explanatory.

24.8 Distribution of Form 136, Subpoena - Complete in duplicate and distribute the original to the subpoenaed person. Place the file copy at Tab A. Provide a photocopy of the original Form 136 to the subpoenaed person if, before actual issuance, s/he has asked that the original be served on his/her attorney. Otherwise, when an attorney has been retained, send the attorney a photocopy (see § 24.7(a)).

24.9 Taking Oral Testimony

(a) Definition and Purpose of Deposition - Oral testimony is generally taken by deposition. A deposition is a process for securing written or oral testimony given by a witness under oath in the course of the investigation in advance of the hearing or trial on the matter under investigation.

(b) Arrangements - In setting the time and place for the deposition, take into account the convenience of witnesses and their counsel. Reserve a suitable room with space for the EEOC investigator and attorney, the witness, the witness's attorney, and the court reporter. At the discretion of the District Director, use either a stenographer or court reporter to record the oral testimony. If a stenographer is used, use a tape recorder as a backup.

(c) Administering Oath to Witness - All testimony must be given under oath before an "officer," who is a person with the authority to administer oaths to witnesses and who is personally responsible for recording, or having someone record under his/her direction and in his/her presence, the testimony of a witness. The District Director, Investigators, staff designated in writing by the District Director, and other staff whose position descriptions contain this authority may administer oaths to witnesses. The oath to be administered is "Do you solemnly swear (or affirm) that you will tell the truth, the whole truth, and nothing but the truth in giving the following testimony?" The right hand of the person administering the oath and the right hand of the witness should be raised. Witnesses who elect to "affirm" may do so without raising the right hand.

(d) Person Present at the Deposition - The RA or other authorized EEOC attorney should be present at the taking of the deposition. The EEOC attorney will inform the witness about format and procedures (see § 24.9(e)(2)). When the witness is not a current employee or official of respondent or where the witness has elected the confidentiality option (see § 23.9), respondent's attorney should not be present during the examination. If the deponent has an attorney, the attorney will be allowed to attend the deposition and advise the deponent. Where a witness refuses to answer questions, the EEOC attorney should indicate that court action may be taken to compel his/her answering.

(e) Examining and Signing the Deposition

(1) General - After the reporter/stenographer has transcribed the testimony, the deposition will be made available to the witness for examination and signature. The witness may waive the signature requirement but must be given an opportunity to read, change, and sign the deposition.

(2) When the Witness Makes Changes or Refused to Sign the Deposition
The witness must be advised in writing that if s/he makes changes to the transcript, EEOC may, in an appropriate case, draw an inference from the fact that the witness' testimony was altered. If the witness fails or refuses to sign or fails to return the transcript to EEOC within 30 days of receipt, EEOC may consider the right to sign to have been waived by the witness. When the witness makes changes in the deposition, a statement of his/her reasons for the change must appear as an addendum to the deposition. Where the changes are so substantial that they have the effect of recanting former material testimony, it is advisable to secure an affidavit from the reporter/stenographer that the testimony transcribed was in fact that to which the witness had testified. The officer administering the oath to the witness will also certify on the deposition that the witness was duly sworn and that the deposition is a true record of the testimony given.

24.10 Witness Fees and Mileage - If a subpoenaed person requests witness and mileage fees, advise the person how to make a claim. EEOC Travel Handbook, Chapter 3, Section III, Paragraph 322, governs the payment of witness fees and mileage. EEOC is not obligated to pre-pay persons for witness and mileage fees.

24.11 ADEA/EPA Subpoena Appeals - Reply to any appeal petition received by Letter 24-E or 24-F to inform the person that there is no appeal procedure.

24.12 Title VII/ADA Subpoena Appeals - A Title VII/ADA subpoena may be appealed by filing a petition to revoke or modify the subpoena with the issuing official who may either grant the petition in its entirety or transmit it to the Commission with a recommended determination (see § 1601.16(b)). The procedures in § 24 are for EEOC staff use and lack of adherence to any procedures herein, not mandated by statute, is not grounds for an appeal.

(a) Petitioner's Responsibilities - A petition must conform to 29 CFR § 1601.16(b). It must be in writing. If sent by mail, it should include a certificate of service showing the date mailed to the issuing official.

(1) Time for Filing - The subpoenaed person must deliver or mail the petition to the EEOC office where the issuing official is located within 5 days (excluding Saturdays, Sundays, and federal legal holidays) after the date of service of the subpoena, i.e., the date of actual service in person by an EEOC employee or the delivery date shown on the return receipt for service by certified mail. The regulation does not provide for extension of the 5 day filing limit and issuing officials may not waive it.

(2) Content - The petition must separately identify each portion of the subpoena with which the person does not intend to comply and must state, with respect to each such portion, the grounds on which s/he relies.

(b) District Office Action on Petitions - Petitions should be acted on within established time frames. The likelihood of a given respondent appealing a subpoena, merely to delay, will be diminished if actual delays are minimized. The issuing official will either grant the petition in its entirety or submit a recommended determination for Commission action within 8 calendar days of receipt or as soon as practicable. The legal unit will prepare the recommended Commission determination, with appropriate assistance by compliance staff (see suggested format at Exhibit 24-G). Include in the determination package Letter 24-H, the petition, the recommended determination, and copies of the charge, the subpoena, the proof of subpoena service, and the written justification described in § 24.1(b)(3)). Send 6 copies of the determination package, within the 8-day period, to the Executive Secretariat in headquarters. Mark the envelope in the lower left corner "Subpoena Petition."

(c) Headquarters Action on the Petition - The petition package will be distributed to the Commission on a 72 hour "notice and hold" consideration procedure. If a hold is placed on the item, the Executive Secretariat will decide whether to make any required revisions or to send the package to the Office of General Counsel, Program Operations, or the originating District Office for revision. The office will complete its revisions and return the materials to the Executive Secretariat within 10 working days for re-circulation.

On final action by the Commission, the Executive Secretariat will transmit the Commission's final determination to the issuing official with any instructions from the Commission (e.g., in the event the subpoena is revoked or modified). When the petition is denied, the last paragraph of the final determination will have blank spaces to be filled in by the issuing official after scheduling the date, time and place for testimony, for mailing or producing evidence, or for providing access to evidence. The issuing official shall serve a copy of the final determination on the person subpoenaed, either in person or by certified mail.

24.13 Enforcing Subpoenas - EEOC may seek court enforcement of subpoenas issued against both private and state and local government respondents. When a respondent fails to comply with a subpoena issued by a field office (no appeal pending), the file will ordinarily be sent to the legal unit for action to enforce the subpoena. The Associate General Counsel, Systemic Litigation Services, will enforce subpoenas issued by the Program Director on behalf of the Director, SIICP. In all other cases, responsibility for the conduct and coordination of all U.S. District Court matters involving subpoenas rests with the Associate General Counsel, Trial Services (GC-T).

The RA in the subpoena-issuing office has primary responsibility for enforcing subpoenas, including preparation and filing of pleadings, subject to the supervision and review of GC-T. GC-T will act on field office requests to approve court enforcement within 15 days of the request. The RA may ask GC-T to provide support in preparing briefs, other legal papers, or preparing for court appearance.

24.14 Employer Compliance With Subpoena for Production of Evidence - The Fourth Circuit has issued the clearest opinion on the subject. In EEOC v. Maryland Cup Corp., 785 F.2d 471 (4th Cir. 1986), cert. denied, ___ U.S. __, 107 S. Ct. 68 (1987), the court held that an employer must comply with an administrative subpoena for production of documents by providing, without reimbursement by the government, all relevant evidence under company control. The Fourth Circuit reasoned that requiring reimbursement for production costs would unduly restrict the investigative function. The court opined that when EEOC's request for documents is not "unreasonable and oppressive," i.e., when producing the information will not "seriously disrupt its normal business operation," an employer has no right to reimbursement for its costs (see § 24.4(a)).

MEMORANDUM

TO: Meredith Jones October 12, 1992
District Director

THRU: Ellie Santarelli
Regional Attorney

THRU: Irene Simmons, Supervisor

FROM: Jose Williams, Investigator

RE: Subpoena Request
James v. XYZ Corp. Charge No. 099830110

Charging Party alleges that he was fired on August 17, 1992 because his supervisor disliked blacks. Respondent claims that CP was discharged for damaging company property, a violation of work rule 16(f). R supplied CP's personnel record but refused to supply any other material. Repeated efforts to obtain comparative data have been unsuccessful. I, therefore, request that a subpoena be issued for the information on the attached list.

Item 1 is requested because CP's personnel file contains only his supervisor's recommendation that CP be fired and the Personnel Director's letter informing CP of his discharge. No specifics are contained in either so other records probably exist. If not, it may be necessary to require testimony of the Personnel Director and the supervisor.

Item 2 is requested to determine whether CP's supervisor has exhibited prejudice against blacks by disciplining them more often or more severely or by otherwise attempting to eliminate them from his sixteen-person work unit. The extended time period is requested to get an adequate sample to determine whether there is a pattern to the supervisor's behavior.

Item 3 is requested to determine whether discharge is the normal treatment for employees who violate work rule 16(f) who have work records comparable to the CP. The time period is extended to get an adequate sample. The Personnel Director indicated that five to ten persons a year are fired for violating work rule 16(f).

Item 4 is requested as an initial means of determining whether the R treats blacks more harshly than whites. The evidence will be used in two ways: to determine whether recommendations against blacks are approved more often than those against whites and to determine by comparing these percentages with the R's EEO-1.

Although Items 3 and 4 are not directly relevant to the specific allegation made by CP (because they do not relate to his supervisor's actions), I recommend that these items be subpoenaed because CP verbally indicated R discriminated in general against blacks; the last EEO-1 report indicates black are somewhat underrepresented (with a slight decline in black representation from previous EEO-1 reports); and R has been reluctant to provide EEOC with date on the treatment of any employees. Depending on the information supplied under Items 3 & 4, more investigation may be necessary.

(SAMPLE SUBPOENA REQUEST)
Exhibit 24-A

[form]

[EEOC Form 136, Subpoena]

[Form available on *inSite* at Enforcement Forms]

Exhibit 24-B

Attachment to Subpoena No.____ Dated ____ in Charge No. _____

1. All personnel records, letters and memoranda relating to the discharge of Henry James, which have not previously been submitted to Commission.

2. Records or a list which includes the following information:

   a) Names of persons working under the supervision of subforeman Ernest Johnson from October 1, 1989 to October 1, 1992.

   b) Racial identification of the person identified in response to request 2(a), above.

   c) All disciplinary actions and the reasons therefore against the persons identified in response to 2(a), above, from October 1, 1989 to October 1, 1992.

   d) The period of time each person identified in response to 2(a), above was under Mr. Johnson's supervision and the reason any such person ceased to work for Mr. Johnson, where appropriate.

3. Personnel records of all persons who violated work rule 16(f) between October 1, 1989 and October 1, 1992. Include race of all such persons.

4. Records or a list of all persons who were recommended for discharge, reason(s) for the recommendation, and the resulting action between October 1, 1989 and October 1, 1992. Include race of such persons.

On Behalf of the Commission:

_____
District Director Date

(SAMPLE SUBPOENA ATTACHMENT IN SINGLE BASIS/ISSUE INVESTIGATION)

Exhibit 24-C

PROOF OF SERVICE

I hereby certify that being over 18 years of age and not a party to or any way interested in these proceedings, I duly served a copy of the subpoena on the persons named in this subpoena.

[ ] in person

(1) [ ] by certified mail

[ ] by leaving a copy with a responsible person, at the principal office or place of business, to wit:

(2) Name Mr. James Simpson

Position Personnel Manager, XYZ Corp.

Address 606 Main Street, Point Barrow, Alaska

(3) On March 3, 1990
(Mo, day, & year)

_____
(Signature of person making service)

(4) Investigator
(Official title, if any)

(5) State Alaska
Parish/
County Klondike

CERTIFICATION OF ATTENDANCE

I certify that the person named herein was in attendance and satisfactorily produced the records requested or gave oral testimony at:

(6) 1717 Snowy Avenue, Point Barrow, Alaska

(7) On March 17, 1990
(Mo, day, & year)

_____
(Signature of certifying EEOC official)

(8) Regional Attorney
(Official title)

(PROOF OF SERVICE)
Exhibit 24-D

(FIELD OFFICE LETTERHEAD)

Charge No.:
Subpoena No.:

Dear :

This is in response to your recent "Petition to Revoke or Modify Subpoena," which has been received in the above-referenced matter.

The subpoena in question was issued by me, on behalf of the Equal Employment Opportunity Commission (EEOC), in furtherance of EEOC's investigation for compliance with the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 et seq.

Pursuant to Reorganization Plan No. 1 of 1978, 43 FR 19807 (5/9/78), and E.O. 12144, 44 FR 37193 (6/26/79), responsibility and authority for enforcement of the ADEA was transferred from the Department of Labor to EEOC on 7/1/79).

Section 7(a) of the ADEA, 29 U.S.C. § 626(a), incorporates by reference section 9 of the Fair Labor Standards Act, 29 U.S.C. § 209, which in turn incorporates section 9 and 10 of the Federal Trade Commission Act, 15 U.S.C. §§ 49 and 50. Under those provisions, EEOC has the "power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation," 15 U.S.C. § 49.

Under section 6(a) of the ADEA, 29 U.S.C. § 625(a), EEOC is authorized to make any delegations deemed necessary to assist in the performance of its statutory functions. Pursuant to that authority, EEOC has delegated the power to issue ADEA subpoenas to, among others, its District Directors. See 29 CFR § 1626.16(b). EEOC's procedural regulations provide that ADEA subpoenas are not subject to administrative review or appeal. See 29 CFR § 1626.16(c). Upon failure of any person to comply with an ADEA subpoena, EEOC is empowered to petition an appropriate United States district court for an enforcement order and sanctions, if necessary.

You should contact this office immediately if you intend to comply with the subpoena. Otherwise, we will recommend commencement of enforcement proceedings.

On Behalf of the Commission:

_____
District Director

(LETTER IN RESPONSE TO PETITION TO REVOKE ADEA SUBPOENA)

Exhibit 24-E

(FIELD OFFICE LETTERHEAD)

Charge No.:

Subpoena No:

Dear :

This is in response to your recent "Petition to Revoke or Modify Subpoena," which has been received in the above-referenced matter.

The subpoena in question was issued by the Commission in furtherance of its investigation under the Equal Pay Act (EPA), 29 U.S.C. § 206(d). Pursuant to Reorganization Plan No. 1 of 1978, 43 FR 19807 (5/9/78), and E.O. 12144, 44 FR 37193 (6/26/79), responsibility and authority for enforcement of the EPA was transferred from the Department of Labor to EEOC on 7/1/79.

The EPA is enforced as part of the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. § 201 et seq. Section 9 of the Fair Labor Standards Act, 29 U.S.C. § 209, incorporates sections 9 and 10 of the Federal Trade Commission Act, 15 U.S.C. §§ 49 and 50. Under those provisions, EEOC has the "power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation," 15 U.S.C. § 49.

Neither the statutes nor the Commission's regulations provide for administrative review or appeal of a subpoena. See 29 CFR § 1620.20. Upon the failure of any person to comply with an EPA subpoena, EEOC is empowered to seek enforcement in an appropriate United States district court.

You should contact this office immediately if you intend to comply with the subpoena. Otherwise, we will recommend commencement of enforcement proceedings.

On Behalf of the Commission:

_____

District Director

(LETTER IN RESPONSE TO PETITION TO REVOKE EPA SUBPOENA)

Exhibit 24-F

IN THE MATTER OF: SUBPOENA NO.

[ ] CHARGE NO.

Charging Party,

v.

[ ]

Respondent.

PETITIONER PETITIONER'S ATTORNEY

[Name and Address] [Name and Address]

DETERMINATION ON PETITION TO REVOKE OR MODIFY SUBPOENA

[A short statement of the relevant sections of the Compliance Manual which pertain to the determination.]

BACKGROUND

[A brief background of the relevant facts concerning the issuance of the subpoena, including the items, documents and things for which the subpoena requires production.]

ANALYSIS

[An analysis of the petition and the relevant case law.]

CONCLUSION

[A conclusion based on the analysis.]

DETERMINATION

[The determination based on the analysis and conclusion.]

On Behalf of the Commission,

_____ _____

Executive Officer Date
Executive Secretariat

(SUGGESTED FORMAT FOR A RECOMMENDED DETERMINATION)

Exhibit 24-G

OFFICE LETTERHEAD

MEMORANDUM

TO: Executive Officer
Executive Secretariat

Subpoena No.:
Charge No.:

FROM: District Director
(General Counsel as appropriate)

SUBJ: SUBPOENA PETITION

Attached is a recommended determination on a petition to revoke or modify the above-cited subpoena along with copies of the required supporting documents.

[Comments in support of the proposed determination.]

Please contact **[name of legal unit attorney]** at **[FTS number]** if you have any questions on this matter.

Attachments
copy of charge
justification memorandum
subpoena and proof of service
petition to revoke/modify

(TRANSMITTAL OF RECOMMENDED DETERMINATION TO HEADQUARTERS)

Exhibit 24-H

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Withheld pursuant to exemption

(b)(7)(E)

of the Freedom of Information and Privacy Act

Page 0873 of 1288

Withheld pursuant to exemption

(b)(7)(E)

of the Freedom of Information and Privacy Act

MODEL INVESTIGATIVE PLAN

_____vs._____

Charge Number_____

CP's allegations	R's defenses	Disputed	Evidence
Statute: Basis: Issue: Initial Assessment: PF Case:	(b)(5);(b)(7)(E)	(Y/N)	(b)(5);(b)(7)(E)

3-Step Basic Investigative Plan

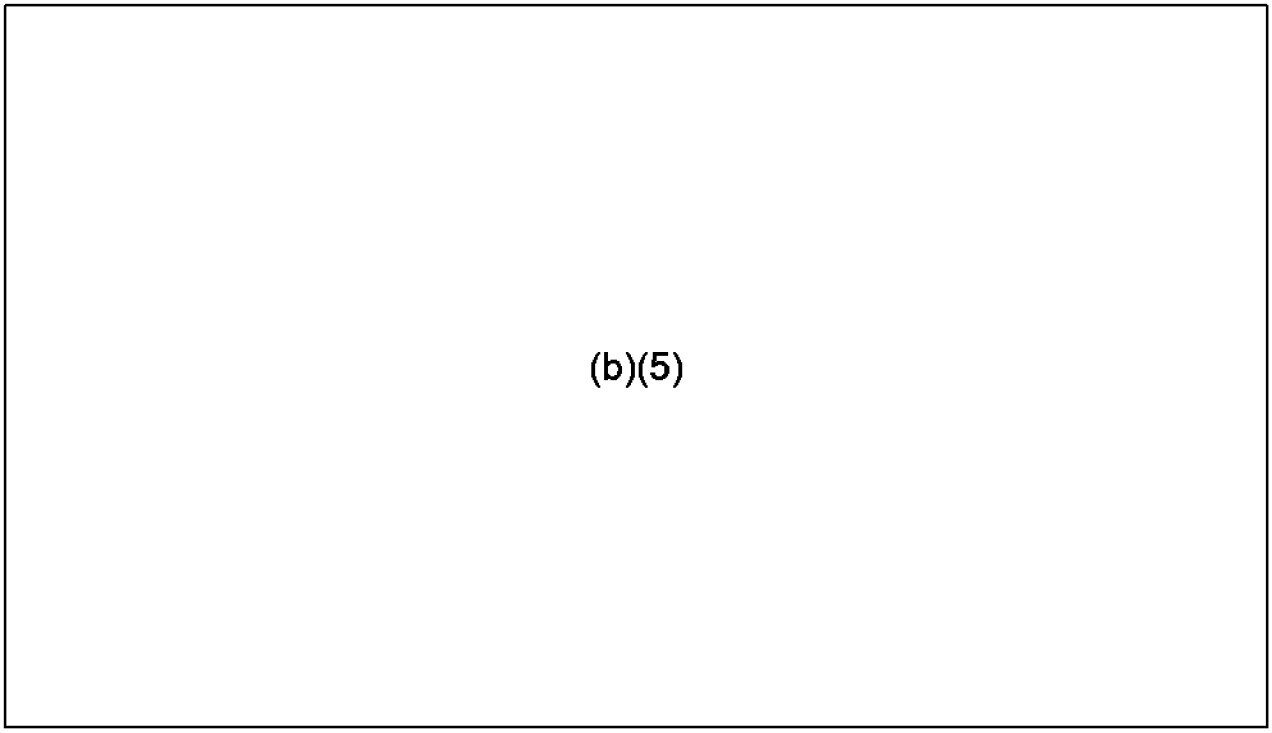
(b)(5);(b)(7)(E)

While an IP may vary in complexity based on the case, 3 simple steps can assist in keeping an investigation on track:

1. Did CP present a prima facie case?
2. Did R articulate a legitimate, non-discriminatory reason for the action?
3. Does the EVIDENCE support the allegation or the defense?

For Investigators, the proper way to brief supervisors and managers about a case is outlined below:

Briefing Technique



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of the Freedom of Information and Privacy Act

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of the Freedom of Information and Privacy Act

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Withheld pursuant to exemption

(b)(7)(E)

of the Freedom of Information and Privacy Act

EEOC Form 161 (11/09) **U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION**

DISMISSAL AND NOTICE OF RIGHTS

To: From:

☐ *On behalf of person(s) aggrieved whose identity is CONFIDENTIAL (29 CFR § 1601.7(a))*

Charge No.	EEOC Representative	Telephone No.

THE EEOC IS CLOSING ITS FILE ON THIS CHARGE FOR THE FOLLOWING REASON:

☐ The facts alleged in the charge fail to state a claim under any of the statutes enforced by the EEOC.

☐ Your allegations did not involve a disability that is covered by the Americans with Disabilities Act.

☐ The Respondent employs less than the required number of employees or is not otherwise covered by the statues.

☐ Your charge was not timely filed with the EEOC; in other words, you waited too long after the date(s) of the alleged discrimination to file your charge.

☐ The EEOC issues the following determination: Based upon its investigation, the EEOC is unable to conclude that the information obtained establishes violations of the statutes. This does not certify that the respondent is in compliance with the statutes. No finding is made as to any other issues that might be construed as having been raised by this charge.

☐ The EEOC has adopted the findings of the state or local fair employment practices agency that investigated this charge.

☐ Other *(briefly state)* _____

- NOTICE OF SUIT RIGHTS -

(See the additional information attached to this form.)

Title VII, the Americans with Disabilities Act, the Genetic Information Nondiscrimination Act, or the Age Discrimination in Employment Act: This will be the only notice of dismissal and of your right to sue that we will send you. You may file a lawsuit against the respondent(s) under federal law based on this charge in federal or state court. Your lawsuit **must be filed WITHIN 90 DAYS from your receipt of this Notice**; or your right to sue based on this charge will be lost. (The time limit for filing suit based on a claim under state law may be different.)

Equal Pay Act (EPA): EPA suits must be filed in federal or state court within 2 years (3 years for willful violations) of the alleged EPA underpayment. This means that **backpay due for any violations that occurred more than 2 years (3 years) before you file suit may not be collectible.**

On behalf of the Commission

_____ _____
(Date Mailed)

Enclosure(s)

cc:

Enclosure with EEOC
Form 161 (11/09)

INFORMATION RELATED TO FILING SUIT UNDER THE LAWS ENFORCED BY THE EEOC

(This information relates to filing suit in Federal or State court under Federal law. If you also plan to sue claiming violations of State law, please be aware that time limits and other provisions of State law may be shorter or more limited than those described below.)

PRIVATE SUIT RIGHTS -- Title VII of the Civil Rights Act, the Americans with Disabilities Act (ADA), the Genetic Information Nondiscrimination Act (GINA), or the Age Discrimination in Employment Act (ADEA):

In order to pursue this matter further, you must file a lawsuit against the respondent(s) named in the charge **within 90 days of the date you *receive* this Notice.** Therefore, you should **keep a record of this date.** Once this 90-day period is over, your right to sue based on the charge referred to in this Notice will be lost. If you intend to consult an attorney, you should do so promptly. Give your attorney a copy of this Notice, and its envelope, and tell him or her the date you received it. Furthermore, in order to avoid any question that you did not act in a timely manner, it is prudent that your suit be filed **within 90 days of the date this Notice was *mailed* to you** (as indicated where the Notice is signed) or the date of the postmark, if later.

Your lawsuit may be filed in U.S. District Court or a State court of competent jurisdiction. (Usually, the appropriate State court is the general civil trial court.) Whether you file in Federal or State court is a matter for you to decide after talking to your attorney. Filing this Notice is not enough. You must file a "complaint" that contains a short statement of the facts of your case which shows that you are entitled to relief. Your suit may include any matter alleged in the charge or, to the extent permitted by court decisions, matters like or related to the matters alleged in the charge. Generally, suits are brought in the State where the alleged unlawful practice occurred, but in some cases can be brought where relevant employment records are kept, where the employment would have been, or where the respondent has its main office. If you have simple questions, you usually can get answers from the office of the clerk of the court where you are bringing suit, but do not expect that office to write your complaint or make legal strategy decisions for you.

PRIVATE SUIT RIGHTS -- Equal Pay Act (EPA):

EPA suits must be filed in court within 2 years (3 years for willful violations) of the alleged EPA underpayment: back pay due for violations that occurred **more than 2 years (3 years) before you file suit** may not be collectible. For example, if you were underpaid under the EPA for work performed from 7/1/08 to 12/1/08, you should file suit before 7/1/10 -- *not* 12/1/10 -- in order to recover unpaid wages due for July 2008. This time limit for filing an EPA suit is separate from the 90-day filing period under Title VII, the ADA, GINA or the ADEA referred to above. Therefore, if you also plan to sue under Title VII, the ADA, GINA or the ADEA, in addition to suing on the EPA claim, suit must be filed within 90 days of this Notice and within the 2- or 3-year EPA back pay recovery period.

ATTORNEY REPRESENTATION -- Title VII, the ADA or GINA:

If you cannot afford or have been unable to obtain a lawyer to represent you, the U.S. District Court having jurisdiction in your case may, in limited circumstances, assist you in obtaining a lawyer. Requests for such assistance must be made to the U.S. District Court in the form and manner it requires (you should be prepared to explain in detail your efforts to retain an attorney). Requests should be made well before the end of the 90-day period mentioned above, because such requests do not relieve you of the requirement to bring suit within 90 days.

ATTORNEY REFERRAL AND EEOC ASSISTANCE -- All Statutes:

You may contact the EEOC representative shown on your Notice if you need help in finding a lawyer or if you have any questions about your legal rights, including advice on which U.S. District Court can hear your case. If you need to inspect or obtain a copy of information in EEOC's file on the charge, please request it promptly in writing and provide your charge number (as shown on your Notice). While EEOC destroys charge files after a certain time, all charge files are kept for at least 6 months after our last action on the case. Therefore, if you file suit and want to review the charge file, **please make your review request within 6 months of this Notice.** (Before filing suit, any request should be made within the next 90 days.)

IF YOU FILE SUIT, PLEASE SEND A COPY OF YOUR COURT COMPLAINT TO THIS OFFICE.

EEOC Form 161-A (11/09) **U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION**

NOTICE OF RIGHT TO SUE
(CONCILIATION FAILURE)

To: From:

☐ On behalf of person(s) aggrieved whose identity is CONFIDENTIAL (29 CFR § 1601.7(a))

Charge No.	EEOC Representative	Telephone No.

This Notice concludes the EEOC's processing of the above-numbered charge. The EEOC found reasonable cause to believe that violations of the statute(s) occurred with respect to some or all of the matters alleged in the charge but could not obtain a settlement with the Respondent that would provide relief for you. In addition, the EEOC has decided that is will not bring suit against the Respondent at this time based on this charge and will close its file in this case. This does not mean that the EEOC is certifying that the Respondent is in compliance with the law, or that the EEOC will not sue the Respondent later or intervene later in your lawsuit if you decide to sue on your own behalf.

- NOTICE OF SUIT RIGHTS -

(See the additional information attached to this form.)

Title VII, the Americans with Disabilities Act, the Genetic Information Nondiscrimination Act, or the Age Discrimination in Employment Act: This will be the only notice of dismissal and of your right to sue that we will send you. You may file a lawsuit against the respondent(s) under federal law based on this charge in federal or state court. Your lawsuit **must be filed WITHIN 90 DAYS from your receipt of this Notice**; otherwise, your right to sue based on this charge will be lost. (The time limit for filing suit based on a state claim may be different.)

Equal Pay Act (EPA): EPA suits must be filed in federal or state court within 2 years (3 years for willful violations) of the alleged EPA underpayment. This means that **backpay due for any violations that occurred more than 2 years (3 years) before you file suit may not be collectible.**

If you file suit, based on this charge, please send a copy of your court complaint to this office.

On behalf of the Commission

_____ _____
(Date Mailed)

Enclosure(s)

cc:

Enclosure with EEOC
Form 161-A (11/09)

INFORMATION RELATED TO FILING SUIT UNDER THE LAWS ENFORCED BY THE EEOC

(This information relates to filing suit in Federal or State court under Federal law.
If you also plan to sue claiming violations of State law, please be aware that time limits and other provisions of State law may be shorter or more limited than those described below.)

PRIVATE SUIT RIGHTS -- Title VII of the Civil Rights Act, the Americans with Disabilities Act (ADA), the Genetic Information Nondiscrimination Act (GINA), or the Age Discrimination in Employment Act (ADEA):

In order to pursue this matter further, you must file a lawsuit against the respondent(s) named in the charge **within 90 days of the date you *receive* this Notice**. Therefore, you should **keep a record of this date.** Once this 90-day period is over, your right to sue based on the charge referred to in this Notice will be lost. If you intend to consult an attorney, you should do so promptly. Give your attorney a copy of this Notice, and its envelope, and tell him or her the date you received it. Furthermore, in order to avoid any question that you did not act in a timely manner, it is prudent that your suit be filed **within 90 days of the date this Notice was *mailed* to you** (as indicated where the Notice is signed) or the date of the postmark, if later.

Your lawsuit may be filed in U.S. District Court or a State court of competent jurisdiction. (Usually, the appropriate State court is the general civil trial court.) Whether you file in Federal or State court is a matter for you to decide after talking to your attorney. Filing this Notice is not enough. You must file a "complaint" that contains a short statement of the facts of your case which shows that you are entitled to relief. Your suit may include any matter alleged in the charge or, to the extent permitted by court decisions, matters like or related to the matters alleged in the charge. Generally, suits are brought in the State where the alleged unlawful practice occurred, but in some cases can be brought where relevant employment records are kept, where the employment would have been, or where the respondent has its main office. If you have simple questions, you usually can get answers from the office of the clerk of the court where you are bringing suit, but do not expect that office to write your complaint or make legal strategy decisions for you.

PRIVATE SUIT RIGHTS -- Equal Pay Act (EPA):

EPA suits must be filed in court within 2 years (3 years for willful violations) of the alleged EPA underpayment: back pay due for violations that occurred **more than 2 years (3 years) before you file suit** may not be collectible. For example, if you were underpaid under the EPA for work performed from 7/1/08 to 12/1/08, you should file suit before 7/1/10 -- *not* 12/1/10 -- in order to recover unpaid wages due for July 2008. This time limit for filing an EPA suit is separate from the 90-day filing period under Title VII, the ADA, GINA or the ADEA referred to above. Therefore, if you also plan to sue under Title VII, the ADA, GINA or the ADEA, in addition to suing on the EPA claim, suit must be filed within 90 days of this Notice and within the 2- or 3-year EPA back pay recovery period.

ATTORNEY REPRESENTATION -- Title VII, the ADA or GINA:

If you cannot afford or have been unable to obtain a lawyer to represent you, the U.S. District Court having jurisdiction in your case may, in limited circumstances, assist you in obtaining a lawyer. Requests for such assistance must be made to the U.S. District Court in the form and manner it requires (you should be prepared to explain in detail your efforts to retain an attorney). Requests should be made well before the end of the 90-day period mentioned above, because such requests do not relieve you of the requirement to bring suit within 90 days.

ATTORNEY REFERRAL AND EEOC ASSISTANCE -- All Statutes:

You may contact the EEOC representative shown on your Notice if you need help in finding a lawyer or if you have any questions about your legal rights, including advice on which U.S. District Court can hear your case. If you need to inspect or obtain a copy of information in EEOC's file on the charge, please request it promptly in writing and provide your charge number (as shown on your Notice). While EEOC destroys charge files after a certain time, all charge files are kept for at least 6 months after our last action on the case. Therefore, if you file suit and want to review the charge file, **please make your review request within 6 months of this Notice.** (Before filing suit, any request should be made within the next 90 days.)

IF YOU FILE SUIT, PLEASE SEND A COPY OF YOUR COURT COMPLAINT TO THIS OFFICE.

OVERVIEW OF THE CHARGE PROCESS

Parties to a Charge of Discrimination

If a charge is actually filed, the parties are:

- Charging Party (CP)
  - Attorney not required
- Respondent (R)

INQUIRIES

- Process starts with an Inquiry from a Potential Charging Party (PCP)
- Generally involves completion of Intake Questionnaire or other correspondence that describes the employment situation
- All captured in IMS with special numbering system—(office code-fiscal year-sequential inquiry number)
- Online Inquiry/Online Information and Scheduling System
- No online charge filing.
- The EEOC interviews and counsels PCP using models of proof and charge procedures to help person make informed decision whether to file a charge.
- **Confidentiality** is required

Inquiries occur in several ways—

- phone (IIG or field office)
- in-person (walk-in or expanded presence)
- letter (from individual or attorney)
- online

- referral (from other federal agencies or FEPAs)

Guidelines for Intake

- Right to file regardless of merits
- Not required to provide witness name/contact information/other proof of claim before filing a charge
- EEOC never tells PCP not to file or counsel against filing
- We accept the charges and use our discretion under PCHP as to how case is assessed and resources provided for investigation.
- Must explain to CP, 10-day notice of charge requirement to Respondent

Confidentiality

- Required by either law (Title VII/ADA/GINA) or Agency practice (ADEA/EPA)
- Criminal offense for any employee of the EEOC "to make public in any manner whatever" any such information prior to litigation—subject to a fine up to $1000 or imprisonment up to 1 year. 29 C.F.R. §§ 1601.22 and 1601.26
- CP and R ≠ Public
- Example—EEOC policy that CP may receive copy of R's position statement and non-confidential attachments

Confidentiality (cont'd)

- Privacy Act applies to all of our laws
- Ethnics regulations prohibit disclosure or use of non-public information to further own private interests or interests of another person . See http://insite.eeoc.gov/OLC/ethics.cfm
- Guidance on maintaining sensitive personal identifiable information (PII) can be found at http://insite.eeoc.gov/OIT/protecting-sensitive-info.cfm

WHAT IS A CHARGE?

Issue(s) + Basis(es)

Minimally Sufficient Charge

In writing
Signed
Identifies the parties (charging party and respondent)
Describes the action/practices that caused harm
Reasonably be construed as stating that the individual wishes to file a charge

After *Holowecki* Decision-Five Elements of a Charge

- Identifies the potential charging party
- Identifies the respondent by name or circumstances
- Describes a covered matter that could be employment discrimination
- Does not express concerns about confidentiality or retaliation
- Can be reasonably construed as request for the EEOC to take remedial action

DRAFTING A CHARGE

- Identify Issue(s) with specific statement of harm
- Identify Basis(es)
- Date(s) of harm
- Current position
- Identify statute(s)

Sample Charge

I have been employed by Acme Bank as a Teller since September 9, 2010. I was denied promotion to the position of Senior Teller on July 10, 2017. A less qualified, male Teller in his 30s was promoted.

I believe that I was denied the promotion because of my sex, female, in violation of Title VII of the Civil Rights Act of 1964, as amended, and my age, 56, in violation of the Age Discrimination in Employment Act, as amended.

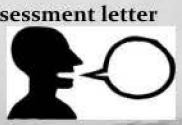
After the Charge is Filed

- Notify Respondent within **10 days**, provide a copy of the signed Form 5, if the charge is perfected at that point.
- **Digital Charge System**
  - Electronic service of perfected charges
  - Instructions to Respondents on how to use the System to receive and to submit position statements and other documents
  - Creates an electronic charge file
  - Improves customer service, expedites internal collaboration and reviews, eases administrative burden on staff, and reduces the use of paper submissions and files

Charges sent to FEPAs

Intake and the Intake Interview

- **First step of the investigation**
- **First contact with the charging party**
- **Accomplished in-person or by phone**
- **First assessment is made**
- **CP informed of online charge status system**
- **CP informed of right to file**
- **CP not given the actual assessment letter category.**



Intake Notes

- The record of your conversation with the CP
- Must be placed in IMS
- Make sure the notes or the IQ include:
  - Witness names, contact information
  - Information regarding the motive other than discrimination such as nepotism, personality conflicts, favoritism, etc.
  - ADA cases-specific information regarding the disability
- Separate Memo—"**CONFIDENTIAL-NOT TO BE RELEASED**"
  - Settlement Information
  - Credibility assessment or other observations/opinions of EEOC staff

Charge Prioritization PCHP

- Category (b)(5)
  - Likely cause determination
  - SA – strategic significance/litigation
  - A2 – cause may be likely, but litigation does not seem likely at the time of categorization.
- Category (b)(5)
  - Requires additional information
- Category (b)(5)
  - Suitable for dismissal

Strategic Enforcement Plan (SEP)

- Eliminating Barriers in Recruitment and Hiring
- Protecting Immigrant, Migrant and Other Vulnerable Workers
- Addressing Emerging and Developing Issues
- Enforcing Equal Pay Laws
- Preserving Access to the Legal System
- Preventing Harassment Through Systemic Enforcement and Targeted Outreach
- "Strategic Impact"

Other Priorities

- DCPs
- Other Topics of Interest

Quality Enforcement Practices

- Commission adopted the **Quality Enforcement Practices** Plan or QEP in 2015 to:
  - Establish clear expectations for staff and the public that reflect the agency's commitment to timely investigations for all charges.
  - Ensure the continued quality of enforcement activities
  - Focus the agency's resources on investigations that have the most law enforcement potential.
  - Reflect commitment to delivering excellent and consistent service in investigating charges and engaging in conciliation.
- QEP sets forth specific quality practices for effective investigations and conciliations
- Published on the EEOC's web site: https://www.eeoc.gov/eeoc/plan/quality_enforcement_practices.cfm

Quality Enforcement Practices

FOR EFFECTIVE INVESTIGATION:

The EEOC identifies the bases, issues, and relevant allegations of the alleged unlawful employment action in a charge.

The EEOC conducts an investigation consistent with its Priority Charge Handling Procedures and applies the law to the facts in its findings.

Quality Enforcement Practices

FOR EFFECTIVE INVESTIGATION:

The EEOC communicates with the charging party, respondent, and their representatives to facilitate the progress of the investigation.

The EEOC communicates its resolution of the investigation to the parties.

Quality Enforcement Practices

FOR EFFECTIVE CONCILIATION

1. The EEOC invites the respondent to participate in conciliation efforts [after a cause finding is issued].
2. The conciliation request seeks meaningful relief for the victims of discrimination and seeks to remedy the discriminatory practices.
3. The EEOC considers offers made by the respondent.
4. The EEOC attempts to secure a resolution acceptable to the agency

- The QEP principles will be discussed in more detail throughout this training

EXERCISE

Scenarios 1-3

CUSTOMER SERVICE

The Importance of Customer Service

- Both charging parties and respondents need our assistance.
- Quality customer service is a cornerstone of the EEOC's Quality Enforcement Practices Plan (QEP)

AFTER THE INTAKE ASSESSMENT

- Assessment is made---
  - Dismissal Recommendation
  - Mediation
  - Investigation
- A Note—Online Charge Status System

RECAP: Initial Stages of the Charge Process

Screening Interview
Intake Interview
Charge filed
Charge assessment – PCHP, SEP and DCP
Copy of charge to employer
Charge sent to mediation or investigation
Charge re-assessment - PCHP

Mediation (ADR)

- Voluntary
- Neutral
- Discuss Issues
- Confidential Sessions
  - Internal Firewall

Investigation-Overview

Gather/Analyze Evidence is Overall Task
Get to a Resolution based on the Evidence is the goal
Tell CP you have the case
Review case file/Prepare IP
Determine best strategy and methods for gathering evidence
Interview CP-Provide copy of PS/non-confidential attachments if requested
Possible Settlement before a finding
Ultimately, get to a recommendation for resolution---IM/LOD---evidence analysis
Dismissal—Form 161 (no cause)/Conciliation or Form 161-A (cause)

Investigation tools/techniques

- Investigative Plan (IP)
- Briefing Technique
- Interviews
- Respondent's Position Statement (PS) and Charging Party's Rebuttal
- Request for Information (RFI)-Respondent/Other Entities
- Fact Finding Conference (FFC)
- On-Site
- Statistical Assistance from ORIP

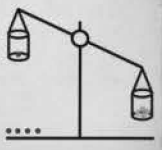
Pre-Determination Interview

- Conduct with charging party when evidence indicates a no cause determination is likely
- Inform charging party of evidence prior to a final determination and provide an opportunity for rebuttal
- CP may receive R's Position Statement on request; CP has 20 days to respond verbally or in writing
- Allows the opportunity to provide investigative leads
- Provides a measure of customer service that reduces complaints
- Assures that charges are not dismissed prematurely
- Pre-Determination Interview with Respondent when cause is recommended

Resolution of the Charge

Finding of Discrimination

- Conciliation Efforts
  - *Mach Mining*
  - *QEP*



Remedies

- Back pay
- Attorney's fees
- Damages
- Hiring
- Promotion
- Reinstatement
- Front Pay
- Reasonable Accommodation

Corrective or Preventive Actions

- ✓TER (targeted equitable relief)

Dismissals and Notice of Rights

Determination that Cause is Unlikely

Withdrawal

No jurisdiction

Reconsideration Requests

- The EEOC is not mandated to reconsider.
- The EEOC offices generally reconsider dismissals only when one of the following standards has been met:
  - misconduct by an Agency representative which may have affected the outcome;
  - substantial new and relevant evidence that was not previously considered and which may have affected the outcome; or
  - an error in the interpretation of the law, which may have affected the outcome.

Proving Discrimination

Theories of Discrimination

THEORIES OF DISCRIMINATION

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THEORIES OF DISCRIMINATION

Learning Objectives

At the end of this session, participants will have the tools necessary to:

- Identify and apply the Theories of Discrimination
- Plan an investigation using the Models of Proof
- Identify employees or applicants who are similarly situated
- Determine when a respondent's stated defense is a pretext For unlawful discrimination
- Analyze a pregnancy discrimination claim
- Analyze a sex-based wage discrimination claim
- Analyze a religious discrimination claim
- Analyze causal connection in a retaliation claim
- Analyze a respondent's liability for harassment claims
- Analyze a GINA claim

INTRODUCTION

The EEOC's mission is to identify and eliminate unlawful employment discrimination. Our first task in accomplishing this mission is to differentiate between employment decisions that may seem arbitrary, unfair, or unreasonable from those that are unlawful under the statutes we enforce. An adverse employment action is not illegal under our statutes unless it involves one of the protected bases of discrimination. For example, if an employer ridicules someone for wearing a tie that is too short, it has not violated Title VII or other nondiscrimination laws.

We will be discussing each of the theories in detail.

The job of the EEOC Investigator is to identify employment actions prohibited by our statutes and to gather and analyze factual information about the identified unlawful action(s). To do that, the Investigator must know the general Theories of Discrimination and the special proof methods established by the courts and EEOC guidelines.

The general theories and their specific applications that arise most frequently in EEOC charges, and that we will discuss in this training, are:

- Disparate Treatment
- Pattern and Practice
- Adverse Impact (or Disparate Impact)

These theories provide the framework for investigating and analyzing complaints of discrimination.

We will also examine how these and other theories of liability apply to certain specific bases or issues, including:

- Pregnancy Discrimination
- Discrimination against Caregivers on a Prohibited Basis
- Sex-Based Wage Discrimination
- Religious Accommodation
- Retaliation
- Harassment

DISPARATE TREATMENT

Disparate treatment is the most easily understood and the most common form of discrimination.

The issue in a disparate treatment case is whether a person has been treated adversely **because of** his/her race, color, sex, national origin, religion, age, disability, family medical history, or genetic information. This is the first step in establishing membership in a protected class.

In a disparate treatment case, proof of a discriminatory motive or intent is critical. Generally, disparate treatment is proven by showing that the individual's race, color, religion, sex, national origin, etc., **motivated** the employment action. Discriminatory motivation need not be conscious. The EEO laws cover not only decisions driven by discriminatory animus but also decisions infected by stereotyped thinking or other forms of less conscious bias.

In many disparate treatment cases, discriminatory motive is **inferred** based on comparative evidence showing **differences in treatment between the charging party and employees outside his or her protected class or substantially younger in ADEA cases.** However, comparative evidence is only one way to prove disparate treatment. There may also be evidence that the employer openly stated its discriminatory motive.

Ultimately, the evidence must show that the employer treated the charging party less favorably than it would have if s/he were of a different race, color, sex, etc.

INVESTIGATING A CHARGE OF DISCRIMINATION - DISPARATE TREATMENT

The question in a disparate treatment case is whether the employer took the adverse action because of the employee's protected characteristic. In investigating a charge of discrimination, you may find either (or both):

- **Circumstantial (indirect) Evidence -** Evidence from which disparate treatment can be inferred (also called "indirect evidence").

- **Direct Evidence -** Evidence of a close causal relationship between a protected characteristic and an employment decision, such as a biased statement or a facially discriminatory policy.

Either kind of evidence can prove discrimination.

CIRCUMSTANTIAL EVIDENCE

The vast majority of disparate treatment cases are proven by

circumstantial evidence. Direct evidence is not required to prove a case of disparate treatment. In fact, the Supreme Court stated that circumstantial evidence is often "more certain, satisfying and persuasive than direct evidence." Desert Palace, Inc. v. Costa, 539 U.S. 90, 100 (2003).

Circumstantial (also called indirect) evidence consists of facts that do not in themselves show an intent to discriminate but from which intent can be inferred.

A common example would be an employer selecting a man for a position over a woman who has more job-related qualifications. Even though the employer does not expressly indicate that it intends to favor male over female applicants, we may infer from the difference in the applicants' qualifications that the female applicant was denied the position because of her sex unless the employer can provide a convincing explanation for its choice.

BASIC ELEMENTS OF A DISPARATE TREATMENT CASE

HOW TO EVALUATE CIRCUMSTANTIAL EVIDENCE

The basic elements of a disparate treatment case involving circumstantial evidence were set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), a landmark U.S. Supreme Court decision. They are:

1. The evidence (from charging party, respondent, and/or other sources) must establish a **prima facie case**. What do we mean by a prima facie case? This means that discrimination can be inferred from the evidence. This is a minimal burden. The elements of the prima facie case for someone claiming discrimination in hiring are:

- The charging party is a member of a protected class;
- The charging party was qualified and applied;
- The charging party was rejected; and
- The respondent continued to seek qualified applicants or selected someone outside of the charging party's protected group (or who were substantially younger in ADEA cases).

Note that the elements of the prima facie case will change depending on the issue in the case, such as discipline or termination rather than failure to hire. For example, in a termination case, the second element may require showing satisfactory job performance, which is equivalent to being qualified in a hiring case.

These elements raise an inference of discrimination (i.e., establish the prima facie case) because they show that the charging party was subjected to an adverse employment action and they eliminate the two most common non-discriminatory reasons why a person might not be hired: (1) that she was not at all qualified for the job or did not apply for it, and (2) that the employer decided not to hire anyone.

2. If the evidence establishes a prima facie case, the respondent must articulate a **legitimate, nondiscriminatory reason** for the action taken.

The respondent generally responds to the charge and offers some nondiscriminatory reason for the employment action. For example, a respondent official may say that he/she refused to hire the charging party not because of his national origin; rather the charging party was not hired because he was not the best qualified applicant. Or, a respondent official may state that she disciplined the charging party not because of his race, but because of his poor attendance and poor performance.

3. Once the respondent has articulated a nondiscriminatory reason, the investigation must focus on whether the articulated reason is a **pretext** for discrimination. Pretext can generally be shown in two ways: 1) evidence that the reason is not credible; or 2) evidence indicating discriminatory motive. In this step of the investigation process, we are "testing respondent's defense."

The most important thing you should remember about the *McDonnell Douglas* elements of proof is that they were never meant to be "rigid, mechanized, or ritualistic." In any investigation, the question to be answered is simply whether the employer took the challenged adverse action against the charging party because of his/her membership in a protected group, i.e., because of a discriminatory motive.) This is achieved by examining all of the surrounding facts and circumstances to determine if there is reason to believe that the

employer acted in a discriminatory manner.

ESTABLISHING PRETEXT

In most cases, evidence that the respondent's explanation is not credible will be sufficient for the investigator to conclude that discrimination motivated the action. In the absence of **conclusive evidence** that the employer was actually motivated by something other than discrimination – such as political motives, nepotism, personal dislike, or personal favoritism – the investigator should generally find that the employer's lack of a credible explanation means that the explanation is **a pretext for discrimination.**

Pretext evidence related to credibility is evidence showing weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's legitimate, non-discriminatory reason sufficient to support a finding that the reason is not worthy of belief. For example, evidence that an employer has changed its reason for the adverse action raises sufficient questions about the truthfulness of the reason given.

Pretext evidence related to discriminatory motive can take a variety of forms, such as discriminatory comments or disparate treatment of comparators. The most common way involves **comparing respondent's treatment of the charging party to respondent's treatment of persons who are similarly situated to the charging party**, but who are not in the charging party's protected group.

Persons who are **similarly situated** are those who are, or were, in similar circumstances, such that it would be reasonable to expect them to receive the same treatment as the charging party. We refer to such persons as **comparators**. To determine if others are similarly situated, it is necessary to know:

- Are they covered by the policy at issue? Even if the policy is not in writing, are they subject to the same practice?
- Did they engage in similar conduct?
- Who was the decision maker for the charging party? Is it the same decision maker for others who engaged in similar conduct?

It is important to note that individuals may be similarly situated for one employment decision, but not for another. For example, two employees may be similarly situated for comparing health or retirement benefits, but not be similarly situated for comparing time and attendance violations.

Some factors to consider in determining who is similarly situated to the charging party are:

- If it is a hiring or promotion case, do the comparators have similar qualifications?
- Are the charging party and the comparator both hourly or salaried employees?
- Are both individuals bargaining unit or non-bargaining unit employees?
- Are they both non-supervisory employees or are they managers/supervisors?
- Are both in the same department or do they have similar functions?
- Are both probationary or non-probationary employees? (Except where the issue of the charging party being placed on probation for disciplinary reasons is the issue.)
- Are both at the same stages of the disciplinary process?
- Did both individuals commit rule violations known to respondent or were the comparator's violations *unknown* to respondent? (Charging parties frequently allege that "everybody did it," but respondent did not discipline them. The Investigator must determine if respondent knew that others were violating the policy.)
- Were the charging party and comparator(s) employed during the same time period and governed by the same policies? (If respondent alleges that there was a policy change, was it legitimate

or a pretext to discriminate against the charging party?)

This list is not exclusive, and some factors will not be relevant in some cases. All relevant factors should be weighed in determining whether someone is a proper comparator. No single factor is dispositive.

Remember that charging parties are not trained to distinguish who is similarly situated to them for the purpose of proving employment discrimination. They frequently focus on someone who is not a good comparator, and fail to recognize significant differences between themselves and the comparator they name.

Respondents may improperly define the pool of similarly situated individuals either through lack of technical knowledge or a desire to present the pool that puts its decision in the most favorable light.

It is the Investigator's responsibility to critically assess the comparators suggested by both parties, to ask probing questions to uncover any unnamed comparators, and to make an independent judgment as to whether the correct individuals are being compared. If the pool of similarly situated individuals is flawed, the entire development of the case may be equally flawed.

The 4-Square Analysis box can graphically assist in developing a valid pool of similarly situated comparators.

	Treated Better than CP	Treated Same/Worse Than CP
CP'S CLASS		
NOT IN CP'S CLASS Or substantially		

younger in ADEA cases		

Properly placing the pool of similarly situated employees into each of the 4 squares in the chart can assist the Investigator in ascertaining whether the charging party's protected status was a factor in the actions taken by the employer.

***Scenario**: Mr. Wheeler (African American), a factory production line worker, was discharged for clocking in at the beginning of his shift and then spending the first hour of his shift in the break room. He claims that others (Caucasian) did the same thing and were not disciplined in any way. Respondent states that the others who spent time in the break room did not clock in until they actually went to their line, or were not production workers*

.

With whom should we compare Mr. Wheeler?
Are the best comparators other production line workers?

In some cases, there may be **no persons who are similarly situated** to the charging party. If the charging party is the only one in her position, the Investigator should look at the treatment of her **predecessor and successor**. The charging party may be in a unique job, or a unique situation. In that case, the Investigator should look for other evidence indicating a discriminatory motive, such as biased statements, statistical evidence, suspicious timing, statements by the employer that lack credibility, etc.
While **comparative evidence** is the most commonly used method of proving pretext, other kinds of evidence may be used to buttress comparative evidence or in place of comparative evidence when it is unavailable.

Statistical Evidence

Statistical evidence can be used to support a finding of pretext. For example, if the charging party says he was discharged, like Mr. Wheeler, because of his race and the respondent says it was because of his

performance, sometimes statistical evidence can help evaluate the claim. What if only Black employees are disciplined/discharged for spending time in the break room?

Statistical evidence can be complex, but the concept is really quite simple. Statistical evidence can support an inference of discrimination where members of a protected group are subjected to unfavorable treatment in disproportionate numbers. For example, if there is evidence that an employer hires 20% of qualified male applicants for construction jobs but only 10% of qualified female applicants, the disproportionate exclusion of female applicants may assist in establishing that an employer's asserted reason for not hiring a female charging party is a pretext for discrimination.

The weight to give statistical evidence will vary from case to case. Generally, statistical evidence will be more probative if it involves large numbers of employees and/or it shows large differences in the treatment of employees in different protected groups. The analysis of statistical evidence can require expert analysis. Investigators can seek guidance from the Research and Technical Information division of the Office of Research, Information and Planning (ORIP) or the Office of General Counsel's Research and Analytical Services (RAS).

Evidence of Discriminatory Bias

Pretext may also be demonstrated by other evidence, such as **suspicious timing, or biased behavior or comments** directed at other employees in the protected group. Such evidence may undermine the credibility of the employer's nondiscriminatory reason and support a finding of disparate treatment.

Sometimes, the timing of the adverse action is suspicious enough to raise an inference of discrimination. For example, if an employer fires a female employee right after he learns that she is pregnant, that certainly raises an inference of discrimination on the basis of sex. Of course, a termination under such circumstances would not necessarily be discriminatory as other evidence might show that the employer was motivated by a nondiscriminatory reason.

If there is evidence that someone related to the decision-making process has made biased comments about other members of the charging party's group, even if not directed at the charging party, or not made at the same time as the adverse decision, those comments may undermine the credibility of the respondent's stated reason for taking action against the charging party. The more closely related and the closer in time such comments are to the decision-making process the more probative they will be.

Scenario: *Judy applies for a promotion, for which she is qualified, to the mail room supervisor position in her company, but respondent selects Jim, a former employee. Judy knows that Jim worked as a mail room clerk for respondent, but she doesn't know what he did in his subsequent job.*

How would you investigate this case to determine whether Judy was subjected to discrimination?

What are the possible bases that Judy could claim, based solely on the facts presented?

What are the elements of Judy's prima facie case?

What evidence would demonstrate pretext?

What other evidence might support her claim?

DIRECT EVIDENCE

It is rare to find direct evidence of discrimination. If a respondent witness tells you that he did not select the charging party because he was too old and inflexible, you have direct evidence of unlawful age discrimination. The respondent has made it clear that the employment action was taken **because of** the charging party's membership in a protected group.

Direct evidence may include an oral statement, a written memorandum or directive, or a policy that treats people differently because of their race, sex, etc.

For example, a statement that "men make better managers than women" would constitute direct evidence that a promotion decision was based on sex if the selecting official made the statement shortly before the promotion decision was made.

Examples of policies that provide direct evidence of discriminatory intent would include a rule prohibiting pregnant women from working in what the employer considers "dangerous" jobs, or a requirement that employees retire upon reaching a certain age. We will discuss the possible defenses to such overtly discriminatory policies; the point here is that they provide direct evidence of a motive to discriminate.

To constitute direct evidence, there must be a connection, or link, between evidence of bias and the adverse action. There may be cases in which there is direct evidence of bias but it does **not** constitute direct evidence that a particular action was motivated by that bias. For example, if an employee who is not connected to the adverse action made a biased oral statement, that statement will not constitute direct evidence that the adverse action was discriminatory. Similarly, if a biased oral statement was made months or years earlier, it may be direct evidence of past bias, but may not be direct evidence of current unlawful discrimination. Such comments, however, may be considered indirect evidence and evaluated along with all other evidence to decide whether the respondent's stated reason for its decision is a pretext for discrimination. The weight of such evidence would depend on various factors, such as who made the comments and when they were made.

Scenario: *A broadcast manager interviews Barbara, a 55-year-old broadcast news journalist, for a newscaster position. Barbara has 30 years of experience with this employer and is well qualified for the position. The manager tells Barbara that he's concerned that she (Barbara) might not stick around because she's already eligible for retirement. He also makes the comment: "Being a news anchor, especially now, is a young man's game. There are so many new things going on, it's hard to keep up and to project confidence and authority in discussing world events." Barbara does not get the job and she does not know if the job has been filled yet.*

Is there any direct evidence of discrimination?

What if no one got the job and the respondent decided to re-advertise? Could Barbara assert age or sex discrimination even in the absence of a comparator? Would she have to wait until the employer actually hired someone to bring her charge to the EEOC?

What are the elements of Barbara's prima facie case?

Has she shown a connection between her protected statuses and the respondent's actions?

Let's assume that someone was selected for the job. Does it matter whether the successful applicant was over or under the age of 40? Would it matter if the person hired were 52? or 22? Would it matter if the person hired were male or female?

SPECIFIC DEFENSES IN DISPARATE TREATMENT CASES

1. MIXED-MOTIVES DEFENSE

Typically, these are cases where the charging party cannot show the respondent is lying about the reason for its decision, but there is other strong evidence of discrimination. This **does not have to be direct evidence**, merely circumstantial evidence that supports an inference that discrimination was at least a motivating factor for the adverse action, even if other factors also may have motivated the action.

Example: Suppose that a charging party was fired for fighting with a co-worker and the co-worker was merely suspended for five days. The respondent explains that the charging party's prior disciplinary record justified the harsher treatment in her case. The investigation reveals that the charging party was the only female forklift operator in the warehouse and that her male supervisors and co-workers had consistently given her a hard time. She had been written up for many infractions for which male employees had not been disciplined. Once she was suspended for cursing–a penalty never imposed on her fellow workers.

It appears that the reason the charging party has more disciplinary action is that she has long been targeted for discriminatory treatment. In that case, even though the charging party cannot deny that she fought with a co-worker and that she has a past disciplinary record, the evidence suggests that the respondent was at least partly motivated by her gender in deciding to terminate her, and in its prior disciplinary actions against her. If the respondent could prove it would have fired her even if her gender had not come into the picture, it would not have to reinstate her or give her back pay or damages.

In the real case from which these facts are drawn, the charging party prevailed and the employer had to provide full relief because it did not meet its burden of showing it would have made the same decision if she had been a man. See *Desert Palace v. Costa*, 539 U.S. 90 (2003).

In some cases, even though the evidence may establish that reliance on a prohibited factor played a role in the adverse action, the respondent may

be able to show that it would have taken the same action even in the absence of discrimination. If the respondent can show this, it will either limit the charging party's entitlement to certain remedies or eliminate liability entirely. (Under Title VII, the ADA, and GINA, the respondent would not have to reinstate the charging party or pay back pay, or compensatory or punitive damages. The respondent would still be liable for discrimination and subject to prospective injunctive relief and for any attorney's fees.)

In an age discrimination charge, or a retaliation charge under any of the EEO statutes, the issue is whether the charging party's protected status was the "but for" cause of the challenged action. In other words, was the charging party's age or protected activity the factor that made a difference? If the evidence shows that the charging party's protected status made a difference, then it obviously would not be possible for the respondent to show that it would have made the same decision even if the charging party had been younger or had not engaged in protected activity. The Supreme Court has held that the mixed-motives defense is not available for charges alleging age discrimination or retaliation because the ADEA and Title VII's retaliation provision do not explicitly provide for this defense.

If the evidence shows that both the charging party's age or protected activity and legitimate factors played a role in the respondent's action, then the investigator should weigh the evidence to determine whether the respondent's age made a difference. For example, if there is evidence that the selecting official stated that the charging party should retire but also evidence that the selecting official rejected the charging party and all of the other applicants who did not meet the advertised minimum qualifications, then the Investigator should issue a dismissal.

On the other hand, assume that the evidence includes the selecting official's discriminatory statement. However, this time it shows that the charging party was qualified and had more experience though slightly lower performance ratings than the selectee. Under these circumstances, the evidence is sufficient to show that age was a "but-for" factor, regardless of whether the selectee's higher performance ratings may have played some role.

2. AFTER-ACQUIRED EVIDENCE DEFENSE

Sometimes the Investigator will find evidence that the respondent acted for discriminatory reasons, but the evidence **also** shows that, **after** respondent took the adverse action, it discovered a lawful reason for doing the same thing.

Example: Suppose that in a failure to hire case, your investigation discloses that the charging party was better qualified than the person selected and you have evidence to indicate the selection was discriminatory. In preparing its response to the charge, respondent discovers that the charging party lied when she stated on the application that she held a college degree. This deception on her application could have been a legitimate, nondiscriminatory reason for not hiring the charging party. But, inasmuch as respondent was not aware of the deception at the time it made the selection, it was not a factor in respondent's actual decision. The Investigator should still issue a finding of discrimination.

However, if respondent can prove that it would have rejected the charging party based only on her deception, back pay and out-of-pocket expenses will be cut off at the date when the deception was discovered, but damages for emotional harm and punitive damages would not be. The respondent also would not be required to rehire the charging party.

If a respondent asserts an after-acquired evidence defense, you should look closely at whether respondent decided to closely review this charging party's file because she filed a charge. If so, you would find that respondent had retaliated against the charging party. Retaliation would constitute an "extraordinary circumstance" that would extend the availability of back pay through the date that the charge is resolved but still would not require that the respondent hire or reinstate the charging party.

3. THE BFOQ OR BONA FIDE OCCUPATIONAL QUALIFICATION DEFENSE

Title VII and the ADEA allow an employer, in very limited circumstances, to discriminate on the basis of sex, religion, national origin, or age **when** that

characteristic is a bona fide occupational qualification (BFOQ) for a particular job. There is no BFOQ for race or color. BFOQ is a very narrow exception and applies only if the employer can prove that its preferred sex, religion, national origin, or age is necessary to perform the essential functions of the job. This is a difficult burden to prove. EEOC investigators should take care not to accept respondent's possibly stereotyped views of the qualifications for their jobs.

An example might be a situation where an employer needs a guard in a women's prison. Depending on the exact job duties and the number of prison staff, gender could be a BFOQ for the job. For example, if the guard would be required to provide security while inmates shower or under other circumstances that implicate inmates' privacy interests, then the employer might be justified in hiring a woman. On the other hand, if the employer could address privacy interests in a less discriminatory manner without sacrificing security, such as by using a screen or by assigning male guards other duties, then the employer could not limit all guard positions to women.

PATTERN OR PRACTICE CLAIMS

Intentional discrimination also can occur on a broad, class-wide basis. Charging parties frequently allege systemic discrimination against one or more protected groups in hiring, promotions, layoffs, or workplace harassment.

When discriminatory policies affect a number of individuals, you should identify and investigate the case as a **class** or **pattern or practice claim** and seek the appropriate remedies to correct the practice. If the investigation reveals a systemic pattern of discrimination, the EEOC should seek relief for the charging party and the entire affected class.

The Supreme Court long ago explained that a pattern or practice claim requires proof that discrimination is the respondent's "standard operating procedure, the regular rather than the unusual practice." United States v. Teamsters, 431 U.S. 324, 336 (1977).

Example: If a charging party challenges a respondent's pay and promotion policies as discriminatory on the basis of sex, the evidence would have to show, usually through statistical evidence, that women as a class were generally paid less and promoted less than men. The proof would have to show "more than the mere occurrence of isolated or "accidental," or sporadic discriminatory acts," but would not have to show discrimination against every woman in the class. The focus is on the "pattern," not each individual decision.

The statistical evidence used to establish a pattern or practice of intentional discrimination is similar to that mentioned earlier in connection with proving pretext. But in a pattern or practice claim, the statistical evidence is used to prove discrimination on a class-wide basis rather than to support an individual claim of discrimination. Anecdotal evidence of discrimination against individual class members should be used to buttress statistical evidence where it is available.

Example: Assume that out of 200 equally qualified applicants, half of whom are white and half black, an employer hires 50 whites and five blacks. It can be shown mathematically that the likelihood of such a

disparity occurring by chance is very small. We can thus infer that the reason for the disparity was intent to favor white over black applicants. To establish a defense in this situation – unlike in the individual disparate treatment case – the respondent would have to show that the statistical analysis was incorrect in some respect; it cannot simply argue that there were nondiscriminatory reasons for particular hiring decisions.

If the respondent is unable to defeat the statistical evidence, then it is liable for a pattern or practice of discrimination and is responsible for class-wide relief, such as prospective injunctive relief or punitive damages. The respondent also can try to show that particular decisions were made for nondiscriminatory reasons. The respondent would not be liable for individual relief, such as reinstatement, back pay, or compensatory damages, for any decisions that it can show were motivated by business reasons rather than discrimination.

If you are investigating a charge that has potential class allegations, you should consult with your supervisor about whether to expand the investigation and whether to seek assistance in developing and analyzing statistical evidence of class wide discrimination under either a disparate treatment or a disparate impact theory.

ADVERSE IMPACT / DISPARATE IMPACT

Most cases involve claims of disparate treatment and are analyzed using the disparate treatment elements of proof. However, there is another theory of discrimination that sometimes arises. "Adverse impact," "disparate impact," and just plain "impact" are terms that are used interchangeably to describe this theory of discrimination.

INVESTIGATING ADVERSE IMPACT

In an adverse impact case, the focus is not on whether there is evidence of intentional discrimination but on whether an employer policy has discriminatory **effects** that cannot be legally justified. Statistical evidence must show that a policy or practice that is neutral on its face (everyone is treated the same under the terms of the policy) has a substantially greater negative impact on members of a protected group as a whole. If the evidence shows such an impact, then the respondent must establish that the policy satisfies the appropriate statutory defense, which depends on whether the claim is under Title VII or the ADEA.

Example: Physical stamina and strength tests might disproportionately exclude older individuals or women from employment consideration. Such tests might be permissible for some jobs that are physically demanding but not for jobs that are sedentary.

A disparate impact claim can challenge any specific employment practice that has a disparate impact even if that practice is part of a larger process that does not have a disparate impact.

Example: A charging party may challenge a written test that has a disparate impact on Hispanics even if the respondent's hiring process, as a whole, does not have a disparate impact on Hispanics.

Sometimes the analysis requires a comparison of applicants who qualify under the standard at issue – who pass a particular test, for example–with those who do not. In other situations, general population statistics can be used. For example, it can be shown from population data that women, on average, are shorter than men.

Your office has software available to assist in an analysis of adverse impact. All District offices also have a Systemic Coordinator who can help with identifying potential class and systemic charges under both the disparate treatment and disparate impact theories and with statistical analysis. In addition, the EEOC Headquarters staff in the Office of Research and Information Planning (ORIP) may also be able to provide assistance if your supervisors think the case merits disparate impact analysis. In addition, analysts are available in most districts to assist with

complex statistical analysis. As noted earlier, statistical analysis can be complex and technical, so an expert should be consulted whenever possible.

In addition, investigators should note that evidence may show that an employer had a discriminatory reason for adopting a facially neutral policy. Under such circumstances, the evidence establishes unlawful disparate treatment. There also may be evidence that the policy, while facially neutral, is applied in a discriminatory way. Such evidence could make a significant difference because, for example, compensatory and punitive damages are available for claims of disparate treatment but not for claims of disparate impact under Title VII.

Respondent Defenses in a Disparate Impact Case

If you determine that a policy has an adverse impact, you must then gather and assess the evidence provided by respondent for establishing a connection between its policy and the jobs at issue, as well as the business reasons for the policy. You should do your best to push respondents to go beyond general assertions (e.g., we will not have criminals in our workplace) and to provide the factual justification relied on (e.g., a recent conviction for theft disqualifies someone from a position handling substantial amounts of cash).

If the Investigator determines that there is a disparate impact violation, relief should be sought for the entire affected class.

Title VII Defense

Under Title VII, if statistical evidence establishes that a neutral policy has a disparate impact on a protected group, then the employer must show that "the challenged practice is job related for the position in question and consistent with business necessity."

In the case of physical stamina or strength tests that have a disparate impact on women, i.e., excludes significantly more women than men from consideration, the respondent would have to show that the test is job related for the positions to which it applies and is consistent with business necessity. The respondent would have to show that the test measures minimum qualifications for successful performance of the job in question. For example, a delivery company with a 70-pound shipping limit might be able to justify a 70-pound lifting requirement for drivers who have to deliver packages without assistance but not for other workers who rarely have to lift heavy packages or for workers who can easily obtain assistance from coworkers.

Even if the employer can show that the challenged practice is justified by business necessity, the investigator should determine whether there is evidence of an alternative that is equally effective in achieving the employer's business goals while having a less discriminatory impact. If such an alternative does exist, then the employer would be required to adopt the alternative.

Example: Suppose that an employer requires that all of its customer service representatives have graduated from a two-year business school. This requirement is shown to have an adverse impact on a particular minority group. The employer proves that this requirement is job-related and consistent with business necessity, by proving that customer service representatives with business school degrees, as a whole, perform better on specific, objective measures of performance than those who do not have business school degrees. Nevertheless, the evidence may show that there is an alternative with less adverse impact that would still meet the employer's business needs. For instance, requiring a combination of two years of business training and/or experience as a customer service representative may be as effective a selection device, while resulting in less adverse impact.

ADEA Defense

In *Smith v. City of Jackson*, 544 U.S. 228 (2005), the Supreme Court held that disparate impact claims are covered by the ADEA, and that the employer's defense is to show that a "reasonable factor other than age" justified the policy. (The availability of disparate impact age claims may vary under state or local laws, however.)

In 2012, the Commission updated its ADEA regulations on disparate impact and explained the statute's "reasonable factor other than age" defense. See 29 C.F.R. § 1625.7. To show that a policy that has a disparate impact on older workers is justified by a "reasonable factor other than age," the policy must be reasonably designed to further a legitimate business purpose. Thus, if an employer adopted a fitness test for law enforcement officers that has a disparate impact on older workers, it would have to show that the test is reasonably designed to measure fitness requirements needed to effectively perform the duties of a law enforcement officer. In contrast, if an employer adopted a fitness test for positions involving sedentary work, then the test would likely be unlawful as it would not measure qualifications reasonably related to the position in question.

These are some examples of policies/practices that would signal the need for an adverse impact analysis:

- Minimum height/weight requirements
- Pre-employment tests
- Certain educational requirements, e.g., high school diploma
- Physical agility tests
- "No beards" policy
- Nepotism policy
- Criminal records exclusions
- Credit or financial history exclusions
- Certain screening devices in online hiring processes

- Height/weight requirements are often used in law enforcement jobs, but may be less job-related in other fields.
- Physical agility tests are sometimes needed but there may be other equally effective tests with less of an impact.
- No beard policies, which impact African American males, are not usually defensible simply as appearance standards, but may be job-related for safety reasons for firefighters or others who must wear masks that will not seal over facial hair.
- Nepotism policies, i.e., policies favoring the employment of friends and relatives of the current work force, may have a disparate impact on groups that are not represented in the current work force. Isolated instances of nepotism, however, will not generally implicate the EEO statutes. Conviction records should not be used to screen out applicants unless the employer's screening policy was crafted to reflect the nature of the job(s) sought, the gravity of the offense(s), and the time that has passed since the crime was committed. If such a "targeted screen" marks someone for rejection, he or she should have an opportunity to present information about erroneous criminal records or mitigating circumstances prior to actually being screened out. For more information on this issue, consult the Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964, at https://www.eeoc.gov/laws/guidance/arrest_conviction.cfm, which was issued by the Commission in 2012.

- The Commission has not fully fleshed out its position on credit checks, but its policy will be guided by the legal requirement that criteria that have a disparate impact must be job related and consistent with business necessity. Investigators should contact the legal unit or OLC if a credit check policy is at issue.

In the Strategic Enforcement Plan (SEP), the Commission has identified as a priority the issue of **Eliminating Barriers in Recruitment and Hiring.** This issue encompasses class-based recruitment and hiring practices and policies, restrictive screening tools, exclusionary policies and practices, and steering particular groups into specific job types. Both disparate treatment and disparate impact theories of liability may apply to such priority issue cases.

EEO-1 REPORTS

Title VII requires that most employers file annual EEO-1 Reports. These reports provide a snapshot of the employer's workforce by race, ethnicity, gender, and job category. Examples of job categories include officials and managers; professionals; sales workers; craft workers; and service workers. EEOC uses EEO-1 data in the investigation of employment discrimination claims and also to research broad trends in the employment status of minorities and women.

All EEOC Investigators have access to EEO-1 Reports through IMS. Generally, investigators should examine the employer's EEO-1 Report, if relevant to the charge, at intake. The EEOC's internal software tool, EEO-1 Analytics, may also be used to examine how the employer's work force compares to comparable employers in the same labor market or geographic area. Internal training on how to use EEO-1 data in investigations is available through staff training webinars, including ones on Use of the EEO-1 Report and Basic Statistics and Availability athttp://dms.eeoc.gov/livelink/livelink.exe?func=LL.getlogin&NextURL=%2Flivelink%2Flivelink%2Eexe%3Ffunc%3Dll%26objId%3D33358615%26objAction%3Dbrowse%26viewType%3D1, and by contacting the Office of Research, Information and Planning (ORIP) for assistance.

All non-federal contractor, private sector employers with 100 or more employees, and Federal prime contractors or first-tier subcontractors with 50 or more employees and a contract amounting to $50,000 or more, or that serve as a depository of Government funds in any amount, must complete and file an EEO-1 Report annually.

State and local governments, school systems, educational institutions, and certain other employers are not required to file the report, but may have other employment survey responsibilities. Only those establishments located in the 50 states and the District of Columbia must file an EEO-1 Report.

There are different filing requirements for single-establishment employers (*i.e.*, employers doing business at only one establishment) and multi-establishment employers.

EEOC's website at https://www.eeoc.gov/employers/reporting.cfm contains

detailed information on who must file these reports; how to file them; and explanations about the various job categories and examples of specific positions that fall into each category.

EXERCISE: THEORIES OF DISCRIMINATION

Identify the ***basis***, ***issue***, ***statute*** and ***appropriate theory*** to pursue in the following scenarios. Also identify any ***additional questions*** you may have for the charging party at Intake.

~~ Scenario #1 ~~

Respondent, Mayfair County Government, has a residency requirement for all applicants: all applicants must have resided in the County for at least three years. Charging party, Carlos Moreno, applied and was qualified for a position as a systems analyst. Moreno claims he was denied the position because of his national origin (Hispanic). Moreno lives in the city of Maywood, which is five miles from Mayfair County.

~~ Scenario #2 ~~

Diane Cook, female, applied for a company-paid fellowship and was rejected. Cook was the third woman to apply and be rejected. The last ten successful fellowship applicants have been male. The training committee, which considers fellowship applications, stated that Cook was rejected because she failed to meet the requirement of having completed 18 credit hours in business administration. Cook satisfied all other requirements, including superior job performance, but the business administration credit hours is a major criterion under company policy.

~~ Scenario #3 ~~

Eldon Little, a 50-year-old white male, worked for respondent for 12 years. Respondent had a reduction in force, and told supervisors to lay off an employee who was not "flexible" and able to learn new skills. Little was selected for a reduction-in-force because his supervisor said that he was "set in his ways," could not learn new skills, and was slow with technology.

~~ Scenario #4 ~~

Nguyen Van To, Vietnamese, applied for a job as a stockman at a warehouse. Van To was not hired because he did not meet the minimum height requirement of 5 feet, 6 inches. Respondent adopted the minimum height requirement because even the longest ladder will not extend to certain shelving units.

~~ Scenario #5 ~~

John Booker, an African-American male, works as a laborer for a public utility company. Booker requested a transfer to a Line Technician, a better paying job. Respondent required Booker to have a high school diploma and pass a general aptitude test and a mechanical aptitude test. Booker could not provide a high school diploma and failed both exams. He was denied the transfer. Respondent states that all employees who request a transfer have to follow the same policies and procedures.

~~ Scenario #6 ~~

Mya Jackson, an African American woman, has worked for the Tuckerout Construction firm for seven years as a section-gang laborer. Jackson applied and was qualified for a position as Foreman. Jackson was denied the position. Respondent states that it did not promote Jackson because she lacked the aggressiveness and assertiveness needed for a leadership position.

PREGNANCY DISCRIMINATION

The Pregnancy Discrimination Act of 1978 amended Title VII to make pregnancy discrimination a form of sex discrimination under Title VII. Basically, Title VII requires **that employers treat women affected by pregnancy or related medical conditions the same way they treat anyone else who has similar temporary limitations.**

The Pregnancy Discrimination Act makes it clear that employers cannot exclude pregnant women from jobs because of stereotypical beliefs that they are incapable of doing their jobs or that after childbirth they will leave their jobs. In addition, employers cannot exclude from employment opportunities women who are not pregnant but could become pregnant. Even genuine concern that hazards inherent to a job could jeopardize the health of a fetus will not justify excluding pregnant or fertile women from the job.

In 2015, the Commission issued a new Enforcement Guidance on Pregnancy Discrimination and Related Issues at https://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm. The Enforcement Guidance updates prior guidance on pregnancy issues in light of legal developments in recent years and includes a discussion of how the ADA, as amended in 2008, applies to individuals with pregnancy-related impairments. The updated guidance was published on June 25, 2015, superseding an initial version of the guidance published in 2014. The guidance reflects the Supreme Court's March 25, 2015 decision, in *Young v. UPS*, 135 S. Ct. 1338 (2015).

The Court held that the McDonnell Douglas burden-shifting analysis generally applies in cases brought under the PDA's second clause, which says that "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes…as other persons not so affected but similar in their ability or inability to work." A woman who claims she was treated less favorably than other employees who are similar in their ability or inability to work can establish a prima facie case of pregnancy discrimination by showing that (1) she is a member of a protected class; (2) she sought "accommodation", (3) the employer did not accommodate her; and (4) the employer

accommodated other employees who were similar in their ability or inability to work. An employer may then articulate a legitimate, nondiscriminatory reason for the different treatment.

The Court explained "that reason normally cannot consist of simply of a claim that it is more expensive or less convenient to add pregnant women to the category of those ('similar in their ability or inability to work') whom the employer accommodates." A claimant may show that the employer's articulated reason is pretextual, i.e., that an employer's policies "significantly burden" pregnant employees and that its "legitimate, nondiscriminatory reasons" are not "sufficiently strong" to justify the burden, "but rather, when considered along with the burden imposed -- give rise to an inference of intentional discrimination."

Thus, as explained in the updated Enforcement Guidance, employer policies that do not facially discriminate on the basis of pregnancy may nonetheless violate the PDA where they impose significant burdens on pregnant employees that cannot be supported by a sufficiently strong justification.

Note that the Young case did not involve the ADA's 2008 amendments, which may significantly affect claims for accommodation of pregnancy-related impairments or limitations. Under the SEP, the Commission has designated the issue of **accommodation of pregnancy-related limitations under the PDA and ADA** as a priority Emerging and Developing Issue. It is important to keep in mind that the ADA Amendments Act's expansion of the definition of "disability" may assist many women with pregnancy-related impairments in seeking workplace accommodations.

As explained in the Commission's Guidance, while pregnancy itself is not an impairment within the meaning of the ADA, pregnant workers may have impairments related to their pregnancies that qualify as disabilities under the ADA, as amended. There are a number of pregnancy-related medical conditions that impose work-related restrictions that are substantially limiting under the ADA, even though they are not permanent. A pregnant employee may be entitled to reasonable accommodation under the ADA for limitations resulting from pregnancy-related impairments that constitute disabilities.

Who would be similarly situated in a pregnancy discrimination case?

The comparator group, the group of similarly situated employees, for a pregnancy allegation includes both male employees and female employees who are not pregnant. Under the Court's decision in Young v. UPS, plaintiffs in PDA cases can establish a prima facie case of pregnancy discrimination by identifying any employee who is similar in his or her ability or inability to work and who is provided with light duty, a reasonable accommodation under the ADA, or another workplace benefit. Employers normally may not use cost or convenience as reasons for refusing to extend to pregnant workers accommodations that they provide to non-pregnant workers who are similar in their ability or inability to work.

The Pregnancy Discrimination Act also makes clear that blanket policies dictating when a woman must take maternity leave are unlawful.

Further, although Title VII does not prohibit per se an employer from asking pregnancy-related questions, such questions may constitute evidence of pregnancy discrimination if the employer later takes an adverse action, such as rejecting a job applicant who revealed during a job interview that she was pregnant.

***Scenario**: Judy, an African American woman, claims that she applied and was qualified for a job as a catering manager and was denied the position because she is African American, single, and pregnant. Respondent states that the company has a policy of not hiring single parents.*

What bases could Judy claim for the failure to hire her?

What is the theory of discrimination in this scenario?

Two of the major issues raised in pregnancy discrimination cases are Pregnancy Leave and Medical Benefits.

Pregnancy Leave

The term "pregnancy leave" generally describes leave taken to cover the employee's inability to work as a result of pregnancy, childbirth, or related

medical conditions. Note that the equivalent terminology used in the EEOC's Enforcement Guidance on Pregnancy Discrimination and Related Issues is "pregnancy-related medical leave."

There is no federal requirement that an employer provide either paid or unpaid leave for temporary disabilities or pregnancy and childbirth, other than the Family and Medical Leave Act (FMLA), which is enforced by the Department of Labor. Once an employer has satisfied its FMLA obligations to an employee, there is no further federal requirement to provide leave.

However, whatever temporary disability leave the employer does provide, if any, must also be provided to pregnant employees. If an employer allows leave for temporary medical conditions not related to pregnancy, it must also allow leave for pregnancy-related conditions that similarly affect the ability to work. Further, an employer cannot apply different terms or conditions to such leave. For example, if an employer allows temporarily disabled employees to take leave without pay after they use up accumulated sick leave, it must grant such leave to employees who need it because of pregnancy-related medical conditions.

Similarly, if an employer pays temporarily disabled employees 60% of their wages while they are on short-term disability leave, it must offer the same rate to employees who are absent due to pregnancy-related conditions.

An employer may not specify the time that maternity leave commences. For example, an employer cannot **require** pregnant employees to go out on leave two weeks before expected delivery.

An employer must use the same procedures to determine a pregnant employee's ability to work as it uses to determine a temporarily disabled employee's ability to work.

For example, an employer cannot require pregnant employees to submit to medical exams as a condition of returning to work or as a condition of granting sick or disability leave, unless it imposes that requirement on employees affected by other conditions.

Medical Benefits

The same basic principle applies: pregnant employees must be treated the same as other employees regarding their ability or inability to work.

Employers who do not offer medical benefit plans are not required to establish such plans by Title VII. However, when such plans are offered, they cannot exclude costs arising from pregnancy, childbirth, or related medical conditions.

Deductibles for pregnancy-related medical costs must be the same as deductibles for other conditions.

Limitations on expenses cannot be applied exclusively to pregnancy-related conditions. For example, an employer's health plan cannot exclude coverage of the cost of a private hospital room post-childbirth if such a cost is covered for medical conditions unrelated to pregnancy.

Scenario: *Charging party applied for a server job at the Seafood Restaurant and was interviewed by the manager. The manager told the charging party he was impressed with her experience and offered her the job. At the end of the interview, the charging party and the manager were chatting, and she told him she was pregnant. The manager told the charging party to call him later in the week to get her start date. When she called a couple of days later, the manager said he hired someone else. He said he was afraid that the charging party would hurt her baby carrying the heavy trays of food and the customers might not like having a pregnant woman waiting on them.*

What are the basis and issue? What is the theory of discrimination?

Scenario: *Charging party works for an oil spill clean-up company. Charging party is pregnant and just found out that her employer's short-term disability policy does not cover pregnancy. Charging party states that the employer's policy extends to employees with short-term disabilities, such as broken arms, etc., regardless of whether incurred through on-the-job or off-the-job injury, but not to short-term disability caused by pregnancy.*

What is the basis and issue? What is the theory of discrimination?

DISCRIMINATION AGAINST CAREGIVERS ON A PROHIBITED BASIS OR BASES

When is it covered under the laws enforced by EEOC?

The purpose of the EEOC's Enforcement Guidance on Unlawful Disparate Treatment of Workers with Caregiving Responsibilities at https://www.eeoc.gov/policy/docs/caregiving.htm, issued in 2007, is to provide an overview of the various ways in which discrimination against caregivers may constitute unlawful disparate treatment under the laws enforced by the EEOC.

The laws enforced by the EEOC do not specifically cover caregiver or parental status discrimination. However, discrimination against caregivers may be covered if an employment decision is based on sex, association with an individual with a disability, or another protected characteristic.

One of the most significant workplace changes since the passage of Title VII in 1964 is the proportion of women who work. In contrast, one of the

things that has not changed is that women remain the primary caregivers in most families.
Caregiving is not limited to childcare and comes in all forms. As the Baby Boomer population ages, discrimination issues involving caregivers are becoming more common. Conflicts between work and family responsibilities often create a "maternal wall" that limits the employment opportunities of caregivers.

Work/family conflicts affect all classes of workers, but most often affect low-wage workers. Lower-paid workers tend to have much less control over their schedules and are more likely to face inflexible employer policies, such as mandatory overtime. Many low-wage earner couples provide childcare by "tag teaming" -- working opposite shifts and taking turns caring for their children.

The maternal wall also affects professional women. As we said, women make up nearly half the labor force, but they are still a much smaller proportion of managers and officials.

The maternal wall is not restricted to women. It can limit the employment opportunities of any worker who needs to balance work and family responsibilities.

Under the EEO statutes, unlawful discrimination against caregivers generally takes the form of disparate treatment. It is often based on stereotypes about caregivers, and can also include harassment and retaliation.

Despite the many changes in the workplace and society since the passage of Title VII in 1964, gender-based stereotypes that caregiving is woman's work have changed very little.

While sex-based discrimination against working mothers and other female caregivers remains common, it may not look the same as it did 30 or 40 years ago. In 1971, the Supreme Court decided a case where the employer had a policy of refusing to hire women with preschool age children, but no such policy for hiring men with preschool age children. We may not see such overt discrimination today, but working mothers are still often seen foremost as mothers, not workers; whereas the same

stereotype is not usually applied to working fathers.

Assumptions about work performance are most common when a woman becomes pregnant or takes on childcare responsibilities. A female worker who was seen as a good performer may suddenly be treated differently when she becomes pregnant or has a child. Because of gender-based stereotypes, employers often make assumptions that women who are caregivers are less committed or dependable than other employees.

Unlawful discrimination against a caregiver is established by examining the totality of the evidence. It is key that there be evidence of discrimination based on sex or some other protected characteristic and not merely evidence of caregiver or parental discrimination. Comparator evidence showing that similarly situated male caregivers are treated better is helpful but not necessary to establish a violation. Discriminatory comments about female caregivers may be voiced openly in the workplace. These "loose lips" comments can frequently show sex-based discrimination against a caregiver even where there is no comparator evidence.

Generally gender-based stereotypes concerning caregiver responsibilities involve women. But unlawful assumptions about male caregivers may also lead to discrimination.

In addition to sex discrimination, women of color may also face race or national origin discrimination.

Many workers are responsible for caring for family members or others with disabilities. It is unlawful to discriminate based on stereotypes about an employee's ability to balance job duties and care for a relative or other individual with a disability.

Employers may be liable if workers with caregiver responsibilities are subjected to offensive comments or other harassment because of race, sex (including pregnancy), association with an individual with a disability, or another protected characteristic and the conduct is sufficiently severe or pervasive to create a hostile work environment.

• Verbal harassment includes comments such as, "Now that you're a mother, you won't have the same dedication to the job. That's why I never

had any children! Maybe you should rethink being a supervisor."

• Scrutiny includes monitoring the employee's time, tracking when she leaves and returns from her lunch break and admonishing her if she is late, even if only by a few minutes.

• Supervisor repeatedly expresses concern that the employee's caretaking responsibilities for his daughter with a disability will prevent him from being able to meet the demands of his job.

• Supervisor removes the employee from team projects, stating that his coworkers do not think that he can be expected to complete his share of the work "considering all of his wife's medical problems."

• Supervisor begins requiring the employee to follow company policies that other employees are not required to follow, such as requesting leave at least a week in advance except in the case of an emergency.

Employers are prohibited from retaliating against workers who oppose unlawful discrimination, such as by complaining about gender stereotyping of working mothers, or who participate in the EEOC charge process, such as filing a charge or testifying on behalf of another worker who has filed a charge.

An employer may also have specific obligations towards caregivers under other federal statutes, such as the Family and Medical Leave Act, or under state or local laws.

SEX DISCRIMINATION BASED ON LGBT STATUS

EEOC interprets and enforces Title VII's prohibition of sex discrimination as forbidding any employment discrimination based on gender identity or sexual orientation. As is true of Title VII and other federal EEO laws generally, these protections apply regardless of any contrary state or local laws. Recent court and Commission decisions have recognized that discrimination against an individual because of gender identity (including transgender status) or sexual orientation is a violation of Title VII's prohibition of sex discrimination.

EEOC accepts and investigates charges of sex discrimination related to LGBT issues as claims of sex-based discrimination under Title VII. The Commission's decisions and positions taken in EEOC's litigation are summarized on our web site in the section, "What You Should Know About EEOC and the Enforcement Protections for LGBT Workers" at https://www.eeoc.gov/eeoc/newsroom/wysk/enforcement_protections_lgbt_workers.cfm.

Some examples of LGBT-related claims that EEOC views as unlawful sex discrimination include:

- Failing to hire an applicant because she is a transgender woman.
- Firing an employee because he is planning or has made a gender transition.
- Denying an employee equal access to a common restroom corresponding to the employee's gender identity.
- Harassing an employee because of a gender transition, such as by intentionally and persistently failing to use the name and gender pronoun that correspond to the gender identity with which the employee identifies, and which the employee has communicated to management and employees.
- Denying an employee a promotion because he is gay or straight.
- Discriminating in terms, conditions, or privileges of employment, such as providing a lower salary to an employee because of sexual orientation, or denying spousal health insurance benefits to a female employee because her legal spouse is a woman, while providing spousal health insurance to a male employee whose legal spouse is a woman.
- Harassing an employee because of his or her sexual orientation, for example, by derogatory terms, sexually oriented comments, or disparaging remarks for associating with a person of the same or opposite sex.
- Discriminating against or harassing an employee because of his or her sexual orientation or gender identity, in combination with another unlawful reason, for example, on the basis of transgender status and race, or sexual orientation and disability.

Three recent decisions by the Commission in federal sector cases are particularly significant with regard to LGBT claims. These precedents apply

in our investigation and resolution of private sector charges.

With regard to gender identity issues, the Commission first held, in *Macy v. Department of Justice*, EEOC Appeal No. 0120120821 (April 20, 2012) at https://www.eeoc.gov/decisions/0120120821%20Macy%20v%20DOJ%20ATF.txt , that discrimination against an individual because that person is transgender is discrimination because of sex and therefore is prohibited under Title VII. In *Lusardi v. Dep't of the Army*, EEOC Appeal No. 0120133395 (April 1, 2015) at https://www.eeoc.gov/decisions/0120133395.txt, the Commission held that an agency's restrictions on a transgender female's ability to use a common female restroom facility constituted disparate treatment on the basis of sex, and that the restroom restrictions combined with hostile remarks, including intentional pronoun misuse, created a hostile work environment on the basis of sex.

The Commission has further held that discrimination against an individual because of that person's sexual orientation is discrimination because of sex and therefore prohibited under Title VII. See *Baldwin v. Dep't of Transportation*, EEOC Appeal No. 0120133080 (July 15, 2015) athttps://www.eeoc.gov/decisions/0120133080.pdf . If an employee is discriminated against on the basis of sexual orientation, the Commission held in *Baldwin,* this will always constitute sex discrimination because: it involved treatment that would not have occurred but for the employee's sex; it took the employee's sex into account by treating him or her differently based on the sex of the persons the employee associates with; and/or it was premised on a fundamental sex stereotype, norm, or expectation, such as the belief that individuals should be attracted only to individuals of the opposite sex. Also, as noted in the *Baldwin* decision, heterosexual employees may also state a claim of sex-based discrimination. For example, a heterosexual man may allege that a gay supervisor denied him a promotion because he dates women instead of men.

Thus, the Commission takes the position that all gender identity discrimination and all sexual orientation discrimination is sex discrimination under Title VII. You should know, however, that the law is developing in this area and courts may take a more limited view of the law's coverage or

may or may not agree with the Commission that all adverse employment actions based on gender identity or sexual orientation are actionable as sex discrimination. Therefore, it is important to collect during the investigation any evidence that might support any of these theories of coverage.

This evidence will also be important in evaluating the merits of the charge. The investigation should pursue all relevant evidence to establish whether or not the challenged employment action was in fact based on the charging party's sexual orientation or gender identity. As in any case, this may include both circumstantial evidence of pretext as well as direct evidence that the action was motivated by the charging party's sexual orientation or gender identity. There may be direct evidence that gender identity or sexual orientation, as such, motivated the challenged action or is the stated basis for the employer's policy or practice.

Other evidence of a sex-based motive may include, for example, any comments or actions that reveal animus, discomfort, disapproval, or consideration of the charging party's sex, including anything relating to behavior, manner, or appearance. It may include adverse actions taken because of the person's failure to conform to sex-based stereotypes, preferences, norms or expectations; sexual or sex-based harassment; or evidence that the sex of the charging party motivated the adverse action in light of the sex of the persons the charging party associates with, including his or her spouse or the persons he or she dates. The Commission also has recognized that terms historically used against gay and lesbian persons are degrading sex-based epithets and will constitute evidence of discrimination on the basis of sex.

The **Strategic Enforcement Plan** designates the issue of "protecting lesbians, gay men, bisexuals and transgender (LGBT) people from discrimination based on sex"" as an **Emerging and Developing Issue** priority.

Guidance on intake and processing of sex discrimination charges related to LGBT status can be found on inSite on the Office of Field Programs' page.

- ***A Note about Other Laws***

Federal contractors and sub-contractors are covered by a separate, explicit prohibition on transgender or sexual orientation discrimination in employment pursuant to Executive Order 13672 and regulations of the U.S. Department of Labor's Office of Federal Contract Compliance Programs.

State or local fair employment laws may explicitly prohibit discrimination based on sexual orientation or gender identity. If that is the case in your state, we should make sure to advise the charging parties that they may have a right to file a charge on that basis with the FEPA.

On the other hand, if a state or local law permits or does not prohibit discrimination based on sexual orientation or gender identity, the EEOC will still enforce Title VII's discrimination prohibitions against covered employers in that jurisdiction because contrary state law is not a defense under Title VII.

SEX-BASED WAGE DISCRIMINATION

All of the laws enforced by EEOC prohibit wage discrimination. We are going to focus here on gender-based wage discrimination covered by both the Equal Pay Act and Title VII. Under the SEP, Enforcing Equal Pay Laws is designated as one of the Commission's national priorities.

The Equal Pay Act

The Equal Pay Act requires that men and women be given equal pay for equal work. The jobs do not need to be identical, but they must be substantially equal. It is job content, not job titles, that determines whether jobs are substantially equal. There is a specific analysis to determine whether jobs are substantially equal under the EPA.

The EPA covers both men and women. A man or a woman may complain that s/he is being paid a lower wage than a person of the opposite sex who is doing the same job in the same place.

Specifically, the EPA provides:

Employers may not pay unequal wages to men and women who perform substantially equal work in jobs that require substantially equal **skill**, **effort**, and **responsibility**, and that are performed under **similar working conditions** within the **same establishment/workplace.**

The first inquiry is whether the jobs being compared share the same "common core" of tasks. In other words, is a significant proportion of the two jobs tasks the same? If so, does the comparator perform extra duties which make the work substantially different? Extra duties will not make the jobs unequal if the extra duties are insubstantial.

For example, suppose a male professor is paid more than a female professor in the same college and the college alleges that the male employee carries a heavier workload and therefore the jobs are unequal. However, the evidence shows that the only difference in workload is that the male teacher gives an occasional additional lecture. This difference is not significant enough to defeat a finding that the jobs are substantially equal.

If the two jobs share the same common core of tasks, then the next issue is whether the jobs are substantially equal with respect to skill, effort, and responsibility and are performed under similar working conditions.

SKILL

Skill is measured by experience, ability, education, and training required to perform the job.

The key issue is what skills are required for the job, not what skills the individual employees may have. For example, two bookkeeping jobs could be considered substantially equal under the EPA even if one of the job holders has a master's degree in physics, since that degree would not be required for the job.

EFFORT

Effort is measured by the amount of physical or mental exertion needed to perform the job. Job factors that cause physical or mental fatigue or stress can be considered in determining the effort required for a job.

For example, suppose that men and women work side-by-side on a line assembling machine parts. The man at the end of the line must also lift the assembled product as he completes his part, and place it on a board. That man's job can**not** be considered to involve equal effort as the other assembly line jobs **if** the extra effort of lifting the assembled product off the line is substantial and it is a regular part of the job.

RESPONSIBILITY

Responsibility may be measured by the extent of work employees do without supervision, the extent the employee exercises supervisory functions, and the impact of the employee's functions on the business (usually financial accountability).

In the assembly line example above, if the employees on the line are all doing the same job of assembling parts, but one employee has the additional task of monitoring his coworkers to make sure that the line does not slow down, it may be determined that this employee has more responsibility than the others.

Often, responsibility is measured in terms of financial accountability. For example, a salesperson who is delegated the duty of determining whether to accept customers' personal checks has more responsibility than other salespeople. On the other hand, a minor difference in responsibility, such as assignment of the task of locking up at the end of the day, may not justify a pay differential.

In order to be substantially equal, the jobs also need to be performed under similar working conditions within the same establishment.

SIMILAR WORKING CONDITIONS

Similar working conditions encompass two factors: (1) physical

surroundings like temperature, fumes, and ventilation; and (2) hazards. "Surroundings" take into account the intensity and frequency of environmental elements encountered in the job, such as heat, cold, wetness, noise, fumes, odors, dust, and ventilation. "Hazards" take into account the number and frequency of physical hazards and the severity of injury they can cause. For example, employees who work with toxic materials may earn more than those who work with safe materials.

SAME ESTABLISHMENT/WORKPLACE

Historically, an establishment/workplace was defined as a single distinct place of business. However, because of the computer revolution and differing work customs, the EEOC takes into account the particular employer's work customs.

For example, a female office manager who worked at a company's Chicago office most likely would not have been able to compare her wages to a male office manager who worked at the company's Atlanta office. However, if it is determined that both office managers, in fact, are under the company's national wage scales and they perform substantially equal work, the actual location of each person's job may not alter the determination that they should be paid the same. Depending on the facts of the case, the EEOC may look at other factors such as whether hiring and work assignments are accomplished from a central location of the employer.

Other relevant factors include whether hiring is centralized, whether employees frequently interchange work locations, and whether the operations of separate units are interconnected. More information and guidance on what to consider when assessing whether two employees work in the same "establishment" can be found on our web site at https://www.eeoc.gov/policy/docs/compensation.html, and in the regulation at 29 CFR 1620.9.

Please note that even if we conclude this is not the "same establishment" for EPA purposes, the female employee could have a claim of unequal wages based on sex discrimination under Title VII because the single establishment/workplace rule does not apply to Title VII.

The EPA does not allow an employer to reduce the wages of any employee to correct an unlawful wage differential.

So, if you discover evidence which indicates that an employer is paying lower wages to women who are performing substantially equal jobs under similar working conditions as higher-paid men, the employer must raise the women's wages, not lower the men's unless it can establish one of the affirmative defenses we are about to discuss.

Defenses under the Equal Pay Act

Once you determine that the jobs are substantially equal, you must analyze respondent's defense.

The EPA allows an employer to pay different wages if the difference is based on one of the four defenses set forth in the statute. They are:

SENIORITY

A seniority system rewards employees according to the length of their employment. A difference in pay for jobs that are substantially equal can be based on a bona fide seniority system. To be bona fide, it must be an established seniority system based on predetermined criteria; it must have been communicated to employees; it must have been applied consistently and even-handedly; and it must not have been adopted with a discriminatory purpose.

MERIT

A merit system rewards employees for exceptional job performance. A difference in pay for jobs that are substantially equal can be based on an established merit system if it is based on predetermined criteria; it has been communicated to employees; and it is applied consistently and even-handedly to employees of both sexes.

A merit system must be a structured procedure in which employees are evaluated at regular intervals according to predetermined criteria, such as efficiency, accuracy, and ability. The merit system can be based on an

objective measurement such as a test, or a subjective rating. However, a merit system that is subjective would be strictly scrutinized by EEOC to assure that it is consistently applied. For example, in one case a bank was unable to rely on its purported merit system to justify different pay for male and female tellers where the primary consideration in pay decisions was a high official's "gut feeling" about each employee.

QUANTITY OR QUALITY OF PRODUCTION

An incentive system provides compensation on the basis of the quality or quantity of production. A difference in pay for jobs that are substantially equal can be based on an established incentive system if it is based on predetermined criteria; it has been communicated to employees; and it is applied consistently and even-handedly to employees of both sexes.

An incentive or productivity system is designed to encourage employees to work more productively and efficiently. For example, if sales people are paid a commission for each item sold, and if males tend to receive a greater total salary than females due to their greater volume of sales, there may be no violation of the EPA.

Note however, that if an employer assigns only males to high-ticket sales, this may be a violation of Title VII because of the difference in assignments based on gender.

ANY OTHER FACTOR OTHER THAN SEX

In addition to relying on a seniority, merit or incentive system, employers can justify different pay for jobs that are substantially equal if they can show that the difference is due to any other non-sex factors, such as differences in job-related education, experience, training, and ability. The cited factor must be related to job performance or one that otherwise benefits the employer's business.

For example, a male physics professor with a Ph.D. in physics could be paid more than a female physics professor with a master's degree even though they perform substantially equal work.

Another factor that might justify a difference in pay is the shift worked. Although the work is identical, employers may pay higher rates to employees who work the night or weekend shifts so long as both men and women can work any shift.

Title VII, ADEA, ADA and GINA

Title VII, ADEA, the ADA and GINA also prohibit wage discrimination. Unlike the EPA, these statutes do not require a comparator performing substantially equal work. Thus, for example, Title VII prohibits paying workers in a job classification at a reduced rate on the grounds that the classification is dominated by women. The basic theories of disparate treatment and adverse impact apply to wage discrimination claims under Title VII, the ADEA, and the ADA. Basic disparate treatment theory applies to GINA wage claims; however, GINA does not cover adverse impact claims.

HOSTILE WORK ENVIRONMENT HARASSMENT

Harassment in the work place can be a particularly egregious form of discrimination. While much publicity and attention are directed toward sexual harassment allegations, the general principles of hostile work environment harassment apply to all bases of discrimination, i.e., harassment based on race, color, religion, national origin, age 40 and over, disability, and genetic information.

Furthermore, it is important to remember that gender-based harassment, i.e., conduct that is **not** of a sexual nature, but is based on the gender of the charging party is also unlawful. For example, a charging party who alleges that her supervisor/manager calls her "stupid broad" and makes other disparaging comments about women that are not sexual in nature may also file a harassment charge based on sex.

Under the SEP, Preventing Harassment through Systemic Enforcement

and Targeted Outreach is one of the national priorities.

ELEMENTS OF A HOSTILE WORK EVIRONMENT CLAIM

Typically, these are the elements of a hostile work environment claim:

• The charging party must have been subjected to the hostile conduct **because of his or her race, sex, religion, national origin, age, disability, or genetic information.**

• The challenged conduct must have been both objectively (to a reasonable person) and subjectively (to the victim) severe or pervasive, such that it creates an abusive work environment (i.e., a hostile work environment).

- The challenged conduct must be unwelcome. If the conduct is subjectively hostile, then it usually also will be unwelcome.

• There must be a legal basis for holding the employer **liable** for the harassment.

HARASSMENT FACT SCENARIOS
~~ DISCUSSION POINTS~~

~~Scenario 1~~

Deborah's male co-workers frequently engage in bawdy sexual banter and horseplay in the office. They trade stories about their sexual exploits and kid about each other's sexual prowess. Deborah sometimes has conversations of a sexual nature with one of her male co-workers, but she has let the others know that she is offended by their banter and horseplay. Deborah has

complained to her supervisor, but he has taken no action.

Can Deborah establish sexual harassment?

Additional points about unwelcomeness:

It is very unusual for comments or conduct based on race, color, age, disability, or national origin to be welcome.

Sexual conduct might be welcome, however, because flirtation and even consensual sexual affairs can occur in the workplace.

What if two co-workers had a consensual sexual affair that soured, and then one of them claims that the other's persistent sexual advances constitute sexual harassment?

Allegations of religious harassment also may raise questions about unwelcomeness and subjective hostility. The charging party might allege that a coworker's proselytizing, i.e. attempts to get the charging party to adopt the coworker's religious views, persisted after the charging party made clear that it was unwelcome, and that the unrelenting proselytizing ultimately rose to the level of creating a hostile work environment.

~~Scenario 2~~

Joseph's male co-worker persistently makes sexual advances toward him, which he rejects. Joseph complains to their supervisor, but the supervisor takes no action.

Can Joseph establish sexual harassment?

~~Scenario 3 ~~

Kimberly's supervisor, Ted, subjected her to sexual advances, remarks, and gestures. For example, on a work-related trip, he made comments about her breasts, told her to "loosen up," and warned, "you know, Kim, I can make your life very hard or very easy here." When Ted interviewed Kimberly for a promotion, he expressed reservations because Kimberly was not "loose

enough," and then rubbed her knee. Ted rejected Kimberly for the promotion.

The employer has a policy against sexual harassment and a procedure through which employees can make complaints to management about harassment that will be swiftly investigated and acted upon. Kimberly did not inform anyone in higher management about Teds conduct while she was employed.

Can Kimberly establish sexual harassment?
The Supreme Court, in *Burlington Industries v. Ellerth*, 524 U.S. 742 (1998), *Faragher v. Boca Raton*, 524 U.S. 775 (1998), and *Vance v. Ball State Univ.*, 133 S. Ct. 2434 (2013), established the framework for determining whether an employer is liable for harassment by a "supervisor." Under this framework, an individual is considered a supervisor if he or she has been authorized to take tangible employment actions against the person alleging harassment. If the alleged harasser was not a supervisor under this standard, then the liability standard for coworker harassment applies, which is discussed below.

A tangible employment action is "a significant change in employment status." The Court provided numerous examples: hiring, firing, promotion, failure to promote, demotion, undesirable reassignment, a decision causing a significant change in benefits, a compensation decision, and work assignment.

If a hostile work environment harassment includes a supervisor's tangible employment action, then the employer is automatically liable for any unlawful harassment, and there is no defense.

On these facts, a reasonable person in Kimberly's position would view Ted's harassment as creating a hostile work environment. In addition, it is clear that Ted was a supervisor since he had the authority to reject Kimberly for a promotion, which is a tangible employment action. Since the harassment included a tangible employment action, the employer is automatically liable for Ted's harassment and it has no defense. Even if it undertook corrective action as soon as it learned about Kimberly's allegation, it still would be liable for the hostile work environment.

Note that Kimberly also has a disparate treatment claim because she was denied a promotion because of her sex.

~~Scenario 4~~

Robert's supervisor, Charles, frequently makes racially offensive remarks. Robert asked Charles to stop but he persists. Robert complains to a higher-level manager, but the manager takes no action. He then files an EEOC charge. Robert states that he is very offended by Charles' conduct.

However, Robert can't show that he has been demoted, negatively evaluated, or otherwise harmed in a tangible way because of the harassment. Robert also cannot show that he suffered severe psychological harm.

Can Robert establish racial harassment?

When is the line crossed between permissible remarks or behavior and unlawful hostile environment harassment?

Suppose that there was only one incident in which Charles made racially offensive remarks. And suppose that Robert genuinely felt that the remark created a hostile work environment based on race. Would that be enough to constitute unlawful harassment?

Severe or pervasive

The governing standard is whether the conduct is severe **or** pervasive enough to create an environment that a **reasonable person objectively** would find hostile or abusive and that the **employee subjectively** perceived it as such.

Relevant factors include: the **frequency** of the conduct; its **severity**; whether it was physically threatening or humiliating; whether it **interfered with the employee's job performance**; and whether there was psychological harm. All the circumstances should be considered; no single factor is determinative.

The more frequent the conduct, the less severe it must be to create a hostile work environment; the less frequent the conduct, the more severe it

must be.

Usually, one racially offensive remark would not be sufficient to create a hostile work environment under a reasonable person standard. However, an exception might be a threat of violence, such as a noose, or a supervisor's use of the n-word to refer to a subordinate. In such a case involving particularly egregious conduct, a single incident of harassment might be sufficiently severe to create a hostile work environment.

~~Scenario 5~~

Anna's supervisor frequently made remarks that were offensive to her and other Hispanic employees. He also made crudely demeaning references to women.

Anna did not complain to higher management about the supervisor's conduct. One month before Anna resigned; a former employee wrote a letter to the head of Anna's department complaining about the supervisor's harassment. The employer conducted an investigation, and the supervisor was reprimanded and disciplined.

Can Anna establish a claim of harassment?

In *Faragher* and *Ellerth*, the Supreme Court held that an employer is liable for a hostile work environment created by supervisor harassment that does not result in a tangible employment action, *unless* the employer can prove the following affirmative defense:

a. **That it exercised reasonable care to prevent and correct promptly any sexually harassing behavior; and**

b. **That the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.**

Although *Faragher* involved sexual harassment, the same liability principles apply to all forms of prohibited harassment under the federal EEO laws.

What if the employer in Scenario 5 had established an anti-harassment

policy? Would that, along with the availability of the internal complaint process and the corrective action it undertook, have been enough to shield it from liability?

In *Faragher*, the employer could not make out that defense because it failed to disseminate its anti-harassment policy to the location where the plaintiff worked, and the employer's policy did not make clear that supervisors could be bypassed in registering complaints.

What more is required for a good anti-harassment policy?

• **The employer should make sure that every employee has read the anti-harassment policy.** The policy should be redistributed periodically, and the employer could attach a form for the employee to sign attesting to the fact that he or she has received and reviewed the policy. It would also be advisable for the employer to post the policy in central locations.

• **The employer's anti-harassment policy should assure employees that they will be protected against retaliation.** Measures should be taken to assure that retaliation does not occur. For example, if a complaint of harassment is made, the alleged harasser should be reminded that retaliation against the person complaining and others who give information is prohibited. Also, if the harasser is a supervisor, management should scrutinize any employment decisions s/he makes affecting the complaining party, to ensure that any such decisions are not based on a retaliatory motive.

• **The policy should clearly explain the internal complaint process.**

• **The complaint process should allow employees to bypass their supervisors in making complaints.** It is advisable to designate at least one official outside an employee's chain of command to take complaints. This can help assure impartial handling of the complaint.

Make sure that the person accused of harassment has no control over the

investigation. Provisions should be made for the possibility that a high level official, who may normally have authority over an internal investigation of harassment, may himself or herself be accused of harassment. In such a circumstance, there should be a procedure in place for an alternative official to direct the investigation.

• ***All* supervisors and managers should be told that they should report complaints of harassment.** If an employee complains to a supervisor, and the supervisor is not designated under the employer's complaint process to take a complaint, then he or she should still report the matter to the appropriate official.

• **The complaint process should protect the confidentiality of the person complaining to the extent possible.** It's not possible to guarantee complete confidentiality, since an effective investigation requires that management disclose some information to potential witnesses. However, information should be shared only with those who need to know about the complaint.

What if an employee tells her supervisor about harassment but asks the supervisor to keep the matter confidential and not to report it?

The employer risks liability if the supervisor honors that request and does nothing. An employer is liable for harassment if management knows about it and does not act reasonably to try to stop it.

• **The complaint procedure should provide for a prompt, thorough, and impartial investigation of all harassment complaints.** The EEOC's enforcement guidance provides detailed guidance on how to conduct such an investigation. The enforcement guidance is available on inSite at: http://insite.eeoc.gov/insite/.

• **The employer's policy and complaint procedure should provide for prompt corrective action whenever it determines that harassment has occurred, including disciplinary action.** Corrective action should not adversely affect the person complaining. For example, if the charging party and harasser have to be separated, the harasser should be the one who is moved, unless the charging party prefers otherwise.

• **The employer should make sure that its supervisors understand what their responsibilities are when employees complain of harassment or when they see harassment occurring.** Lower-level supervisors should also be trained, not just on harassment generally, but also on the specifics of the employer's complaint procedure.

~~Scenario 6~~

Jack drives his secretary, Nancy, to a meeting outside their office. During the drive, Jack pulls the car to the side of the road and makes advances toward Nancy. He begins by making a few suggestive remarks then fondles her in increasingly offensive ways, despite her demands that he stop. When Nancy persists in fighting him off, Jack gives up and resumes the drive.

This was the first time that Jack made an advance toward Nancy, and he never again makes other sexual advances toward her. Nancy considers filing a complaint with her employer, but she assumes that no one will believe her since there were no eyewitnesses.

Can Nancy establish a sexual harassment claim?

How would you investigate this case?

How can you investigate in a he said/she said situation?

What sort of corrective action would be appropriate if you conclude the harassment did occur?

~~Scenario 7~~

Joan dreads each time her photocopier breaks down because the repair person assigned to her office always makes racially offensive remarks. Because her copier breaks down on a weekly basis, Joan is frequently subjected to his racial slurs, epithets, and other derogatory remarks about African Americans. Joan has complained to her supervisor, but the supervisor says that he doesn't have any control over the repair person

because that individual does not work for him but rather is an employee of the photocopier service company. The supervisor does relay Joan's complaints to the service company, but no action is taken.

Can Joan establish unlawful racial harassment?

Was relaying the complaint to the service company sufficient corrective action:

What if Joan's co-worker harassed her?

TIPS FOR INVESTIGATING HOSTILE WORK ENVIRONMENT CHARGES

The nature of harassment allegations requires Investigators to employ a wide range of skills and techniques to determine whether the conduct complained of meets the standards for a hostile work environment. Investigators should consider the following when investigating charges of a hostile work environment.

Proof of a hostile work environment charge requires **explicit and detailed information** and descriptions of the offensive conduct. Conclusory descriptions (e.g., "I was subjected to unwelcome sexual advances") may be appropriate when drafting a charge. However, your interview notes or an affidavit must contain the details of the alleged harassment. Investigators must put a witness at ease to elicit this type of information while being persistent about documenting the allegations in detail.

• Be sensitive to the nature of the allegations without being judgmental or overly sympathetic. Do not minimize the emotional effect of the conduct on the charging party even if you would not be so affected.

• Use the words used by the charging party (or other witness).

• Do not gloss over details of graphic sexual acts or other egregious conduct because you or the witness are uncomfortable talking about the incidents.

Credibility of the victim and the alleged harasser can determine the outcome of your investigation. Because many incidents of harassment occur only between the victim and the harasser, there are not usually eyewitnesses to the incidents. However, there are other kinds of corroborative evidence that can be obtained:

• Observations of the victim's demeanor before or after an incident of harassment.

Example: A witness observed the charging party leaving the harasser's office in tears and with her clothing and hair in disarray, but does not know what was said or done in the office.

• Other employees who worked with or for the alleged harasser. Try to obtain the names, addresses, and telephone numbers of present and past employees who may be able to confirm that the alleged harasser engaged in a pattern or practice of conduct.

• Past disciplinary records of the harasser can provide evidence as to the past conduct of the harasser **and** whether the employer took corrective action on previous complaints of harassment and how effective they were.

Credibility of the alleged victim(s) of harassment or the alleged harasser **cannot** be determined by physical appearance, dress, or personal hygiene. Do not assume that a physically unattractive person would not be harassed. Similarly, age, sex, race, and other protected characteristics are irrelevant to an individual's credibility.

Be aware that poor management techniques or skills are not harassment unless the charging party was targeted because of her sex or other protected status. On the other hand, an individual who disparages everyone because of race, sex, religion, etc., may create a discriminatorily hostile working environment for which an employer may be liable.

RETALIATION

Retaliation is another form of disparate treatment, based not on an individual's membership in a protected group, but rather on the individual having acted to challenge discrimination.

The statutes enforced by EEOC prohibit retaliation against an individual because he or she has either:

- opposed an unlawful employment practice, or
- made a charge, testified, assisted, or participated in an EEOC investigation, proceeding, or hearing concerning prohibited discrimination.

Some charges may present a claim of "anticipatory retaliation," in which an employer threatens adverse action against an employee who has not yet engaged in protected activity in order to discourage him or her from doing so

Investigators should expedite the processing of retaliation charges because of the need to preserve the integrity of the investigative process and prevent a chilling effect on the willingness of individuals to protest discriminatory conduct.

The retaliation provisions provide exceptionally broad protection to individuals who file charges or otherwise aid in an EEOC enforcement function.

- Any person who has engaged in opposition or participation.

- Those who protest discrimination against others are protected from retaliatory conduct, as well as those who protest discrimination directed at themselves.

- It is important to note that the **individual challenging discrimination does not have to be a member of the protected group in question to be protected against retaliation**. For example, a man who testifies during an investigation that he saw the female charging party being sexually harassed by her supervisor and is later disciplined because of his participation has grounds for a retaliation charge.

Under the SEP, Preserving Access to the Legal System is one of the national priorities.

ELEMENTS OF A RETALIATION CLAIM

There are three essential elements of a retaliation claim under the federal EEO statutes. They are:

1) **Protected Activity** - the charging party must show **opposition** to discrimination or **participation** in the statutory complaint process;

2) **Materially Adverse Action** - any adverse treatment that would be likely to deter a reasonable person from engaging in protected conduct;

3) **Causal connection** between the protected activity and the adverse action.

Opposition

Opposition is defined as **explicit or implicit communication** of a belief that employment discrimination has occurred. In an easy case, there is evidence that the charging party clearly stated to his/her employer that s/he believed s/he was the victim of some type of unlawful employment discrimination. But sometimes the charging party's form of opposition is ambiguous, and sometimes it depends on the context of the charging party's action or remark. Opposition can be protected even if it is informal or does not include the words "harassment," "discrimination," or other legal terminology. A communication or act is protected opposition as long as the circumstances show that the individual is conveying resistance to a perceived potential EEO violation.

Example: What if the charging party, who is African American, said to his supervisor, "I think I should get paid more." If he later claims that this statement was a complaint of sex- or race-based wage discrimination, and that he was subjected to retaliation for making that complaint, would it be appropriate to find that he engaged in protected activity? Probably not. His statement was just too ambiguous. There are too many possible reasons why a person might believe that his/her wage is unfair.

Suppose, however, that the charging party's workplace is filled with graffiti

on the walls with racially offensive words and pictures. Suppose also that the charging party said to his supervisor, "I want the graffiti removed." Like the other example, the charging party did not *explicitly* say, "I believe I am being subjected to racial harassment." Would you conclude that his statement was too ambiguous to qualify as opposition? No. In this fact situation, it seems clear that his supervisor reasonably should have interpreted his statement as opposition to racial harassment.

In addition, the **manner of opposition must be reasonable.** The right to oppose discrimination must be balanced against the employer's need for a stable and productive work environment. Thus, violent or unlawful forms of opposition, such as physically assaulting a manager, would not be reasonable. However, refusing to perform a job task that involves engaging in conduct the charging party reasonably believes is unlawful discrimination is protected opposition.

The charging party must have a **reasonable and good faith belief** that discrimination occurred. As long as the individual had a reasonable and good faith belief that the opposed practice was unlawful, the person is protected against retaliation, even if it is ultimately determined that the opposed practice was not discriminatory.

Participation

Any form of participation in the complaint process qualifies, not just filing a charge, but also giving information regarding someone else's charge.

A person is protected from retaliation where s/he files a charge, testifies, assists, or participates in any manner in an investigation, proceeding or hearing under the applicable statute.

Protection under the participation clause is absolute, and does not require that the manner of opposition be reasonable, or that the participation be based on a reasonable good faith belief.

Note: The Commission's position is that some internal complaints may be considered "participation." Check with the Legal Unit if characterizing the protected activity as participation rather than opposition would alter the outcome.

Scenario: *Luis, who is Hispanic, filed charges with the EEOC in April, June, and September, complaining that his supervisor had denied him the promotions for which he had applied. After his supervisor, Linda, got notice of the third charge, she came to Luis and said, "If you file any more of these frivolous complaints, I promise I will take disciplinary action against you."*

Assume that none of Luis's prior charges had any merit. Does that affect your analysis?

Materially Adverse Action

Did the employer subject the charging party to any kind of adverse treatment that would be likely to deter a reasonable person from filing a charge?

Although trivial annoyances are not actionable, more significant retaliatory treatment that is reasonably likely to deter protected activity is unlawful. This is broader than the standard for discrimination. There is no requirement in retaliation claims that the adverse action materially affect the terms, conditions, or privileges of employment.

Adverse actions undertaken after the charging party's employment relationship with the employer ended, such as negative job references, can also be challenged.

The facts and circumstances of each case determine whether a particular action is retaliatory in that context. For this reason, the same action may be retaliatory in one case but not in another. Depending on the facts, examples of "materially adverse" actions may include:

- work-related threats, warnings, or reprimands;
- negative or lowered evaluations;
- transfers to less prestigious or desirable work or work locations;
- threatening reassignment; scrutinizing work or attendance more closely than that of other employees, without justification;
- removing supervisory responsibilities;
- engaging in abusive verbal or physical behavior that is reasonably likely to deter protected activity, even if it is not yet "severe or pervasive" as required for a hostile work environment;
- requiring re-verification of work status, making threats of deportation, or initiating other action with immigration authorities because of protected activity;
- taking (or threatening to take) a materially adverse action against a close family member (who would then also have a retaliation claim, even if not an employee).

Two common examples of unlawful post-employment retaliation are:

- Undeserved negative reference
- Post-employment reduction in benefits

Was there any adverse action in the last scenario involving Luis and Linda? If so, what was it?

Causal Connection

A violation would not necessarily be found simply because the charging party engaged in protected activity and was subsequently subjected to an adverse action. There must be **proof** that the **reason** for the adverse action was that the person engaged in protected activity.

In rare cases, such as Luis's, there is direct evidence of that causal connection. Far more commonly, the causal connection is proved through circumstantial evidence.

What evidence would prove a causal connection?

For retaliation claims against private sector employers and state or local government employers, the Supreme Court has ruled that the causation standard requires that "but for" a retaliatory motive, the employer would not have taken the adverse action. "But for" causation means, even if there are multiple causes, the materially adverse action *would not have occurred* without retaliation.

First, you would determine **whether the treatment of the charging party changed** after she made the protest. Then, determine if there is evidence supporting a causal connection between the protected activity and the adverse treatment.

In some cases, the employer's own statements may acknowledge or betray its intention to deter an applicant or employee from engaging in protected activity. However, in many cases, there are different pieces of evidence, either alone or together, that may support an inference that retaliation caused a materially adverse action. Examples include:

- suspiciously close timing between the EEO activity and the materially adverse action (see below for more discussion of this point);
- verbal or written statements demonstrating a retaliatory motive, comparative evidence (e.g., the individual was disciplined for an infraction that regularly goes undisciplined in that workplace, or that another employee who did not engage in EEO activity committed and was not disciplined as severely);
- demonstrated falsity of the employer's proffered reason for the adverse action; or

- any other pieces of evidence which, viewed alone or in combination with other facts, may support an inference of retaliatory intent.

If the adverse action occurred shortly after the protected activity, and the person who undertook the adverse action was aware of the protected activity, then an inference of retaliatory motive is possible.

However, the fact that a long period of time elapsed between the protected activity and the adverse action does not necessarily foreclose a retaliation claim. Even when the time between the protected activity and the adverse action is lengthy, other evidence of retaliatory motive may establish the causal link. For example, actions related to the continued processing of an EEOC charge may remind an employer of its pendency or stoke an employer's animus. Moreover, an opportunity to engage in a retaliatory act may not arise right away. In these circumstances, a materially adverse action might occur long after the original protected activity occurs, and retaliatory motive is nevertheless proven.[I]

For example, in one case where the charging party was fired fourteen months after she filed an EEOC charge, there was evidence that her manager mentioned the charge at least twice a week during the interim, and her termination occurred just two months after the EEOC dismissed her original charge. These facts support the inference of retaliation despite the lapse of time.

Retaliation claims based on circumstantial evidence usually boil down to the question of whether the respondent's explanation for the adverse action is pretextual. As in other disparate treatment claims, Investigators may examine how the respondent treated the charging party in comparison to how it treated **similarly situated employees** who did not engage in protected activity. As with any type of discrimination claim, a comparator is not required, but is one type of evidence to consider.

Who is similarly situated in a retaliation charge?

The definition of the comparator group for a retaliation claim is everyone of any race, sex, etc., who did not oppose discrimination or participate in protected activity.

The bottom line is that an individual who has complained of job

discrimination must be treated the same as anyone else who did not make such a complaint. If the individual was not performing well in his job and was headed toward discipline or discharge, the fact that he engaged in protected activity does not protect him against any legitimate adverse action.

In 2016, the Commission issued new Enforcement Guidance on Retaliation and Related Issues, https://www.eeoc.gov/laws/guidance/retaliation-guidance.cfm at https://www.eeoc.gov/laws/guidance/retaliation-guidance.cfm , as well as an accompanying Questions and Answers publication, https://www.eeoc.gov/laws/guidance/retaliation-qa.cfm athttps://www.eeoc.gov/laws/guidance/retaliation-qa.cfm .

GINA

The Genetic Information Nondiscrimination Act of 2008 (GINA), prohibits genetic discrimination in employment and other areas. It took effect on November 21, 2009. The EEOC enforces Title II of GINA, which makes it illegal to discriminate against employees or applicants because of genetic information.

Title II of GINA prohibits the **use of genetic information in making employment decisions**, restricts employers and other entities covered by Title II (employment agencies, labor organizations and joint labor-management training and apprenticeship programs – referred to as "covered entities") from **requesting, requiring or purchasing genetic information,** and strictly **limits the disclosure of genetic information.**

Definition of "Genetic Information"

Genetic Information includes information about an individual's genetic tests and the genetic tests of an individual's family members, as well as information about the manifestations of a disease or disorder in an individual's family members, i.e., **family medical history.**

Family medical history is included in the definition of genetic information because it is often used to determine whether someone has an increased risk of getting a disease, disorder, or condition in the future. Genetic

information also includes an individual's request for, or receipt of, genetic services, or the participation in clinical research that includes genetic services by the individual or a family member of the individual, and the genetic information of a fetus carried by an individual or by a pregnant woman who is a family member of the individual, or by a pregnant woman who is a family member of the individual and the genetic information of any embryo legally held by the individual or family member using an assisted reproductive technology.

GINA forbids discrimination on the basis of genetic information when it comes to any aspect of employment, including hiring, firing, pay, job assignments, promotions, layoffs, training, fringe benefits, or any other term or condition of employment. An employer may never use genetic information to make an employment decision because genetic information is not relevant to an individual's current ability to work.

Harassment Because of Genetic Information

Under GINA, it is also illegal to harass a person because of his or her genetic information. Harassment can include, for example, making offensive or derogatory remarks about an applicant or employee's genetic information, or about the genetic information of a relative of the applicant or employee.

Retaliation

GINA also prohibits retaliation, as the other statutes do.

GINA also has rules against acquiring genetic information and requiring covered entities to keep genetic information confidential.

Rules Against Acquiring Genetic Information

It will usually be unlawful for a covered entity to get genetic information. There are six narrow exceptions to this prohibition:

•Inadvertent acquisitions of genetic information do not violate GINA, such as in situations where a manager or supervisor overhears someone talking about a family member's illness.

•Genetic information (such as family medical history) may be obtained as part of health or genetic services, including wellness programs, offered by the employer on a voluntary basis, if certain specific requirements are met.

•Family medical history may be acquired as part of the certification process for FMLA leave (or leave under similar state or local laws or pursuant to an employer policy), where an employee is asking for leave to care for a family member with a serious health condition.

•Genetic information may be acquired through commercially and publicly available documents like newspapers, as long as the employer is not searching those sources with the intent of finding genetic information or accessing sources from which they are likely to acquire genetic information (such as websites and on-line discussion groups that focus on issues such as genetic testing of individuals and genetic discrimination).

•Genetic information may be acquired through a genetic monitoring program that monitors the biological effects of toxic substances in the workplace where the monitoring is required by law or, under carefully defined conditions, where the program is voluntary.

•Acquisition of genetic information of employees by employers who engage in DNA testing for law enforcement purposes as a forensic lab or for purposes of human remains identification is permitted, but the genetic information may only be used for analysis of DNA markers for quality control to detect sample contamination.

Confidentiality of Genetic Information

It is also unlawful for a covered entity to disclose genetic information about applicants, employees or members. Covered entities must keep genetic information **confidential** and in a separate medical file.

In 2010, the EEOC issued regulations covering all aspects of GINA, including definitions, prohibited practices, and rules regarding acquisition of genetic information and confidentiality. These regulations are published at 29 C.F.R Part 1635 at https://www.gpo.gov/fdsys/pkg/CFR-2011-title29-vol4/xml/CFR-2011-title29-vol4-part1635.xml.

Wellness Programs and Genetic Information

On May 17, 2016, the Commission issued a final rule at https://www.federalregister.gov/documents/2016/05/17/2016-11557/genetic-information-nondiscrimination-act, to amend the GINA regulations as they relate to employer wellness programs.

The term "wellness program" generally refers to health promotion and disease prevention programs and activities offered to employees. Some wellness programs are part of an employer-sponsored group health plan, and other wellness programs are not tied to group health plans. Many of these programs ask employees to answer questions on a health risk assessment (HRA) and/or undergo biometric screenings for risk factors (such as high blood pressure or cholesterol). Other wellness programs provide educational health-related information or programs that may include nutrition classes, weight loss and smoking cessation programs, onsite exercise facilities, and/or coaching to help employees meet health goals. Some employers now extend wellness programs to employees' family members, particularly those who are enrolled in employer group health plans.

The final GINA rule says employers may provide limited financial and other inducements (also called incentives) in exchange for an employee's spouse providing information about his or her current or past health status as part of a wellness program, whether or not the program is part of a group health plan.

Also on May 17, 2016, the Commission issued a final rule under the ADA regarding wellness programs, which is discussed in the section of this manual on the ADA. The final ADA rule provides guidance on the extent to which the ADA permits employers to offer incentives to employees who respond to disability-related inquiries or undergo medical examinations as part of wellness programs.

More information about GINA, the ADA, and wellness programs can be found in an internal webinar. If you have questions or charges raising wellness program issues, please follow the Office of Field Programs' guidance on coordination at . http://insite.eeoc.gov/OFP/upload/Wellness-Coordination-Memo-to-Field-June-22-2016.pdf.

APPENDIX: EVIDENCE

Evidence exists in different forms. The story that a witness tells you during an interview and is later reduced to interview notes or an affidavit is evidence. The copy of the employer's personnel manual and wage records are evidence. Medical records are evidence. E-mail and other computer records are evidence. Statistics showing the relevant labor pool in the respondent's geographic area are evidence. It is important to understand what constitutes evidence so that Investigators can determine its relevance to a charge.

Documentary Evidence

Evidence can exist in the form of written documents. The documents can be typed or handwritten, formal policy documents issued by a respondent, or an employee's notes on a day calendar. The following are some examples of documentary evidence:

- written employee manuals or human resources manuals
- letters of discipline or other disciplinary records/notes – e.g., interview notes of hiring officials, notes of staff meetings or other meetings, notes of telephone conversations/telephone logs or other records documenting communications
- personnel records, including written applications, resumes, letters rejecting an application, letters offering employment, insurance records/medical records in the custody of the CP or in the custody of the respondent
- computer printouts
- electronic documents, text messages, and emails

The Investigator should try to ensure the authenticity of the documents received by determining the source of documents and who keeps custody of the documents. If documents are provided by the charging party, ask how s/he obtained them and from whom. If necessary, verify the source of the documents.

Testimony

The oral testimony of a witness is evidence. Although testimony may be reduced to writing (as interview notes or an affidavit), it is critical that Investigators accurately document the oral testimony of a witness. This is important to preserve the evidence in an investigation, to provide a basis to continue an investigation, and to provide a complete investigative file that may be the basis for litigation. The Investigator should try to thoroughly record the oral testimony of a witness through interviews. Once that testimony is documented, however, be aware that additional testimony may be taken and should also be documented. Typically, some witnesses are interviewed more than once during the course of an investigation.

Other Forms of Documents

- Photographs or video recordings

  The Investigator should ascertain the source of the photographs and obtain testimony about the content of the photographs (e.g., "This picture shows the graffiti near my desk before I filed a charge with the EEOC.") The testimony should be obtained from someone with actual and direct knowledge of what the photograph is submitted to show.

- Audio Recordings

  A charging party or a respondent may submit tape recordings or audio files during an investigation. The Investigator must determine the source of the audio recording and should also obtain evidence that identifies the voices on the audio recording.

  Be aware that tape or audio recordings are generally not the best evidence an Investigator can obtain because of authenticity problems. Also, tapes and their cases may break or be damaged because of heat, cold, etc, and digital audio recordings can be modified.

Models of Proof

Revised July 2016

I. DISPARATE TREATMENT

PROOF OF DISPARATE TREATMENT VIA CIRCUMSTANTIAL EVIDENCE
(hiring/promotion)

P.F. CASE:
(1) Charging Party (CP) is a member of the protected class
(2) CP applied for a job for which CP met the stated qualifications
(3) CP was rejected
(4) Employer (ER) filled the job or continued to seek applications from persons with similar qualifications (ER's selection of person outside of CP's protected class or substantially younger supports inference of discrimination but this is not always a required element of proof)

REBUTTAL: ER articulates a legitimate, nondiscriminatory reason for rejecting CP

PRETEXT: The reasons advanced by ER are a pretext to hide discrimination. Examples of such evidence:
(1) reason advanced by ER is not believable
(2) similarly situated individuals outside CP's class were treated differently
(3) evidence of bias by ER's decision makers towards persons of CP's class
(4) Statistics showing underemployment of members of CP's class (this evidence may be helpful but usually not determinative)

PROOF OF DISPARATE TREATMENT VIA CIRCUMSTANTIAL EVIDENCE
(discharge/discipline)

P.F. CASE:
(1) CP is a member of the protected class
(2) CP was performing at satisfactory level
(3) CP was discharged or otherwise disciplined
(4) CP was replaced by an employee outside the protected class or substantially younger (this is not always a required element of proof)

REBUTTAL: ER articulates legitimate, nondiscriminatory reason for discharging or disciplining CP

PRETEXT: The reasons advanced are a pretext to hide discrimination (see examples above)

NOTE: *CP must be a member of a protected class and has to have suffered adverse treatment/action. CP's claim is not necessarily defeated if CP cannot provide comparative evidence, as long as there is other evidence which reasonably gives rise to an inference of discrimination. Also, a claim should not be dismissed based on lack of certain evidence if CP was not in a position to have access to such evidence.*

DIRECT EVIDENCE OF EXCLUSIONARY POLICY UNDER TITLE VII, ADEA	
P.F. CASE:	Testimony or documentary evidence of an employment policy or practice to exclude CP from a job or otherwise adversely treat persons in CP's protected class
REBUTTAL:	ER disproves discriminatory policy or practice, or proves statutory defense such as BFOQ

NOTE: *Under the ADA, an ER can justify a blanket policy that excludes persons with a particular covered disability if it can prove that the policy is job related and consistent with business necessity, and that the particular CP could not perform the job even with a reasonable accommodation.*

PROOF OF MIXED MOTIVES DEFENSE FOR DISPARATE TREATMENT	
P.F. CASE:	Circumstantial or direct evidence proves that discrimination against CP on the basis of his/her protected class was a motive in the challenged action
REBUTTAL:	ER is unable to discredit proof of discriminatory motive but attempts to prove it would have taken the same action even without the discriminatory motive.
RELIEF:	**Under Title VII, the ADA and GINA,** ER is liable at minimum for injunctive relief and attorney's fees. If ER proves that the challenged action was <u>also</u> based on a legitimate motive and that this motive would have induced it to take same action regardless of the discrimination, it avoids liability for reinstatement, back pay or damages. If ER does not prove it would have taken the same action anyway, it is liable for full relief. **Note: The mixed motive theory is no longer available under the ADEA as the result of the Supreme Court decision in *Gross v. FBL Financial Services*.** Instead, the employee must establish that age was the "but for" cause of the employer's action.

AFTER ACQUIRED EVIDENCE OF LEGITIMATE MOTIVE FOR DISPARATE TREATMENT	
PROOF:	CP proves either through circumstantial or direct evidence that discrimination was the true motive operating at the time of the challenged action.
RELIEF:	If ER proves that there was a legitimate basis for the challenged action that ER discovered after-the-fact, and that this evidence would have induced it to take the same action regardless of the discrimination, then CP will usually not be entitled to reinstatement and other remedies will also be limited. Specifically, back pay and compensatory damages (other than damages for emotional harm) will be limited to the period prior to the discovery of the relevant evidence.

II. DISPARATE IMPACT

DISPARATE IMPACT UNDER TITLE VII	
P.F. CASE:	Neutral employment practice has disproportionate adverse effect on CP's protected class. CP must isolate and identify the specific employment practice(s) that are allegedly responsible for the disproportionate adverse effect (statistical disparities).
REBUTTAL:	ER proves that challenged practice is job related and consistent with business necessity
ALTERNATIVES:	There is an alternative employment practice that would be substantially as effective but would have less adverse impact

DISPARATE IMPACT UNDER ADEA **(Note: The disparate impact theory of discrimination is available under the ADEA, but the defense is different.**	
P.F. CASE:	Neutral employment practice has disproportionate adverse effect on older workers. CP must isolate and identify the specific employment practice(s) that are allegedly responsible for the disproportionate adverse effect (statistical disparities).
REBUTTAL:	ER has to show that the practice is based on reasonable factors other than age. This is an easier standard than that used under Title VII cases and narrows the scope of liability for the ER. Whether or not a less discriminatory alternative is available should not be considered.
NOTE:	The Commission issued a regulation entitled "Disparate Impact and Reasonable Factor Other than Age", in April 2012. 29 CFR Part 1625, which defines the RFOA defense to ADEA disparate impact claims. Investigators who encounter a possible ADEA disparate impact claim should consult with their Legal Unit. OLC is available for consultation as well.

DISCRIMINATORY QUALIFICATION STANDARDS AND SELECTION CRITERIA UNDER ADA NOTE: Investigators should refer to ADA regulations at 29 CFR Part 1630		
P.F. CASE:	(1)	CP has physical or mental impairment that substantially limits one or more major life activities
	(2)	A neutral qualification standard or selection criterion screens out CP on the basis of his or her disability and CP satisfies the other job requirements
REBUTTAL:	(1)	ER proves that challenged standard is job related and consistent with business necessity
	(2)	ER proves that CP could not meet the standard with reasonable accommodation

MODELS OF PROOF TO ESTABLISH DISABILITY COVERAGE UNDER THE ADA

For impairments that are on the (j)(3)(iii) list in the EEOC regulations:

(1) If a CP has a "(j)(3)(iii)"physical or mental impairment, and
(2a) the impairment is readily observable, or
(2b) there is medical documentation of the impairment,
then the impairment should easily be concluded to be a disability under the ADA. Impairments listed in (j)(3)(iii) are deafness; blindness; partially or completely missing limbs or mobility impairments requiring the use of a wheelchair; intellectual disability (formerly termed mental retardation); autism; cerebral palsy; major depressive disorder; bipolar disorder; post-traumatic stress disorder; obsessive compulsive disorder; schizophrenia; cancer; diabetes; epilepsy; HIV infection; multiple sclerosis; and muscular dystrophy.

For impairments that are not on the (j)(3)(iii) list:

Model of Proof for substantially limited major bodily functions:
(1) If there is medical evidence that a physical or mental impairment substantially limits a major bodily function; or
(2) a substantial limitation of a major bodily function is readily observable,
then the impairment is a disability under the ADA.

Model of Proof for substantially limited traditional major life activities:
(1) If a CP has a physical or mental impairment, and
(2) there is evidence that the impairment substantially limits a traditional major life activity,
then the impairment is a disability under the ADA.
The evidence could be CP's experience, medical evidence, the fact that the impairment and/or substantial limitation of a major life activity is readily observable, or information from persons who know the CP.

Model of Proof for mitigating measures: If there is evidence that:
(1) the impairment substantially limited a major life activity before using the mitigating measure; or
(2) the impairment would substantially limit a major life activity if the mitigating measure was stopped,
then the impairment is a disability under the ADA .
Major life activities could be major bodily functions, traditional major life activities or both.

Model of Proof for episodic impairments or impairments in remission: If there is evidence that (1a) an episodic impairment, or
(1b) an impairment in remission
(2) would substantially limit a major life activity when active,
then the impairment is a disability under the ADA.
Major life activities could be major bodily functions, traditional major life activities, or both.

Model of Proof for "record of a disability": If the evidence shows that a CP
(1a) had an impairment that substantially limited a major life activity but either no longer has the impairment or the impairment no longer substantially limits a major life activity or
(1b) was misclassified as having an impairment that substantially limited a major life activity
then the impairment is a disability under the "record of" prong.
Major life activities could be major bodily functions, traditional major life activities, or both.

Model of Proof for "regarded as" having a disability: If there is evidence that:
(1a) CP has an impairment or
(1b) R believed CP has an impairment;
(2) R took an adverse action against CP; and
(3) R took the adverse action because of the actual or perceived impairment;
then CP is "regarded as" having a disability.

III. OTHER FORMS OF UNLAWFUL DISCRIMINATION

EPA: SEX-BASED WAGE DISPARITY		
P.F. CASE:	(1)	Unequal pay between CP and other employee(s) of opposite sex
	(2)	The jobs at issue require substantially equal skill, effort, and responsibility and are performed under similar working conditions within the same establishment
REBUTTAL: Wage difference is based on a seniority, merit, or incentive system, or on any other factor other than sex ***Note: Title VII also applies to claims of sex-based wage discrimination.***		

TITLE VII: FAILURE TO PROVIDE RELIGIOUS ACCOMMODATION		
P.F. CASE:	(1)	CP sincerely holds religious belief that conflicts with job requirement
	(2)	CP informed supervisor of conflict and need for accommodation
	(3)	ER failed to provide a reasonable accommodation
REBUTTAL: CP's requested accommodation would result in more than minimal hardship to employer ("Title VII undue hardship")		

ADA: FAILURE TO PROVIDE REASONABLE ACCOMMODATION NOTE: Investigators should refer to ADA regulations at 29 CFR Part 1630		
P.F. CASE:	(1)	CP has a disability under prongs one (a physical or mental impairment that substantially limits one or more major life activities) or two (a record of a disability)
	(2)	CP notified ER of his/her disability and need for accommodation
	(3)	There is an accommodation that would allow CP to participate in the application process; to perform the essential functions of the job; or to enjoy equal benefits and privileges of employment as enjoyed by similarly-situated employees without disabilities
	(4)	ER failed to provide an effective accommodation
REBUTTAL: The requested accommodation (as well as alternative effective accommodations) would pose an undue hardship.		

RETALIATION	
P.F. CASE:	(1) CP opposed what CP reasonably and in good faith believed to be an unlawful employment practice or CP participated in the EEO process (2) ER subjected CP to an adverse action that would likely discourage a reasonable person from opposing discrimination or participating in the EEO process. (3) There was a causal connection between CP's protected activity and the adverse treatment (shown, e.g., by timing of adverse treatment soon after CP's protected activity, or other factual links between the two)
REBUTTAL:	ER articulates a legitimate nondiscriminatory reason for the adverse action
PRETEXT:	Reasons advanced by ER are a pretext to cover retaliatory motive. Examples of such evidence: (1) reason advanced by ER is not believable (2) similarly situated individuals who did not oppose discrimination or participate in the EEO process were treated differently

HARASSMENT (on any protected basis)	
P.F. CASE:	(1) CP was subjected to unwelcome comments or conduct based upon his/her protected class status (2) The conduct resulted in a tangible job action or was sufficiently severe or pervasive to create a hostile environment (measured by standard of reasonable person in CP's situation and by CP's subjective experience) (3) Basis exists for holding ER liable for harassment
REBUTTAL:	ER attempts to prove the harassment did not happen, or the CP welcomed the conduct (i.e., the conduct was not subjectively hostile), or it was not sufficiently severe or pervasive, or that it did not know about the harassment and therefore cannot be held liable.

LIABILITY (for supervisory/management harassment):

ER is automatically liable if the harassment resulted in a tangible employment action. If it did not, ER is still liable unless it proves that it took reasonable care to prevent and correct the harassment promptly and that the CP unreasonably failed to take advantage of any preventive or corrective opportunities provided by the ER

LIABILITY (for co-worker harassment):

ER is liable if it knew or should have known of the harassment and failed to take immediate and appropriate corrective action

LIABILITY (for non-employee harassment):

ER is liable if it knew or should have known and failed to take immediate and appropriate corrective action and ER had some control over the harasser

GINA: ACQUISITION OF GENETIC INFORMATION MODEL OF PROOF

P.F. CASE: (1) CP is an applicant, employee, or former employee of ER
(2) ER requested, required, purchased, or otherwise acquired genetic information about CP, including family medical history which is genetic information about CP.

REBUTTAL: ER asserts one of six exceptions to the general prohibition:
(1) inadvertent request for medical information;
(2) offer of health or genetic services, e.g. wellness program;
(3) FMLA request to care for family member with serious health condition;
(4) commercial and publicly available documents;
(5) genetic monitoring of effects of toxic substances in the workplace; or
(6) DNA testing for law enforcement of human remains identification purposes if used for quality control purposes.

GINA: USE OF GENETIC INFORMATION MODEL OF PROOF

P.F. CASE: (1) CP is an applicant, employee, or former employee of ER.
(2) ER makes an adverse employment decision about CP (refusal to hire, termination, setting compensation, or altering any terms, conditions, or privileges of employment) based on genetic information ER has about CP, including family medical history which is genetic information about CP.

REBUTTAL: ER articulates a legitimate, nondiscriminatory reason for its adverse action.

PRETEXT: The reasons advanced by ER are a pretext to hide genetic discrimination. Examples of such evidence:
(1) reason advanced by ER is not believable
(2) similarly situated individuals outside CP's class (i.e. about whom ER had no, or different, genetic information) were treated differently
(3) evidence of concern about genetic information expressed by ER's decision makers
(4) similar treatment of other individuals whose genetic information is known to ER

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE

REPORT OF CO-CHAIRS
CHAI R. FELDBLUM & VICTORIA A. LIPNIC

EXECUTIVE SUMMARY & RECOMMENDATIONS

JUNE 2016

EXECUTIVE SUMMARY

Full text of report available at:
https://www.eeoc.gov/eeoc/task_force/harassment/upload/report.pdf

As co-chairs of the Equal Employment Opportunity Commission's Select Task Force on the Study of Harassment in the Workplace ("Select Task Force"), we have spent the last 18 months examining the myriad and complex issues associated with harassment in the workplace. Thirty years after the U.S. Supreme Court held in the landmark case of *Meritor Savings Bank v. Vinson* that workplace harassment was an actionable form of discrimination prohibited by Title VII of the Civil Rights Act of 1964, we conclude that we have come a far way since that day, but sadly and too often still have far to go.

Created in January 2015, the Select Task Force was comprised of 16 members from around the country, including representatives of academia from various social science disciplines; legal practitioners on both the plaintiff and defense side; employers and employee advocacy groups; and organized labor. The Select Task Force reflected a broad diversity of experience, expertise, and opinion. From April 2015 through June 2016, the Select Task Force held a series of meetings – some were open to the public, some were closed working sessions, and others were a combination of both. In the course of a year, the Select Task Force received testimony from more than 30 witnesses, and received numerous public comments.

Throughout this past year, we sought to deploy the expertise of our Select Task Force members and our witnesses to move beyond the legal arena and gain insights from the worlds of social science, and practitioners on the ground, on how to prevent harassment in the workplace. We focused on learning everything we could about workplace harassment – from sociologists, industrial-organizational psychologists, investigators, trainers, lawyers, employers, advocates, and anyone else who had something useful to convey to us.

Because our focus was on prevention, we did not confine ourselves to the legal definition of workplace harassment, but rather included examination of conduct and behaviors which might not be "legally actionable," but left unchecked, may set the stage for unlawful harassment.

This report is written by the two of us, in our capacity as Co-Chairs of the Select Task Force. It does not reflect the consensus view of the Select Task Force members, but is informed by the experience and observations of the Select Task Force members' wide range of viewpoints, as well as the testimony and information received and reviewed by the Select Task Force. Our report includes analysis and recommendations for a range of stakeholders: EEOC, the employer community, the civil rights community, other government agencies, academic researchers, and other interested parties. We summarize our key findings below.

Workplace Harassment Remains a Persistent Problem. Almost fully one third of the approximately 90,000 charges received by EEOC in fiscal year 2015 included an allegation of workplace harassment. This includes, among other things, charges of unlawful harassment on the basis of sex (including sexual orientation, gender identity, and pregnancy), race, disability, age, ethnicity/national origin, color, and religion. While there is robust data and academic

literature on sex-based harassment, there is very limited data regarding harassment on other protected bases. More research is needed.

Workplace Harassment Too Often Goes Unreported. Common workplace-based responses by those who experience sex-based harassment are to avoid the harasser, deny or downplay the gravity of the situation, or attempt to ignore, forget, or endure the behavior. The least common response to harassment is to take some formal action – either to report the harassment internally or file a formal legal complaint. Roughly *three out of four* individuals who experienced harassment never even talked to a supervisor, manager, or union representative about the harassing conduct. Employees who experience harassment fail to report the harassing behavior or to file a complaint because they fear disbelief of their claim, inaction on their claim, blame, or social or professional retaliation.

There Is a Compelling Business Case for Stopping and Preventing Harassment. When employers consider the costs of workplace harassment, they often focus on legal costs, and with good reason. Last year, EEOC alone recovered $164.5 million for workers alleging harassment – and these direct costs are just the tip of the iceberg. Workplace harassment first and foremost comes at a steep cost to those who suffer it, as they experience mental, physical, and economic harm. Beyond that, workplace harassment affects *all* workers, and its true cost includes decreased productivity, increased turnover, and reputational harm. All of this is a drag on performance – and the bottom-line.

It Starts at the Top – Leadership and Accountability Are Critical. Workplace culture has the greatest impact on allowing harassment to flourish, or conversely, in preventing harassment. The importance of leadership cannot be overstated – effective harassment prevention efforts, and workplace culture in which harassment is not tolerated, must start with and involve the highest level of management of the company. But a commitment (even from the top) to a diverse, inclusive, and respectful workplace is not enough. Rather, at all levels, across all positions, an organization must have systems in place that hold employees accountable for this expectation. Accountability systems must ensure that those who engage in harassment are held responsible in a meaningful, appropriate, and proportional manner, and that those whose job it is to prevent or respond to harassment should be rewarded for doing that job well (or penalized for failing to do so). Finally, leadership means ensuring that anti-harassment efforts are given the necessary time and resources to be effective.

Training Must Change. Much of the training done over the last 30 years has not worked as a prevention tool – it's been too focused on simply avoiding legal liability. We believe effective training can reduce workplace harassment, and recognize that ineffective training can be unhelpful or even counterproductive. However, even effective training cannot occur in a vacuum – it must be part of a holistic culture of non-harassment that starts at the top. Similarly, one size does *not* fit all: Training is most effective when tailored to the specific workforce and workplace, and to different cohorts of employees. Finally, when trained correctly, middle-managers and first-line supervisors in particular can be an employer's most valuable resource in preventing and stopping harassment.

New and Different Approaches to Training Should Be Explored. We heard of several new models of training that may show promise for harassment training. "Bystander intervention training" – increasingly used to combat sexual violence on school campuses – empowers co-workers and gives them the tools to intervene when they witness harassing behavior, and may show promise for harassment prevention. Workplace "civility training" that does not focus on eliminating unwelcome or offensive behavior based on characteristics protected under employment non-discrimination laws, but rather on promoting respect and civility in the workplace generally, likewise may offer solutions.

It's On Us. Harassment in the workplace will not stop on its own – it's on all of us to be part of the fight to stop workplace harassment. We cannot be complacent bystanders and expect our workplace cultures to change themselves. For this reason, we suggest exploring the launch of an *It's on Us* campaign for the workplace. Originally developed to reduce sexual violence in educational settings, the *It's on Us* campaign is premised on the idea that students, faculty, and campus staff should be empowered to be part of the solution to sexual assault, and should be provided the tools and resources to prevent sexual assault as engaged bystanders. Launching a similar *It's on Us* campaign in workplaces across the nation – large and small, urban and rural – is an audacious goal. But doing so could transform the problem of workplace harassment from being about targets, harassers, and legal compliance, into one in which co-workers, supervisors, clients, and customers all have roles to play in stopping such harassment.

Our final report also includes detailed recommendations and a number of helpful tools to aid in designing effective anti-harassment policies; developing training curricula; implementing complaint, reporting, and investigation procedures; creating an organizational culture in which harassment is not tolerated; ensuring employees are held accountable; and assessing and responding to workplace "risk factors" for harassment.

RECOMMENDATIONS

Recommendations Regarding the Prevalence of Harassment in the Workplace

- EEOC should work with the Bureau of Labor Statistics or the Census Bureau, and/or private partners, to develop and conduct a national poll to measure the prevalence of workplace harassment based on sex (including pregnancy, sexual orientation and gender identity), race, ethnicity/national origin, religion, age, disability, and genetic information over time.

- Academic researchers should compile baseline research on the prevalence of workplace harassment based on race, ethnicity/national origin, color, religion, age, disability, genetic information, sexual orientation, and gender identity.

- EEOC should confer with the Merit Systems Protection Board to determine whether it can repeat its study of harassment of federal employees, and expand its survey to ask questions regarding harassment based on race, ethnicity/national origin, color, religion, age, disability, genetic information, sexual orientation, and gender identity in the federal government, and to disaggregate sexually-based harassment and gender-based harassment.

- EEOC should work within the structure established by the Office of Personnel Management to offer specific questions on workplace harassment in the Federal Employee Viewpoint Survey.

Recommendations Regarding Workplace Leadership and Accountability

- Employers should foster an organizational culture in which harassment is not tolerated, and in which respect and civility are promoted. Employers should communicate and model a consistent commitment to that goal.

- Employers should assess their workplaces for the risk factors associated with harassment and explore ideas for minimizing those risks.

- Employers should conduct climate surveys to assess the extent to which harassment is a problem in their organization.

- Employers should devote sufficient resources to harassment prevention efforts, both to ensure that such efforts are effective, and to reinforce the credibility of leadership's commitment to creating a workplace free of harassment.

- Employers should ensure that where harassment is found to have occurred, discipline is prompt and proportionate to the severity of the infraction. In addition, employers should ensure that where harassment is found to have occurred, discipline is consistent, and does not give (or create the appearance of) undue favor to any particular employee.

- Employers should hold mid-level managers and front-line supervisors accountable for preventing and/or responding to workplace harassment, including through the use of metrics and performance reviews.

- If employers have a diversity and inclusion strategy and budget, harassment prevention should be an integral part of that strategy.

Recommendations Regarding Harassment Prevention Policies and Procedures

- Employers should adopt and maintain a comprehensive anti-harassment policy (which prohibits harassment based on any protected characteristic, and which includes social media considerations) and should establish procedures consistent with the principles discussed in this report.

- Employers should ensure that the anti-harassment policy, and in particular details about how to complain of harassment and how to report observed harassment, are communicated frequently to employees, in a variety of forms and methods.

- Employers should offer reporting procedures that are multi-faceted, offering a range of methods, multiple points-of-contact, and geographic and organizational diversity where possible, for an employee to report harassment.

- Employers should be alert for any possibility of retaliation against an employee who reports harassment and should take steps to ensure that such retaliation does not occur.

- Employers should periodically "test" their reporting system to determine how well the system is working.

- Employers should devote sufficient resources so that workplace investigations are prompt, objective, and thorough. Investigations should be kept as confidential as possible, recognizing that complete confidentiality or anonymity will not always be attainable.

- EEOC and the National Labor Relations Board should confer, consult, and attempt to jointly clarify and harmonize the interplay of the National Labor Relations Act and federal EEO statutes with regard to the permissible confidentiality of workplace investigations, and the permissible scope of policies regulating workplace social media usage.

- Employers should ensure that where harassment is found to have occurred, discipline is prompt and proportionate to the behavior(s) at issue and the severity of the infraction. Employers should ensure that discipline is consistent, and does not give (or create the appearance of) undue favor to any particular employee.

- In unionized workplaces, the labor union should ensure that its own policy and reporting system meet the principles outlined in this section.

- EEOC should, as a best practice in cases alleging harassment, seek as a term of its settlement agreements, conciliation agreements, and consent decrees, that any policy and any complaint or investigative procedures implemented to resolve an EEOC charge or lawsuit satisfy the elements of the policy, reporting system, investigative procedures, and corrective actions outlined above.

- EEOC should, as a best practice in cases alleging harassment, seek as part of its settlement agreements, conciliation agreements, and consent decrees, an agreement that researchers will be allowed to work with the employer in assessing the impact and efficacy of the policies, reporting systems, investigative procedures, and corrective actions put into place by that employer. While we encourage EEOC to seek such an agreement when appropriate, we do not suggest that the agency must do so in all instances, or that failure to obtain such an agreement should derail otherwise acceptable settlement proposals.

- Groups of employers should consider coming together to offer researchers access to their workplaces to research the effectiveness of their policies, reporting systems, investigative procedures, and corrective actions put into place by those employers, in a manner that would allow research data to be aggregated in a manner that would not identify individual employers.

Recommendations Regarding Anti-Harassment Compliance Training

- Employers should offer, on a regular basis and in a universal manner, compliance trainings that include the content and follow the structural principles described in this report, and which are offered on a dynamic and repeated basis to all employees.

- Employers should dedicate sufficient resources to train middle-management and first-line supervisors on how to respond effectively to harassment that they observe, that is reported to them, or of which they have knowledge or information – even before such harassment reaches a legally-actionable level.

- EEOC should, as a best practice in cases alleging harassment, seek as a term of its settlement agreements, conciliation agreements, and consent decrees, that employers adopt and maintain compliance training that comports with the content and follows the structural principles described in this report.

- EEOC should, as a best practice in cases alleging harassment, seek as a condition of its settlement agreements, conciliation agreements, and consent decrees, an agreement that researchers will be allowed to work with the employer to assess the climate and level of harassment in respondent workplaces pre- and post-implementation of compliance trainings, and to study the impact and efficacy of specific training components. Where possible, this research should focus not only on the efficacy of training in large organizations, but also smaller employers and newer or "start up" firms. While we encourage EEOC to seek such an agreement when appropriate, we do not suggest that the agency must do so in all instances, or that failure to obtain such an agreement should derail otherwise acceptable settlement proposals.

- Groups of employers should consider coming together to offer researchers access to their workplaces to research the effectiveness of trainings, particularly in the context of holistic harassment prevention efforts, in a manner that would allow research data to be aggregated and not identify individual employers.

- EEOC should compile a resource guide for employers that contains checklists and training modules for compliance trainings.

- EEOC should review and update, consistent with the recommendations contained in this report, its anti-harassment compliance training modules used for Technical Assistance Seminars, Customer Specific Trainings, trainings for Federal agencies, and other outreach and education programs.

Recommendations Regarding Workplace Civility and Bystander Intervention Training

- Employers should consider including workplace civility training and bystander intervention training as part of a holistic harassment prevention program.

- EEOC and the National Labor Relations Board should confer, consult, and attempt to jointly clarify and harmonize the interplay of the National Labor Relations Act and federal EEO statutes with regard to the permissible content of workplace "civility codes."

- Researchers should assess the impact of workplace civility training on reducing the level of harassment in the workplace.

- EEOC should convene a panel of experts on sexual assault bystander intervention training to develop and evaluate a bystander intervention training module for reducing harassment in the workplace.

- EEOC should, as a best practice in cases alleging harassment, seek as part of its settlement agreements, conciliation agreements, and consent decrees, an agreement that researchers will be allowed to work with the employer in assessing the efficacy of workplace civility training and/or bystander intervention training on reducing the level of harassment in the workplace. While we encourage EEOC to seek such an agreement when appropriate, we do not suggest that the agency must do so in all instances, or that failure to obtain such an agreement should derail otherwise acceptable settlement proposals.

- Groups of employers should consider coming together to offer researchers access to their workplaces to research the effectiveness of workplace civility and bystander intervention trainings in a manner that would allow research data to be aggregated and not identify individual employers.

Recommendations Regarding General Outreach

- EEOC should develop additional resources for its website, including user-friendly guides on workplace harassment for employers and employees, that can be used with mobile devices.

- Non-profit organizations should conduct targeted outreach to employers to explain the business case for strong harassment prevention cultures, policies, and procedures.

- Non-profit organizations (including employee advocacy organizations, business membership associations, and labor unions) should develop easy-to-understand written resources and other creative materials (such as videos, posters, etc.) that will help workers and employers understand their rights and responsibilities.

- EEOC should partner with internet search engines to ensure that a range of EEOC resources appear high on the list of results returned by search engines.

Recommendations Regarding Targeted Outreach to Youth

- EEOC should continue to update its Youth@Work initiative (including its website) to include more information about harassment.

- Colleges and high schools should incorporate a component on workplace harassment in their school-based anti-bullying and anti-sexual assault efforts.

- EEOC should partner with web-based educational websites, such as Khan Academy, or YouTube channels that have a large youth following, to develop content around workplace harassment.

- EEOC should establish a contest in which youth are invited to design their own videos or apps to educate their peers about workplace harassment.

***Recommendation Regarding an* It's On Us *campaign*:**

- EEOC assists in launching an "*It's On Us*" campaign to end harassment in the workplace.

MEMBERS OF THE SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE

Chai R. Fedlbum, Commissioner, U.S. Equal Employment Opportunity Commission

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Theories of Discrimination

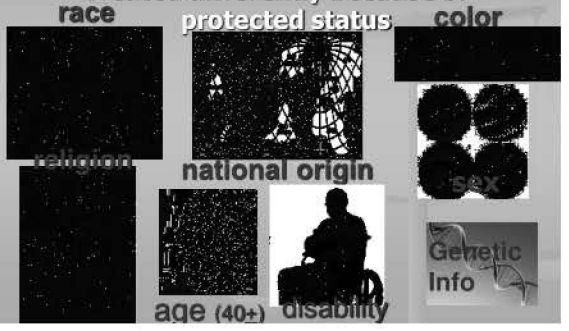
Proving Discrimination

Theories of Discrimination

- Disparate Treatment
  - Pattern or Practice
- Adverse Impact/Disparate Impact
- Pregnancy Discrimination
- Sex-based Wage Discrimination
- Sex discrimination based on LGBT status
- Harassment
- Retaliation
- Religious Accommodation *covered in Religion section*
- ADA, GINA *additional issues will be covered separately*

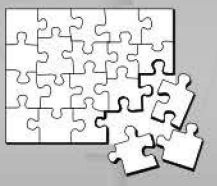
Disparate Treatment

Treated differently because of protected status



Investigating a Charge of Disparate Treatment

- Circumstantial (indirect) Evidence
- Direct Evidence



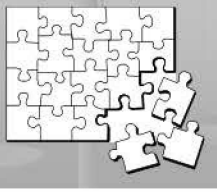
Disparate Treatment Elements of Proof Prima Facie Case

Hiring/Promotion

- Charging Party (CP) is a member of the protected class
- CP applied for a job for which CP met the stated qualifications
- CP was rejected
- Employer filled the job with someone outside the protected class or continued to seek applications from persons with similar qualifications (R's selection of person outside of CP's protected class supports inference of discrimination but this is not always a required element of proof)

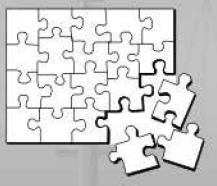
Disparate Treatment Elements of Proof

- Employer articulates a legitimate, nondiscriminatory reason for rejecting CP
- The reason is a pretext to hide discrimination



Who is Similarly Situated?

- Subject to the same policy or practice
- Engaged in similar conduct/behavior
- Under same decision maker



Who is Similarly Situated? Factors to Consider

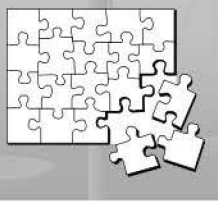
- Similar qualifications
- Hourly v. salary
- Bargaining unit v. non-bargaining unit
- Supervisory v. non-supervisory
- Same department/similar functions
- Probationary v. non-probationary
- Stages of disciplinary process
- Same time period
- Employer knew of both CP and comparator violations

Investigating for Pretext

- Comparative evidence
  - Similarly situated employees of different protected group treated differently
- Statistical evidence
- Other evidence
  - Suspicious timing
  - Behavior/comments suggest bias

Employer Defenses

- Mixed-Motives Defense
- After Acquired Evidence Defense
- Bona Fide Occupational Qualification (BFOQ) Defense



Adverse Impact Elements of Proof

- Prima facie case: Facially neutral policy/practice disproportionately excludes members of protected group
- Employer defense:
  - Title VII
    - Job-related and consistent with business necessity
    - No less discriminatory alternatives
  - ADEA
    - Based on reasonable factor other than age

Adverse Impact Examples

- Minimum height/weight requirements
- Certain educational requirements
- Certain physical agility tests
- "No beards" policy
- Nepotism policy
- Background checks – e.g., arrest and conviction records, credit checks
- Screening devices – online

EEO-1 Reports

Most employers must file annual reports providing a snapshot of the workforce by race, ethnicity, gender and job category.

EEO-1 Reports

- All private sector employers with 100 or more employees, as well as some federal contractors with 50 or more employees, must submit reports annually
- Exception
  - State and local governments, school systems, educational institutions

Review Respondent's EEO-1 and use EEO-1 Analytics Tool as appropriate in charge investigations

Pregnancy Discrimination Act (Amended Title VII)

- Congress enacted the Pregnancy Discrimination Act in 1978 to make clear that discrimination based on pregnancy, childbirth, or related medical conditions is a form of sex discrimination prohibited by Title VII
- The PDA requires that employers treat women affected by pregnancy, childbirth or related medical conditions the same as they treat other persons not so affected but similar in their ability or inability to work

Pregnancy Act Coverage

The PDA covers all aspects of pregnancy and all aspects of employment. It prohibits discrimination based on:

- Current pregnancy
- Past pregnancy
- Potential or intended pregnancy
- Medical conditions related to pregnancy or childbirth

Pregnancy Act Prohibitions

- **An employer cannot fire, refuse to hire, demote, or take any other adverse action against a woman if pregnancy, childbirth, or a related medical condition was a motivating factor in the adverse employment action**
- **The PDA prohibits discrimination with respect to all aspects of employment, including pay, job assignments, promotions, layoffs, training, and fringe benefits (such as leave and health insurance)**
- **Accommodation issues may arise under PDA and/or ADA**
- See *Enforcement Guidance on Pregnancy Discrimination and Related Issues* (June 25, 2015)

Pregnancy Act Prohibitions

- **Under the Supreme Court's 2015 decision in *Young v. UPS* and the updated Commission Enforcement Guidance, employer policies that do not facially discriminate on the basis of pregnancy may nonetheless violate the PDA where they impose significant burdens on pregnant employees that cannot be supported by a sufficiently strong justification.**
- This case involved the denial of a pregnant employee's request for light duty due to a lifting restriction. The employer's policy was to provide light duty or alternative assignments to only certain categories of employees.

Pregnancy Act – Prima Facie Case

- The Supreme Court in *Young* said that a woman can establish a prima facie case of pregnancy discrimination under *McDonnell Douglas* by showing that
  - she is a member of a protected class
  - she sought "accommodation" – *such as light duty*
  - the employer did not accommodate her
  - the employer accommodated other employees who were similar in their ability or inability to work
- An employer may then articulate a legitimate, nondiscriminatory reason for the different treatment.
- The reason normally cannot consist simply of a claim that it is more expensive or less convenient to add pregnant women to the category of those ('similar in their ability or inability to work') whom the employer accommodates.

Pregnancy Act – Proof of Pretext

- The Court said the claimant may show that the employer's articulated reason is pretextual, i.e., that an employer's policies "significantly burden" pregnant employees and that its "legitimate, nondiscriminatory reasons" are not "sufficiently strong" to justify the burden, "but rather, when considered along with the burden imposed—give rise to an inference of intentional discrimination."

Pregnancy Discrimination Act – Intersection with ADA

- The *Young* case did not involve the ADA's 2008 amendments.
- While pregnancy itself is not an impairment within the meaning of the ADA, pregnant workers may have impairments related to their pregnancies that qualify as disabilities under the ADA, even though they are not permanent. A pregnant employee may be entitled to reasonable accommodation under the ADA for limitations resulting from pregnancy-related impairments that constitute disabilities.
- This is an *SEP priority Emerging and Developing Issue*.

Equal Access to Benefits and Leave

- **An employer is required to treat an employee temporarily unable to perform the functions of her job because of her pregnancy or a related medical condition in the same manner as it treats other employees similar in their ability or inability to work, whether by providing modified tasks, alternative assignments, or fringe benefits such as disability leave.**
- **Same terms and conditions of leave**
- **Employer may not specify when leave commences**
- **Same procedures to determine ability to return to work**

Medical Benefits Related to Pregnancy

- Employers who have health insurance benefit plans must apply the same terms and conditions for pregnancy-related costs as for medical costs unrelated to pregnancy.
- Same deductibles for pregnancy-related medical costs

Discrimination Against Caregivers When is it covered under the Laws enforced by EEOC?





- Covered under EEO laws when based on a **protected characteristic**
- Also implicates other laws, e.g., FMLA
  - "Family responsibilities discrimination"

Unlawful Disparate Treatment

- Gender stereotyping and other sex-based disparate treatment of women
- Pregnancy
- Male caregivers
- Women of color
- ADA – association provision
- Hostile work environment
- Retaliation

Caregiver stereotyping under the ADA

- Unlawful to discriminate based on stereotypes about an employee's ability to balance job duties and care for a relative or other individual with a disability

  Example: A job applicant reveals during her job interview that her husband has MS. Under the assumption that she will not be able to work overtime when necessary, the employer refuses to hire her

Hostile Work Environment Examples - Caregivers

- An employee is subjected to verbal harassment and heightened scrutiny by her supervisor after returning from maternity leave
- A supervisor discriminates against an employee after discovering the employee's wife has a severe form of multiple sclerosis

Sex Discrimination Based on LGBT Status

- **The Commission interprets and enforces Title VII's prohibition of sex discrimination as forbidding all forms of discrimination on the basis of gender identity (transgender status) and sexual orientation.**
- **Commission decisions have taken the position that discrimination against an individual because of gender identity (including transgender status) or sexual orientation will *always* constitute discrimination on the basis of the individual's sex.**
- **This is an *SEP Emerging and Developing Issue* priority.**

Sex Discrimination Based on LGBT Status

- As in any case, charges should be assessed and investigated to determine if the challenged employment action was, in fact, based on the Charging Party's sexual orientation or gender identity.
- What kinds of evidence should be sought to show whether sexual orientation or gender identity motivated the challenged employment action?
- Evidence may include direct evidence that gender identity or sexual orientation, as such, motivated the challenged action – or is the express basis for an employer's policy.
- Gather any other evidence of a sex-based motive.

Sex Discrimination Based on LGBT Status

- Evidence may include, for example, any comments or actions that reveal:
  - Sex stereotyping, or adverse actions relating to the Charging Party's failure to conform to sex-based stereotypes, preferences, or expectations
  - Animus, discomfort, disapproval, or consideration of Charging Party's sex, including behavior, manner, or appearance
  - Motive relating to the Charging Party's sex in light of the sex of persons he or she associates with, including his or her spouse or persons he or she dates.
  - Any other evidence that the Charging Party's sex motivated the employer's action, including sex-based harassment

The Equal Pay Act (EPA)

- Prohibits wage discrimination based on gender
- Employers may not pay unequal wages to men and women performing substantially equal work in the same establishment

EPA General Provisions

No unequal wages for men and women who perform jobs that:

- Share "common core" of tasks
- Require substantially equal skill, effort, and responsibility and are performed under similar working conditions
- Are in the same establishment

"Common Core" of Tasks

Do the jobs share the same "common core" of tasks?

- Is a significant proportion of the tasks the same?
- Does the comparator's job involve extra duties?
  - If so, are they substantial?
  - Extra duties that are insignificant will not render the jobs unequal.

What is Skill?

- Experience,
- Ability,
- Education, and
- Training required to perform the job

What is Effort?

Effort is measured by the amount of physical or mental exertion needed to perform a job.

What is Responsibility?

- Work done without supervision
- Supervisory functions
- Impact of functions on the business (usually financial accountability)

What are Similar Working Conditions?

- Two Factors…
  - Physical surroundings (i.e. temperature, fumes, ventilation)
  - Hazards




What is Same Establishment/Workplace?

- Historically, an establishment was defined as a single distinct place
- Because of the computer revolution and differing work customs, the establishment may be expanded depending on the employer's work customs.

Employer Defenses for Differences in Wages

- Seniority system
- Merit system
- Incentive system
- Any other factor other than sex/gender

Seniority System

- Length of employment
- A difference in pay based on a seniority system is permitted as long as it is -
  - based on predetermined criteria,
  - has been communicated to employees, and
  - is applied consistently and even-handedly.

Merit System

- Job performance
- A difference in pay based on a merit system is permitted as long as it is -
  - based on predetermined criteria,
  - has been communicated to employees, and
  - is applied consistently and even-handedly.

Incentive System
Quality or Quantity of Production

- Quality or quantity of production
- A difference in pay based on an incentive system is permitted if it is -
  - based on predetermined criteria,
  - has been communicated to employees, and
  - is applied consistently and even-handedly.

Factors Other Than Sex/Gender

- Employers may offer higher compensation to applicants and employees who have
  - greater education,
  - experience,
  - training, or
  - ability
- Where the qualification is related to job performance or otherwise benefits the employer's business.

Factors Other Than Sex/Gender

A difference is pay for night and day shifts may be justified as long as both men and women are allowed to work either shift.



Harassment Elements of Proof

- Subjected to unwelcome comments or conduct based on a protected status – *each basis of discrimination under all statutes covered*
- Conduct resulted in a tangible job action
- Or comments/conduct were sufficiently severe or pervasive to interfere with CP's work performance to create a hostile environment (measured by standard of reasonable person)
- Basis exists for holding employer liable for harassment

Retaliation

- Variation of Disparate Treatment
- All statutes prohibit retaliation against an individual because s/he has either:
  - Opposed an unlawful employment practice, or
  - Made a charge, testified, assisted or participated in an EEO process

Retaliation Elements of Proof

- CP opposed what CP reasonably and in good faith believed to be an unlawful employment practice or CP participated in the EEO process
- ER subjected CP to adverse treatment
- There was a causal connection between CP's protected activity and the adverse treatment (shown, e.g., by timing of adverse treatment soon after CP's protected activity)

What is Opposition?

- Explicit or implicit communication
- Manner of the opposition must be reasonable
- CP must have reasonable and good faith belief that discrimination occurred

What is Participation?

- Participating in any manner
  - Investigation
  - Proceeding
  - Hearing
  - Litigation
- Concerning prohibited discrimination

What is an Adverse Action?

- Harassment or intimidation
- Denial of employment benefits
- Discharge, discipline, demotion, reassignment, transfer
- Unjustified evaluations/reports
- Accelerated disciplinary action
- Any adverse treatment likely to deter a reasonable person from engaging in protected conduct

How do you establish Causal Connection?

- Proof that the reason for the adverse action was - CP engaged in protected activity
  - Did ER change its treatment of CP?
  - What is the time line?
  - How are others (similarly situated) treated?

Theories of Discrimination

- Disparate Treatment
  - Pattern or Practice
- Adverse Impact/Disparate Impact
- Pregnancy Discrimination
- Sex-based Wage Discrimination
- Sex discrimination based on LGBT status
- Religious Accommodation
- Harassment
- Retaliation
- ADA
- GINA

Discrimination Based on Religion

RELIGION

TABLE OF CONTENTS

DISCRIMINATION BASED ON RELIGION

This section of the training will cover:

- Disparate treatment analysis of employment decisions based on religion, including recruitment, hiring, segregation, promotion, discipline, compensation, and religious expression.

- Harassment analysis, including religious belief or practice as a condition of employment or advancement, hostile work environment, and employer liability issues.

- Reasonable accommodation analysis, including notice of the conflict between religion and work, scope of the accommodation requirement and undue hardship defense, and common methods of accommodation.

- Related forms of discrimination, including discrimination based on national origin, race, or color, as well as retaliation.

NOTE: See the Resources Section at the end of this Chapter for a listing of all of the publications available to EEOC investigators pertaining to religious discrimination/accommodation and backlash issues.

TYPES OF RELIGIOUS DISCRIMINATION UNDER TITLE VII

Title VII prohibits covered employers, employment agencies, and unions from:

- treating applicants or employees differently (disparate treatment) based on their religious beliefs or practices – or lack thereof – in any aspect of employment, including recruitment, hiring, assignments, discipline, promotion, and benefits;

- segregating employees based on religious beliefs or practices, e.g., assigning individuals who wear religious garb to non-customer contact positions

- subjecting employees to harassment because of their own religious beliefs or practices – or lack thereof – or because of the religious practices or beliefs of people with whom they associate (*e.g.*, relatives, friends, etc.) ;

- denying reasonable accommodation of an applicant's or employee's sincerely held religious beliefs or practices – or lack thereof – if an accommodation will not impose an undue hardship on the conduct of the business;

- retaliating against an applicant or employee who has engaged in protected activity, including participation (*e.g.*, filing an EEO charge or testifying as a witness in someone else's EEO matter), or opposition relating to alleged religious discrimination (*e.g.*, requesting reasonable accommodation or complaining to human resources department about alleged religious discrimination).

NOTE: Although disparate treatment, segregation, harassment, reasonable accommodation, and retaliation are discussed in separate sections of this training, it is important to bear in mind that more than one of these theories of religious discrimination may apply in any given case.

RELIGION – BROADLY DEFINED

In the training session on Jurisdiction/Threshold Issues, we covered the following general points regarding religious discrimination:

> ***A. Religion* is very broadly defined under Title VII, and is not limited to established religions. Religious beliefs, practices, and observances include, for example, atheist or agnostic beliefs, beliefs that are new, uncommon, or not part of a formal church or sect, as well as beliefs with few adherents, or which are idiosyncratic, illogical, or unreasonable to others. The definition includes not only beliefs that are theistic in nature, but also non-theistic *"moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views."***
>
> **Religious beliefs can include unique views held by a few or even one individual; however, mere personal preferences are not religious beliefs. Whether a practice is religious may depend on the employee's motivation; the same practice might be engaged in by one person for religious reasons and another person for purely secular reasons (e.g., dietary restrictions, tattoos, uncut beard, dreadlocks).**

Investigation Tip: Determining whether there is a religious belief may require you to obtain more information from the charging party about the tenets, rituals, etc. of the religion and in some instances, you may get information from others such as church leaders. (For further tips, see APPENDIX at the end of this section.)

B. Title VII's accommodation requirement only applies to *religious beliefs, practices, and observances if the beliefs are "sincerely held" and the reasonable accommodation poses no undue hardship on the employer.* Title VII jurisdictional rules apply to all religious discrimination claims raised under the statute.

Investigation Tip: Employer should not automatically assume that a practice is not sincere just because it is novel, the belief or degree of observance changed over time (e.g., employee converts, or becomes more observant), or is it only observed on a particular holiday (e.g., only wearing a Muslim headscarf during Ramadan).

C. However, statutorily-defined *"religious organizations" and "religious educational institutions" are exempt from certain religious discrimination provisions* (e.g., they can prefer to hire co-religionists), though they are not permitted to discriminate on any other basis (e.g., race, sex, etc.).

If the "religious organization" exception is raised as a defense by a respondent, you will typically need to investigate the facts to determine if respondent meets the Title VII definition of a "religious organization" and even if so, whether the challenged employment decision is of the type permitted by the exception.

Investigation Tip: Determining coverage may involve investigation into facts such as: (i) whether the articles of incorporation state a religious purpose, (ii) whether it is affiliated or supported by a church or other religious organization; (iii) whether its day-to-day operations are religious (e.g., are the services the entity performs, the product it produces, or the educational curriculum it provides directed toward propagation of the religion); and (iv) whether it is not for profit.

D. In addition, courts apply a "ministerial exception" that generally bars EEO claims on any basis by employees who serve in clergy roles for religious institutions or who offer religious instruction, lead rites, etc.

Example: Parochial school teacher who teaches only math can bring an ADA claim, but parochial school teacher who provides math and religious instruction cannot.

If respondent invokes the "ministerial exception" as a defense, you will typically need to investigate whether the position at issue would have required charging party to perform any religious function to determine whether the exception applies.

DISPARATE TREATMENT CLAIMS

The analysis of disparate treatment based on religion is the same as the analysis of disparate treatment based on race, color, sex, or national origin. Disparate treatment violates Title VII whether motivated by bias against or preference toward an applicant or employee due to his religious beliefs, practices, or observances (or lack thereof).

For example, with respect to recruitment and hiring, unless an employer falls within the "religious organization" exception, it is unlawful:

- to recruit individuals of a particular religion or adopt recruitment practices, such as word-of-mouth recruitment, that have the purpose or effect of discriminating based on religion

- to refuse to hire individuals of a certain religion, or decide to fire an employee because of his religious beliefs or practices or lack thereof

In addition, all covered employers, **including religious organizations**:

- may not discipline or discharge employees because of their religious beliefs or non-belief

- may not impose stricter requirements for promotion on particular employees because of their religion or non-belief

- may not impose more or different work requirements on an employee because of that employee's religious beliefs or practices, or lack thereof

- may not discriminate based on religion in any "terms, conditions, or privileges of employment," *e.g.* training, leave, work assignments, or wages and benefits

- Similarly, employment agencies may not comply with requests from employers to engage in discriminatory recruitment or referral practices.

If there is a question about whether an employment decision was based on religion, the issue is resolved using the same methods of proof applicable to other Title VII cases.

"Disparate Treatment – Recruitment"

Chandran, the president of a company that owns several gas stations, needs managers for the new convenience stores he has decided to add to the stations. He posts a job announcement at the Hindu Temple that he attends and asks other members of the Temple to refer only Hindu friends or family members who may be interested in the position. He does no other recruitment.

By limiting his recruitment to Hindus, is Chandran engaging in unlawful discrimination?

"Discipline"

Joanne, a retail store clerk, is frequently 10-15 minutes late for her shift several days a week when she attends Mass at a Catholic Church across town. Her manager, Donald, has never disciplined her for this tardiness, and instead filled in for her at the cash register until she arrived, stating that he understood her situation. On the other hand, Yusef, a newly hired clerk who is Muslim, is disciplined by Donald for arriving 10 minutes late for his shift even though Donald knows it is due to his attendance at services at the local Mosque.

Is Donald engaging in unlawful disparate treatment?

"Wages and Benefits"

Janet, who practices Native American spirituality, is a newly hired social worker for an agency that provides tuition reimbursement for professional continuing education courses offered by selected providers. Janet applied for tuition reimbursement for an approved course that was within the permitted cost limit. Janet's supervisor denies her request for tuition reimbursement, stating that since Janet believes in "the supernatural and other voodoo" she "won't make a very good caseworker."

If these facts are established, does the evidence establish unlawful disparate treatment based on religion?

DISPARATE TREATMENT – RELIGIOUS EXPRESSION

Title VII's prohibition on disparate treatment based on religious beliefs also can apply to disparate treatment of religious expression in the workplace. For example, if one employee displays a Bible on her desk at work and another employee in the same workplace begins displaying a Quran, the supervisor cannot permit the Bible but direct that the Quran be put out of view. That would be differential treatment of similarly situated employees with respect to the display of a religious item at work, and would be disparate treatment in violation of Title VII.

Charges involving religious expression may present claims not only of disparate treatment, but also of harassment and/or denial of reasonable accommodation. We discuss these theories further in this section. Note, however, that Title VII requires employers to accommodate expression that is based on a sincerely held religious practice or belief, unless it threatens to constitute harassment or otherwise poses an undue hardship on the conduct of the business. For example, an employer can restrict religious expression where it would cause customers or co-workers reasonably to perceive the religious expression to be the employer's own message, or where the item or message in question is harassing or otherwise disruptive.

Disparate treatment, segregation, harassment, and retaliation relating to religious garb and grooming are prohibited. In addition, as a religious accommodation, employers must make exceptions to their usual rules or preferences to permit applicants and employees to follow religious dress and grooming practices if doing so would not pose an undue hardship.

> Examples of religious garb and grooming practices include wearing religious clothing or articles (*e.g.*, a Sikh turban or a Christian cross); observing a religious prohibition against wearing certain garments (*e.g.*, a Muslim, Pentecostal Christian, or Orthodox Jewish woman's practice of not wearing pants or short skirts), or adhering to shaving or hair length observances (*e.g.*, Sikh uncut hair and beard, Rastafarian dreadlocks, or Jewish peyes (sidelocks)).

When an exception is made as a religious accommodation, the employer may nevertheless retain its usual dress and grooming expectations for other employees, even if they want an exception for secular reasons.

Are there any Disparate Treatment Defenses a Respondent May Raise?

- **"Customer or Co-worker Preference"?**

  Employers may not rely on coworker, customer, or client discomfort or preference as the basis for a discriminatory action. If an employer takes an action based on the discriminatory preferences of others, the employer is unlawfully discriminating.

- **Security Requirements?**

  In general, an employer may adopt security requirements for its applicants/employees if done for nondiscriminatory reasons and applied in a nondiscriminatory manner. For example, an employer may require Muslim applicants to undergo the same background investigation as applicants of other religions, but cannot require them to undergo a more extensive background investigation or security procedures solely because of their religion.

- **BFOQ (bona fide occupational qualification)**

  Although Title VII permits employers to hire and employ employees on the basis of religion if religion is "a bona fide occupational qualification" reasonably necessary to the normal operation of that particular business or enterprise, due to the religious organization and ministerial exceptions, the BFOQ defense rarely arises with respect to religion and the exemption is a narrow one that would seldom be successfully invoked by a non-religious organization.

Jasjit, who wears a turban as part of his Sikh religion, is hired to work as a cashier at a convenience store. A few weeks after Jasjit begins working, the manager notices that the work crew from the construction site near the store no longer comes in for coffee in the mornings. When he inquires, the crew complains that Jasjit, whom they mistakenly believe is Muslim, makes them uncomfortable in light of all the recent terrorist attacks. The manager tells Jasjit that he has to let him go because of the customers' discomfort.

Does this constitute discrimination based on religion?

RELIGIOUS HARASSMENT

Claims of religious harassment are proved in the same manner as harassment on other bases, *e.g.*, race, color, sex national origin, genetic information, disability, or age. However, some unique fact patterns arise in religious harassment cases, in particular because sometimes the alleged harassment is the result of religious expression by a co-worker or supervisor, or even the owner of the business.

In such situations, an employer may be required to reconcile its dual obligations to take prompt remedial action in response to alleged harassment and to accommodate certain employee religious expression. (Title VII requires employers to accommodate expression that is based on a sincerely held religious practice or belief, but not if it threatens to constitute harassment or otherwise poses an undue hardship on the conduct of the business. For example, an employer can restrict religious expression where it would cause customers or co-workers reasonably to perceive the materials to express the employer's own message, or where the item or message in question is harassing or otherwise disruptive.)

Religious Coercion That Constitutes a Tangible Employment Action

One type of harassment claim arises if an employer or supervisor explicitly or implicitly requires or coerces an employee to abandon, alter, or adopt a religious practice as a condition of receiving a job benefit or avoiding an adverse action. (This can also constitute disparate treatment or denial of accommodation in some cases.)

Forward to slide: *Harassment Based on Coercion*

Ahmad was raised as a Muslim but no longer practices Islam and sometimes attends Christian services. His supervisor, Fadl, is a devout Muslim who lectures Ahmad about abandoning Islam and advises him to follow the teachings of the Quran. Fadl says that if Ahmad expects to advance in the company, he should join Fadl and other Muslims for weekly prayer sessions in Fadl's office. Notwithstanding this pressure to conform his religious practices in order to be promoted, Ahmad refuses to attend. He was subsequently denied a promotion for which he applied even though he was the most qualified.

Do Fadl's actions constitute unlawful discrimination? How should this case be analyzed?

Hostile Work Environment

Another type of harassment claim arises if the employee is subjected to a hostile work environment because of religion. An unlawful hostile work environment based on religion in violation of Title VII might take the form of either verbal or physical harassment or unwelcome imposition of religious views or practices on an employee. A hostile work environment is created when the "workplace is permeated with

discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment."

To establish a case of religious harassment, an employee must show that the harassment was:

- based on his religion
- unwelcome
- severe or pervasive (altered the conditions of employment by creating an intimidating, hostile, or offensive work environment)
- there is a basis for employer liability

Under Title VII, employers must permit employees to practice their religion, which may include engaging in religious expression, unless doing so imposes an undue hardship on the operation of the business.

Employees must also be protected from a hostile work environment, *i.e.*, an environment tainted by intimidating, abusive ridicule or insult based on religion.

Religious expression that is overtly abusive, derogatory, or insulting has the potential to create a hostile environment for any employee exposed to it regardless of its intended target.

Forward to slide: *Harassment - Reasonable Person*

Although he hired employees of all religions, the Director of "Get Drug Free Today" required employees to sign a statement that they would support the values of the Church of Scientology. He regularly chastised those whose conduct did not conform to those values.

***Would a reasonable person perceive this to be offensive*?**

Forward to slide: ***Hostile Environment - Severe or Pervasive***

Bob, a supervisor, occasionally allowed entirely spontaneous and voluntary prayers by employees during office meetings. During one meeting, he referenced Bible passages related to "slothfulness" and "work ethic." Amy complained that Bob's comments and the few instances of allowing voluntary prayers during office meetings created a hostile environment.

If Amy files a charge, will the evidence establish that the alleged harassment was "severe or pervasive"?

Forward to slide: ***Hostile Environment - Severe or Pervasive***

Ihsaan is a Muslim. Shortly after recent terrorist attacks, Ihsaan came to work and found the words "You terrorists go back where you came from! We will avenge the victims!! Your life is next!" scrawled in red marker on his office door.

If Ihsaan files a charge, will the evidence establish that the alleged harassment was "severe or pervasive"?

Forward to slide: *Hostile Environment*

Betty is a Mormon. During a disagreement regarding a joint project, a co-worker, Julian, tells Betty that she doesn't know what she is talking about and that she should "go back to Salt Lake City." When Betty subsequently proposes a different approach to the project, Julian tells her that her suggestions are as "flaky" as he would expect from "her kind." When Betty tries to resolve the conflict, Julian tells her that if she is uncomfortable working with him, she can either ask to be reassigned, or she can "just pray about it." Over the next six months, Julian regularly makes similar negative references to Betty's religion.

Do Julian's remarks create a hostile environment?

Forward to slide: *Hostile Environment*

While eating lunch in the company cafeteria, Clarence often overhears conversations between Dharma and Khema. Dharma, a Buddhist, is discussing meditation techniques with Khema, who is interested in Buddhism. Clarence strongly believes that meditation is an occult practice that leads to devil worship and complains to their supervisor that Dharma and Khema are creating a hostile environment for him. The supervisor takes no action.

Does this constitute a hostile work environment based on religion?

Employer Liability

Harassment by Supervisors or Managers[1]

An employer is always liable for a supervisor's harassment if it results in a tangible employment action.

A tangible employment action is "a significant change in employment status." Unfulfilled threats are insufficient. Characteristics of a tangible employment action are:

1. A tangible employment action is the means by which the supervisor brings the official power of the enterprise to bear on subordinates, as demonstrated by the following:

- it requires an official act of the enterprise;
- it usually is documented in official company records;
- it may be subject to review by higher level supervisors; and
- it often requires the formal approval of the enterprise and use of its internal processes.

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[1] In *Burlington Industries, Inc. v. Ellerth*, 118 S. Ct. 2257 (1998), and *Faragher v. City of Boca Raton*, 118 S. Ct. 2275 (1998), the Supreme Court made clear that employers are subject to vicarious liability for unlawful harassment by supervisors. The standard for employer liability for hostile work environment harassment depends typically on whether or not the harasser is the victim's supervisor. An employer is vicariously liable for a hostile work environment created by a supervisor. In *Vance v. Ball State University*, 133 S. Ct. 2434 (2013), the Supreme Court held that an employee is a "supervisor" if the employer has empowered that employee "to take tangible employment actions against the victim, *i.e.*, to effect a 'significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.'" The Court stated that an employer is liable for hostile work environment harassment by employees who are not supervisors if the employer was "negligent in failing to prevent harassment from taking place." In assessing such negligence, the Court explained, "The nature and degree of authority wielded by the harasser is an important factor to be considered in determining whether the employer was negligent." Also relevant is "[e]vidence that an employer did not monitor the workplace, failed to respond to complaints, failed to provide a system for registering complaints, or effectively discouraged complaints from being filed."

2. A tangible employment action usually inflicts direct economic harm.

3. A tangible employment action, in most instances, can only be caused by a supervisor or other person acting with the authority of the company.

   Examples of tangible employment actions include:

   - hiring and firing;
   - promotion and failure to promote;
   - demotion;
   - undesirable reassignment;
   - a decision causing a significant change in benefits;
   - compensation decisions; and
   - work assignment.

Any employment action qualifies as "tangible" if it results in a significant change in employment status. For example, significantly changing an individual's duties in his or her existing job constitutes a tangible employment action regardless of whether the individual retains the same salary and benefits. Similarly, altering an individual's duties in a way that blocks his or her opportunity for promotion or salary increases also constitutes a tangible employment action.

If the supervisor's harassment does not result in a tangible employment action, the employer may be able to avoid liability or limit damages by establishing an affirmative defense that includes two necessary elements:

(a) the employer exercised reasonable care to prevent and promptly correct any harassing behavior, **and**

(b) the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

Harassment by Co-Workers

An employer is liable for harassment by co-workers where it:

- knew or should have known about the harassment, and
- failed to take prompt and appropriate corrective action.

Harassment by Non-Employees

An employer is liable for harassment by non-employees where it:

- knew or should have known about the harassment,
- could control the harasser's conduct or otherwise protect the employee, and
- failed to take prompt and appropriate corrective action.

Jennifer's employer, ABC, Inc., had an anti-harassment policy and complaint procedure that covered religious harassment. All employees were aware of it, because ABC widely and regularly publicized it. Despite his knowledge of the policy, Jennifer's supervisor frequently mocked her religious beliefs. When Jennifer told him that his comments bothered her, he told her that he was just kidding and she should not take everything so seriously. Jennifer never reported the problem. When one of Jennifer's co-workers eventually reported the supervisor's harassing conduct, the employer promptly investigated, and acted effectively to stop the supervisor's conduct.

Jennifer files a religious harassment charge. Respondent asserts in its position statement that it is not liable for the harassment because Jennifer never made a complaint under the company's internal anti-harassment policy and complaint procedures.

Is the employer liable?

Tristan works for XYZ, a contractor that manages Crossroads Corporation's mail room. When Tristan delivers the mail to Julia, the receptionist, he gives her religious tracts, attempts to convert her to his religion, and persists even after she tells him to stop. Julia reports Tristan's conduct to her supervisor, who tells her that he cannot do anything because Tristan does not work for Crossroads. The harassment continues.

If Julia files a harassment charge, can Crossroads successfully defend on the ground that the harasser was not its employee?

REASONABLE ACCOMMODATION

Overview: Title VII requires an employer to reasonably accommodate an employee whose sincerely held religious belief, practice, or observance conflicts with a work requirement, unless providing the accommodation would create an undue hardship.

***NOTE*: Under Title VII, the undue hardship defense to providing religious accommodation requires a showing that there was no accommodation the employer could have provided without a "more than *de minimis*" cost or burden. This level of hardship is a far lower standard for an employer to meet than the "undue hardship" defense to an ADA accommodation claim, which is defined in the ADA as "significant difficulty or expense."**

A reasonable religious accommodation is any adjustment that will allow the employee to comply with his or her religious practices and beliefs. "Reasonable" means it is feasible and it would effectively accommodate the religious conflict. Under Title VII, employers have a **duty "to reasonably accommodate"** the religious practices and beliefs of an employee or applicant, unless to do so would create an **undue hardship** on the conduct of the employer's business, which is defined as a more than *de minimis* cost or burden.

As discussed earlier in this section, accommodation requests often relate to work schedules (time off or change of schedule to accommodate religious services or Sabbath observance), exceptions to employer dress and grooming rules to accommodate religious garb or grooming practices, or religious expression or practice while at work (e.g. prayer breaks, or being excused from an employer-sponsored workplace religious observance).

Religious accommodation cases must be analyzed on a case-by-case basis. Determinations must be based on an individualized assessment of the relevant facts, which may include the particular accommodation needed, the position held, the workplace and the impact on the employer's business, in order to analyze whether providing an accommodation would create an "undue hardship."

Elements of a Religious Accommodation Claim

Denial of religious accommodation is a form of disparate treatment. There are four elements in a religious accommodation claim.

1. **The charging party has a sincerely-held religious belief that needs to be accommodated.**

   Religious accommodation may be required if the charging party has a sincere and meaningful religious belief concerning a particular practice, even if the charging party does not belong to a specific religious group.

2. **The charging party informed the respondent (or the respondent was through some other means aware) of the need for religious accommodation.**

   For example, a charging party requested Saturdays off, but did not tell the respondent that the reason he needed Saturdays off was to observe a religious practice. Respondent denied the request. Has the respondent denied accommodation to the charging party? No, because respondent was not on notice of the need for a *religious* accommodation.

Be aware, however, of the type of fact pattern presented in *EEOC v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028 ((2015), in which the EEOC alleged an applicant who wore a headscarf to her job interview was not hired because respondent did not want to make an exception to its dress code. The Supreme Court held that where an employer does not hire someone because it knows or suspects religious accommodation is needed, it is irrelevant that the applicant did not request accommodation. "Title VII of the Civil Rights Act of 1964 prohibits a prospective employer from refusing to hire an applicant in order to avoid accommodating a religious practice that it could accommodate without undue hardship." Respondent cannot take an adverse employment action to avoid the duty to reasonably accommodate. **NOTE: There are a variety of fact patterns and possible legal theories that may be raised in an *Abercrombie* type of case. Therefore, before dismissing a charge involving this type of situation be sure to confer with your supervisor and the legal unit.**

3. The respondent did not provide a reasonable accommodation to the charging party.

Unlike other issues of discrimination under Title VII, employers have an **affirmative duty** beyond not discriminating; there is a duty to reasonably accommodate.

Respondent does not have to provide the exact accommodation requested, as long as the religious accommodation provided is reasonable, i.e. eliminates the conflict between the work-related requirement and the CP's religious belief, practice, or observance. Where the employer offers an alternative to the employee's preferred accommodation that will eliminate the conflict, the employee must attempt to meet his religious needs if possible through the employer's proposed accommodation.

4. **If the respondent failed to provide reasonable accommodation, respondent is liable unless it can prove that any accommodation would have posed an undue hardship on the conduct of its business.**

   The investigation of a religious accommodation charge will often focus on the efforts the employer made, or could have made, to accommodate the charging party's request.

Element #2: Notice of the Conflict between Religion and Work

- Was the employer aware of both of the need for accommodation and that it is for a religious reason?

- In many cases, the employee will have requested accommodation. The employee should explain the religious nature of the belief or practice at issue, and cannot assume that the employer will already know or understand it.

- However, no "magic words" are required to place an employer on notice of an applicant's or employee's conflict between religious needs and a work requirement. To request an accommodation, an individual may use plain language and need not mention any particular terms such as "Title VII" or "religious accommodation." However, the applicant or employee should provide enough information to make the employer aware that there is a conflict between the individual's religious practice or belief and a requirement for applying for or performing the job.

- Again, note that under the *Abercrombie & Fitch* Supreme Court decision, even if an applicant does not mention a need for an accommodation, if the employer fails to hire her because it knows or suspects she may need religious accommodation, this will violate Title VII. It is unlawful for the employer to take an adverse employment action motivated by its belief, concern, or suspicion, even if unconfirmed, that the individual may need

a religious accommodation that the employer could have provided without undue hardship.

Discussion of the Request - An Interactive Process

An employer is not required by Title VII to conduct a discussion with an employee before denying the employee's accommodation request. But as a practical matter, failing to confer can have adverse legal consequences for both an employee and an employer. For example, in some cases where an employer made no effort to accommodate, courts have found that the employer did not meet its burden of proof to establish that the plaintiff's proposed accommodation would actually have posed an undue hardship.

Likewise, courts have ruled against employees who refused to cooperate with an employer's requests for reasonable information necessary to resolve the accommodation request. For example, if an employee requested a schedule change to accommodate daily prayers, the employer might need to ask for information about the religious observance, such as time and duration of the daily prayers, in order to determine if accommodation can be granted without posing an undue hardship on the operation of the employer's business.

Sometimes the employee's request for accommodation does not provide the employer enough information to make a decision, or the employer has a bona fide doubt about the basis for the accommodation request. In these circumstances, the employer is entitled to make a limited inquiry into the facts and circumstances of the employee's claim that the belief or practice at issue is religious and sincerely held, and that the belief or practice requires an accommodation. Whether an employer has a reasonable basis for seeking to verify the employee's stated beliefs will depend on the facts of a particular case. If it did not, then it may be liable for improperly denying the accommodation request.

Diane requests that her employer schedule her for "fewer hours" so that she can "attend church more frequently." The employer denies the request because it is not clear what schedule Diane is requesting or whether the change is sought due to a religious belief or practice.

Diane files a charge alleging denial of accommodation, and respondent asserts in its position statement that her statements did not constitute an accommodation request.

Was Diane's statement sufficient to put respondent on notice of her conflict between a religious observance and a work requirement?

Rachel, who worked as a ticket agent at a sports arena, asked not to be scheduled for any Friday night or Saturday shifts, to permit her to observe the Jewish Sabbath from sunset on Friday through sunset on Saturday. The arena wanted to give Rachel only every other Saturday off.

Is the arena's proposed accommodation reasonable?

Tina, a newly hired part-time store cashier whose sincerely held religious belief is that she should refrain from work on Sunday as part of her Sabbath observance, asked her supervisor never to schedule her to work on Sundays. Tina specifically asked to be scheduled to work Saturdays instead. However, her employer offered to allow her to work on Thursday, which she found inconvenient because she takes a college class on that day.

If Tina files a charge alleging denial of reasonable accommodation, can she prevail?

Yvonne, a member of the Pentecostal faith, was employed as a nurse at a hospital. When she was assigned to the Labor and Delivery Unit, she advised the nurse manager that her faith forbids her from participating "directly or indirectly in ending a life," and that this proscription prevents her from assisting with abortions. She asks the hospital to accommodate her religious beliefs by allowing her to trade assignments with other nurses in the Labor and Delivery Unit as needed. The hospital concludes that it cannot accommodate Yvonne within the Labor and Delivery Unit because it is not feasible given the work of that unit. The hospital instead offered to permit Yvonne to transfer to a vacant nursing position in the Newborn Intensive Care Unit, which did not perform any such procedures.

Did the hospital violate Title VII?

Element #4: Undue Hardship

An employer can refuse to provide a reasonable accommodation if it would pose an undue hardship. Undue hardship may be shown if the accommodation would impose **"more than *de minimis* burden" on the operation of the employer's business.**

Case-by-Case Determination

The determination of whether a particular proposed accommodation imposes an undue hardship must be made by considering the particular factual context of each case. Investigators should be careful to examine each religious accommodation charge on a case-by-case basis in deciding whether undue hardship exists. It is rare that all of the facts will be exactly the same in any two situations involving issues of religious accommodation and different employers.

Relevant factors include:

- the type of workplace;
- the nature of the employee's duties;
- the identifiable cost or other burden of the accommodation in relation to the size and operating costs of the employer, and
- the number of employees who in fact need a particular accommodation.

Costs to be considered include not only direct monetary costs but also the burden on the conduct of the employer's business. For example, courts have found undue hardship where the accommodation diminishes efficiency in other jobs, infringes on other employees' job rights or benefits, impairs workplace safety, or causes co-workers to carry the accommodated employee's share of potentially hazardous or burdensome work.

Remember that a particular accommodation might pose an undue hardship on one employer in one situation but would not do so for another employer. For example, an employer with multiple facilities might be better able than another employer to accommodate a Muslim employee who sought a transfer so that he could attend midday Friday prayers at a nearby mosque during his lunch break.

More than "*De Minimis*" Cost

The employer must demonstrate how much cost or disruption is actually involved in order to prove undue hardship. An employer cannot rely on potential or hypothetical hardship when faced with a religious obligation that conflicts with scheduled work. A mere assumption that many more people with the same religious practices as the individual being accommodated may also seek accommodation is not evidence of undue hardship.

Generally, the payment of administrative costs necessary for an accommodation, such as costs associated with rearranging schedules and recording substitutions for payroll purposes or infrequent payment of premium wages (i.e., overtime pay) for a substitute will not constitute more than *de minimis* cost. By contrast, having to regularly pay premium wages for substitutes will constitute an undue hardship.

Patricia alleges she was terminated from her job as a steel mill laborer because of her religion (Pentecostal) after she notified her supervisor that her faith prohibits her from wearing pants, as required by the mill's dress code, and requested as an accommodation to be permitted to wear a skirt. Management contends that the dress code is essential to the safe and efficient operation of the mill, and has evidence that it was imposed following several accidents in which skirts worn by employees were caught in the same type of mill machinery which Patricia operates.

Has the mill's evidence established undue hardship?

Would the result be different if the mill had no evidence of any such past accidents at its own facility or any other?

Security Considerations

If a religious practice actually conflicts with a legally mandated federal, state, or local security requirement, an employer need not accommodate the practice because doing so would create an undue hardship. If a security requirement has been unilaterally imposed by the employer and is not required by law or regulation, the employer will need to decide whether it would be an undue hardship to modify or eliminate the requirement to accommodate an employee who has a religious conflict.

Harvinder, a baptized Sikh who works in a hospital, wears a small (4-inch), dull and sheathed kirpan (miniature sword) strapped and hidden underneath her clothing, as a symbol of her religious commitment to defend truth and moral values. When Harvinder's supervisor, Bill, learned about her kirpan from a co-worker, he instructed Harvinder not to wear it at work because it violated the hospital policy against weapons in the workplace. Harvinder explained to Bill that her faith requires her to wear a kirpan in order to comply with the Sikh Code of Conduct, and gave him literature explaining that the kirpan is a religious artifact, not a weapon. She also showed him the kirpan, allowing him to see that it was no sharper than butter knives found in the hospital cafeteria. Nevertheless, Bill told her that she would be terminated if she continued to wear the kirpan at work.
Is the employer liable for denial of a religious accommodation?

Seniority Systems and Collectively Bargained Rights

A proposed religious accommodation poses an undue hardship if it would deprive another employee of a job preference or other benefit guaranteed by a bona fide seniority system or collective bargaining agreement (CBA).

The mere existence of a seniority system or collective bargaining agreement does not relieve the employer of the duty to attempt reasonable accommodation of all its employees' religious practices.

The question is whether an accommodation can be provided without violating the seniority system or CBA. Allowing voluntary substitutes and swaps does not constitute an undue hardship to the extent the arrangements do not violate a bona fide seniority system.

Moreover, other policies, procedures and practices of an employer that are neither based on a seniority system nor part of the CBA affecting other employees' rights must, absent

undue hardship, be modified to provide a reasonable accommodation.

For example, unless doing so would violate the CBA or would otherwise pose an undue hardship, an employer must make an exception to its policy of requiring all employees, regardless of seniority, to work an "equal number of undesirable weekend, holiday, and night shifts" by allowing voluntary shift swaps between qualified co-workers in order to accommodate a particular employee's sincerely-held religious belief that he may not work on the Sabbath.

Co-worker Complaints

Although infringing on co-workers' ability to perform their duties or subjecting co-workers to a hostile work environment will generally constitute undue hardship, the general disgruntlement, resentment, or jealousy of employees will not.

Undue hardship requires more than proof that some co-workers complained. A showing of undue hardship based on co-worker interests generally requires evidence that the accommodation would actually infringe on the rights of co-workers or cause disruption of work.

Common Methods of Accommodation in the Workplace

Under Title VII, an employer or other covered entity may use a variety of methods to provide reasonable accommodations to its employees. The most common methods are:

- flexible scheduling and use of accrued or unpaid leave;
- voluntary substitutes or swaps of shifts and assignments;
- lateral transfer and/or change of job assignment; and
- modifying workplace practices, policies and/or procedures.

Schedule Changes

An employer may be able to reasonably accommodate an employee by allowing flexible arrival and departure times, floating or optional holidays, flexible work breaks, use of lunch time in exchange for early departure, staggered work hours, and other means to enable an employee to make up time lost due to the observance of religious practices.

To be a reasonable accommodation, however, EEOC's position is that the accommodation selected must eliminate – not merely reduce – the employee's religious conflict with an assigned schedule, if this can be done without posing an undue hardship.

Rashid, a janitor, tells his employer on his first day of work that he practices Islam and will need to pray at several prescribed times during the workday in order to adhere to his religious practice of praying at five specified times each day, for several minutes, with hand washing beforehand. The employer objects because its written policy allows one fifteen-minute break in the middle of each morning and afternoon. Rashid's requested change in break schedule will not exceed the 30 minutes of total break time otherwise allotted, affect his ability to perform his duties, or otherwise cause an undue hardship for his employer.

Must the employer grant the accommodation request?

A large employer operating a fleet of buses has a policy of refusing to accept driver applications unless the applicant agrees that he or she is available to be scheduled to work any shift, seven days a week.

Does this policy constitute religious discrimination?

Costs of Overtime and Premium Wages Resulting From Schedule Changes

- The regular payment of premium wages necessary for providing an accommodation such as flexible scheduling will generally cause undue hardship to the employer. 29 C.F.R. § 1605.2(e)(1). In addition, undue hardship may result from the cost of hiring additional employees.

- However, an employer may be required to bear the costs of making occasional payments of premium wages for a substitute, or paying premium wages temporarily while a more permanent accommodation is being sought. An employer may also be required to pay administrative costs resulting from the accommodation, including costs of rearranging schedules or recording substitutions for payroll purposes.

Voluntary Substitutes and Shift Swaps

- While it would pose an undue hardship to require employees *involuntarily* to substitute for one another or swap shifts, reasonable accommodation can often be accomplished without undue hardship where a volunteer with substantially similar qualifications is available, either for a single absence or an extended period of time.

- The employer's obligation is to make a good faith effort to allow voluntary substitutions and shift swaps, under circumstances which do not discourage employees from substituting for one another or trading shifts to accommodate a religious conflict.

Change of Job Tasks and Lateral Transfer

If an employee's religious belief or practice conflicts with a particular job task, the employer may accommodate by eliminating the task or transferring the employee to a different position or location without that task. Determining undue

hardship will depend on factors such as the nature and importance of the task at issue, the availability of others to perform the task, the availability of other positions, and the applicability of a CBA or seniority system.

This issue might arise, for example, where a pharmacist seeks to be relieved of assisting customers who are filling contraceptive prescriptions as a religious accommodation. Whether the employee could be accommodated would depend on whether it would pose an undue hardship, i.e. where there was no qualified co-worker on duty to whom such customer service duties could be transferred with respect to the particular prescriptions at issue, or whether it would otherwise pose more than a *de minimis* burden on the operation of the employer's business.

An electrical utility lineman requests accommodation of his Sabbath observance, but because the nature of his position requires being available to handle emergency problems at any time, there is no accommodation that would permit the lineman to remain in his position absent undue hardship.

Is the employer required to consider alternative reasonable accommodations and offer one if it can be provided without undue hardship?

Modifying Workplace Practices, Policies and Procedures

Dress and Grooming Standards

- When an employer has a dress or grooming policy that conflicts with the practices or beliefs of an employee's religion, the employee may ask for an exception to the policy as a reasonable accommodation.

- Religious grooming practices may relate, for example, to shaving or hair length. Religious dress may include clothes, head or face coverings, jewelry, or other items.

- Absent undue hardship, religious discrimination may be found where an employer fails to accommodate the employee's religious dress or grooming practices. Note that customer or co-worker fears or prejudices do not amount to undue hardship. Denying a position to an applicant or employee due to perceptions of customer preferences about religious attire would be denial of religious accommodation **and** disparate treatment based on religion because it would be the same thing as refusing to hire because of religion.

Samantha, a practicing Muslim who wears a headscarf for religious reasons, applied for a sales position at a large clothing store. The first-line hiring supervisor rated her qualified for the position based on her experience. However, because Samantha wore a headscarf, the manager suspected that it was because of her religion. When she relayed this concern to the top manager, she was told not to hire Samantha because the company's policy did not allow head coverings.

Was not selecting Samantha for this reason a violation of Title VII?

There are a variety of fact patterns and possible legal theories that may be raised in an Abercrombie type of case. The decision is new and enforcement ramifications are still being considered. Therefore, before dismissing a charge involving this type of situation, be sure to confer with your supervisor and the legal unit.

Prakash, who works for CutX, a surgical instrument manufacturer, does not cut his facial hair because of his Sikh religious observance. When he seeks a promotion to manage the division responsible for sterilizing the instruments, his employer tells him that, to work in that division, he must cut his beard because it may contaminate the sterile field. When Prakash explains that he cannot trim his beard for religious reasons, the employer offers to allow Prakash to wear two face masks instead of trimming his beard. Prakash thinks that wearing two masks is unreasonable and files a charge alleging denial of accommodation.

What is the likely result?

Use of Employer Facilities

If any employee needs to use space at the workplace as a reasonable accommodation, for example use of a quiet area for prayer during break time, the employer must accommodate the request under Title VII unless it would pose an undue hardship. If the employer allows employees to use the facilities at issue for non-religious activities not related to work, it may be difficult for the employer to demonstrate that allowing the facilities to be used in the same manner for religious activities is not a reasonable accommodation or poses an undue hardship.

Excusing Union Dues

Absent undue hardship, Title VII requires employers and unions to accommodate an employee who holds religious objections to joining or financially supporting a union. Such an employee can be accommodated by allowing the equivalent of her union dues (payments by union members) or agency fees (payments often required from non-union members in a

unionized workplace) to be paid to a charity agreeable to the employee, the union, and the employer. Whether such an accommodation (called a charity-substitute) would cause an undue hardship is an individualized determination based upon, among other things, the union's size, operational costs, and the number of individuals that need the accommodation.

If an employee's religious objection is not to joining or financially supporting the union, but rather to the union's support of certain political or social causes, the employee may be accommodated if it would not pose an undue hardship by, for example, reducing the amount owed and/or by allowing the employee to donate to a charitable organization the full amount the employee owes or that portion that is attributable to the union's support of the cause to which the employee has a religious objection, or by diverting the full amount to the national, state, or local union in the event one of those entities does not engage in support of the cause to which the employee has a religious objection.

INVESTIGATIVE STEPS - Religious Accommodation

While not all of the following issues will be in dispute in every charge alleging denial of religious accommodation, if charging party alleges that respondent failed to accommodate his/her religious beliefs or practices, the investigator should generally follow this line of inquiry, considering these steps:

Ascertain the nature of the belief or practice that CP claims R has failed to accommodate (*e.g.*, dress, grooming, holy day observance, etc.) and what accommodation was sought (e.g., exception to dress code, schedule change, leave, etc.).

If disputed by R, determine whether CP's beliefs are "religious" in nature. If not disputed by R, we generally

do not question whether CP's beliefs are "religious" in nature. It is not the EEOC's role to determine what beliefs are/are not "religious."

If disputed by R, determine whether CP "sincerely holds" the particular religious belief or practice at issue. Again, if this is not disputed by R, it is not EEOC's role to determine whether persons who file charges have "sincerely held" religious beliefs.

Ascertain whether of the need for a religious accommodation, *i.e.*, whether it that an accommodation was needed and that it was for religious reasons. If there was a request for accommodation by or on behalf of the applicant or employee, the investigator should seek evidence of when, where, how, and to whom notice was given, and the names of any witnesses to the notification. Even if there was not a request, remember that it violates Title VII for an employer to take an adverse employment action based on its knowledge or even suspicion that an applicant or employee may need an accommodation. **NOTE: There are a variety of fact patterns and possible legal theories that may be raised in an *Abercrombie* type of case. The decision is new and enforcement ramifications are still being considered. Therefore, before dismissing a charge involving this type of situation, be sure to confer with your supervisor and the legal unit.**

If R claims that it was not notified or otherwise aware of CP's need for an accommodation, the investigator should attempt to resolve this discrepancy by gathering additional evidence corroborating or refuting CP's and R's contentions.

Determine R's response, if any, to an accommodation request. Was an accommodation offered, and if so, what? The investigator should obtain R's statement of all attempts to accommodate CP, if any attempts were made.

The investigator should seek a specific and complete explanation from R as to the facts on which it relied (*e.g.*, why R concluded CP did not have a sincerely-held religious belief or practice, or why R concluded that accommodation would have posed an undue hardship in terms of cost, disruption, effect on co-workers, or any other reason). For example, in the event R is a union and the accommodation claim relates to payment of agency fees or union dues, the investigator should obtain any relevant information regarding how the particular union at issue may have handled payment by this religious objector in order to provide accommodation.

If R asserts that it did not accommodate CP's request because it would have posed an undue hardship, obtain all available evidence regarding whether or not a hardship would in fact have been posed, *i.e.*, whether the alleged burden is more than *de minimis*. If R's undue hardship defense is based on cost, ascertain the cost of the accommodation in relation to R's size, nature of business operations, operating costs, and the impact, if any, of similar accommodations already being provided to other employees. If R's undue hardship defense is based on a factor other than cost (*i.e.*, disruption, production or staffing levels, security, or other factor), similarly ascertain the impact of the accommodation with respect to R's particular workplace and business. Determine if R has made any similar exceptions for other employees for any reason, religious or otherwise.

When there is more than one method of accommodation available that would not cause undue hardship, the investigator should evaluate whether the accommodation offered is reasonable by examining: (1) whether any alternative reasonable accommodation was available; (2) whether R considered any alternatives for accommodation; (3) the alternative(s) for

accommodation, if any, that R actually offered to CP; and (4) whether the alternative(s) the employer offered eliminated the conflict.

If R asserts CP failed to cooperate with R in reaching an accommodation, obtain any available evidence regarding the relevant communications, including whether CP refused any offer of reasonable accommodation.

Prayer, Proselytizing, and Other Forms of Religious Expression in the Workplace

Some employees may seek to display religious icons or messages at their work stations. Others may seek to proselytize by engaging in one-on-one discussions regarding religious beliefs, distributing literature, or using a particular religious phrase when greeting others. Still others may seek to engage in prayer at their work stations or to use other areas of the workplace for either individual or group prayer or study. In some of these situations, an employee might request accommodation in advance to permit such religious expression. In other situations, the employer will not learn of the situation or be called upon to consider any action unless it receives complaints about the religious expression from either other employees or customers.

Prayer, proselytizing, and other forms of religious expression do not arise solely as religious accommodation, but may also raise disparate treatment or harassment issues.

To determine whether an employer was required to allow or continue to permit an employee to pray, proselytize, or engage in other forms of religiously-oriented expression in the workplace, consider -- based on the facts of the particular case -- the potential disruption, if any, that will be posed by permitting this expression of religious belief. Relevant considerations may include the effect such expression has had, or can reasonably be expected to have, if permitted to continue, on co-workers, customers, or business operations.

Effect on Co-Workers

Expression can create undue hardship if it disrupts the work of other employees or constitutes – or threatens to constitute – unlawful harassment. Since an employer has a duty under Title VII to protect employees from religious harassment, it would be an undue hardship to accommodate expression that constitutes or threatens to constitute unlawful harassment of co-workers.

Effect on Customers

The determination of whether it is an undue hardship to allow employees to engage in religiously-oriented expression to customers is a fact-specific inquiry and will depend on the nature of the expression, the nature of the employer's business, and the extent of the impact on customer relations.

For example, one court found that it did not as a matter of law pose an undue hardship to allow an employee to use the general religious greeting "Have a Blessed Day," where it had little demonstrable adverse impact on customers or the business in brief anonymous interactions involving a cashier accepting payment. However, other courts have found undue hardship where religiously-oriented expression was used in the context of a regular business interaction with a client who objected. Whether or not a client objects, it may be an undue hardship for an employer to accommodate an employee's religious expression if in the circumstances it could be mistaken as the employer's own message. Where the religiously-oriented expression is not limited to use of a phrase or greeting, but rather is in the manner of individualized, specific proselytizing, an employer is far more likely to be able to demonstrate that it would constitute an undue hardship to accommodate an employee's religious expression, regardless of the length or nature of the business interaction.

Susan and Roger are members of the same church and are both employed at XYZ Corporation. Susan works as an architect in a private office on an upper floor, where she occasionally interacts with coworkers, but not with customers. Roger is a security guard stationed at a desk in the front lobby of the XYZ building through which all employees, customers, and other visitors must enter. At a recent service at Susan and Roger's church, the minister distributed posters with the message "Jesus Saves!" and encouraged parishioners to display the posters at their workplaces in order to "spread the word." Susan and Roger each display the poster on the wall above their respective work stations. XYZ orders both to remove the poster despite the fact that both explained that they felt a religious obligation to display it, and despite the fact that there have been no complaints from co-workers or clients.

If Susan and Roger both file charges alleging denial of religious accommodation, what is the likely result?

Helen, an employee in a mental health facility that served a religiously and ethnically diverse clientele, frequently spoke with clients about religious issues and shared religious tracts with them as a way to help solve their problems, despite being instructed not to do so. After clients complained, Helen's employer issued her a letter of reprimand stating that she should not promote her religious beliefs to clients and that she would be terminated if she persisted. She did continue and was terminated. She files a charge alleging denial of accommodation because the employer did not permit her to engage in these discussions with clients, which she asserts her religious beliefs require her to do.

If the employer asserts undue hardship, what is the likely result?

RELATED FORMS OF DISCRIMINATION

National Origin, Race, and Color

Title VII's prohibition against religious discrimination may overlap with Title VII's prohibitions against discrimination based on national origin, race, and color. Where a given religion is strongly associated – or perceived to be associated – with a certain national origin, the same facts may state a claim of both religious and national origin discrimination. All four bases might be implicated where, for example, co-workers target a dark-skinned Muslim employee from Saudi Arabia for harassment because of his religion, national origin, race, and/or color.

Employer-Sponsored Programs

If an employer holds religious services or programs or includes prayer in business meetings, Title VII requires that the employer accommodate an employee who asks to be excused for religious reasons, absent a showing of undue hardship. Excusing an employee from religious services normally does not create an undue hardship because it does not cost the employer anything and does not disrupt business operations or other workers.

Retaliation: Special Considerations in Accommodation Cases

EEOC has taken the position that even if an accommodation request is legally denied, the making of the request is still "protected activity" for which an applicant or employee cannot be subject to retaliation.

In July 2008, EEOC issued a Compliance Manual section on religious discrimination, as well as a short question-and-answer summary, and in 2014 issued technical assistance publications on religious garb and grooming. All of the Commission's publications on religious discrimination can be found on inSite under Enforcement - Compliance Manual. They can also be found on the Commission's public website at http://ww.eeoc.gov/laws/types/religion.cfm.

In late 2015, EEOC issued a statement and provided additional information for employees and employers regarding discrimination against individuals who are, or who are perceived to be, Muslim or Middle Eastern. A factsheet entitled "What You Should Know About Religious and National Origin Discrimination Against Those Who Are, or Are Perceived to Be, Muslim or Middle Eastern" can be found on our website at:
http://www.eeoc.gov/eeoc/newsroom/wysk/religion_national_origin_2016.cfmIn 2016.
The Office of Field Programs issued further guidance on tracking inquiries charges, and outreach involving religious and national origin backlash issues which can be found on our website at:
http://insite.eeoc.gov/ofp/directives-memos.cfm#CP_JUMP_84366.

Key resources include:

- EEOC Compliance Manual: Religious Discrimination
- Questions and Answers: Religious Discrimination in the Workplace
- Best Practices for Eradicating Religious Discrimination in the Workplace
- Religious Garb and Grooming in the Workplace: Rights and Responsibilities
- Fact Sheet on Religious Garb and Grooming In the Workplace

- Questions and Answers for Employees: Responsibilities Concerning the Employment of Individuals Who Are, or Are Perceived to Be, Muslim or Middle Eastern.

- Questions and Answers for Employers: Responsibilities Concerning the Employment of Individuals Who Are, or Are Perceived to Be, Muslim or Middle Eastern.

The Compliance Manual section contains detailed instructions for investigators in handling religious discrimination charges, including lists of questions to ask and information to gather if respondent disputes whether the belief or practice at issue is "religious," whether it is "sincerely held," or whether charging party was denied a reasonable accommodation.

APPENDIX

APPENDIX: Employer Inquiries into Religious Nature or Sincerity of Belief

Because the definition of religion is broad and protects beliefs and practices with which the employer may be unfamiliar, the employer should ordinarily assume that an employee's request for religious accommodation is based on a sincerely-held religious belief. If, however, an employee requests religious accommodation, and an employer has an objective basis for questioning either the religious nature or the sincerity of a particular belief or practice, the employer would be justified in seeking additional supporting information.

If the Respondent (R) disputes that the Charging Party's ("CP's") belief is "religious," consider the following:

Begin with the CP's statements. What religious belief or practice does the CP claim to have? In some cases, the CP's credible testimony regarding his belief or practice will be sufficient to demonstrate that it is religious. In other cases, however, the investigator may need to ask follow-up questions about the nature and tenets of the asserted religious beliefs, and/or any associated practices, rituals, clergy, observances, etc., in order to identify a specific religious belief or practice or determine if one is at issue.

Since religious beliefs can be unique to an individual, evidence from others is not always necessary. However, if the CP believes such evidence will support his or her claim, the investigator should seek evidence such as oral statements, affidavits, or other documents from CP's religious leader(s) if applicable, or others whom CP identifies as knowledgeable regarding the religious belief or practice in question.\

Remember, where an alleged religious practice or belief is at issue, a case-by-case analysis is required. Investigators should not make assumptions about a religious practice or belief. In some cases, to determine whether CP's asserted practice or belief is "religious" as defined under Title VII, the investigator's general knowledge will be insufficient, and additional objective information

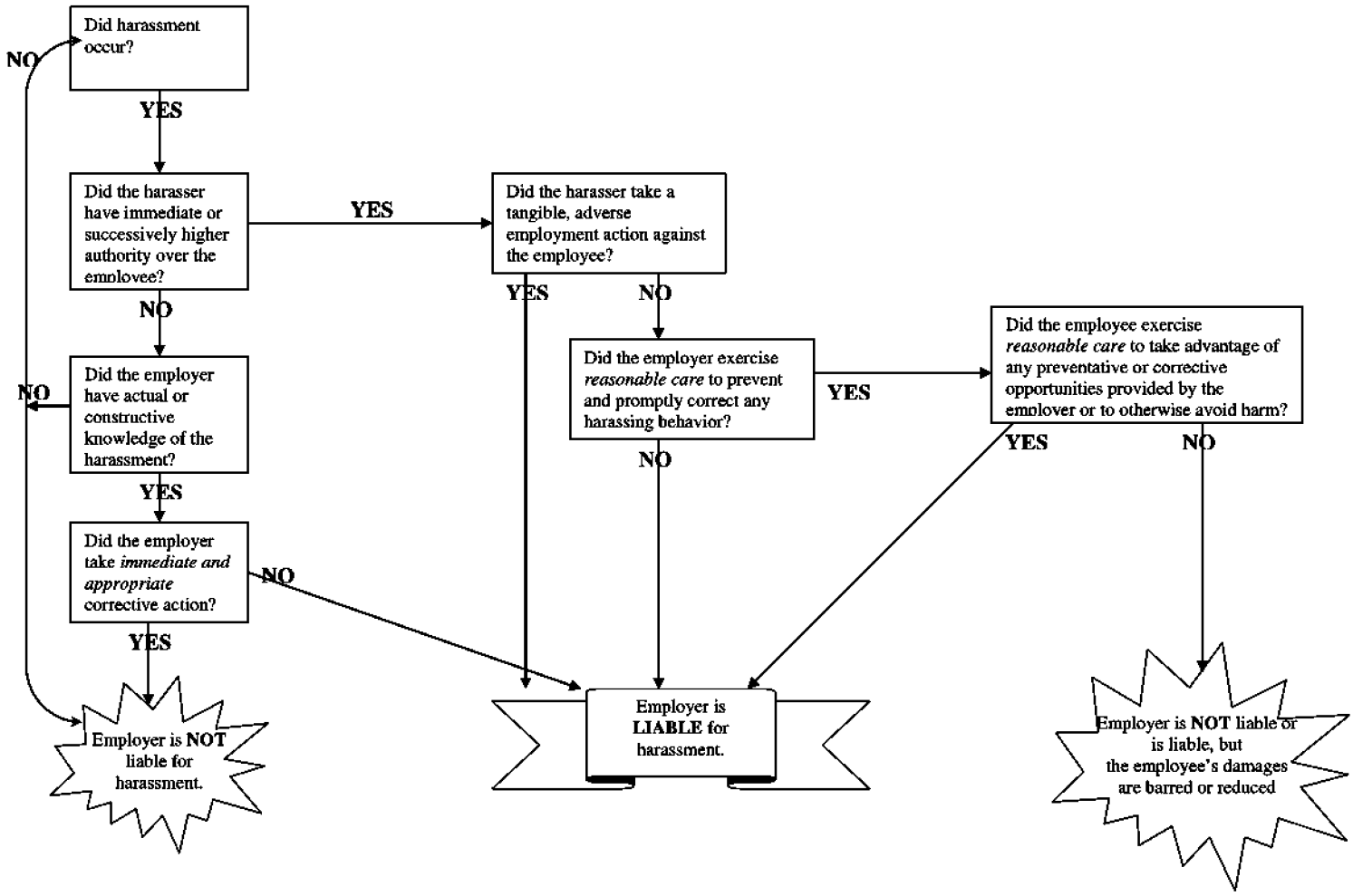
will have to be obtained, while nevertheless recognizing the intensely personal characteristics of adherence to a religious belief.

If the Respondent disputes that CP's belief is "sincerely held," the following evidence may be relevant:

Oral statements, an affidavit, or other documents from CP describing his or her beliefs and practices, including information regarding when CP embraced the belief or practice, as well as when, where, and how CP has adhered to the belief or practice; and/or,

Oral statements, affidavits, or other documents from potential witnesses identified by CP or R as having knowledge of whether CP adheres or does not adhere to the belief or practice at issue (*e.g.*, CP's religious leader (if applicable), fellow adherents (if applicable), family, friends, neighbors, managers, or co-workers who may have observed his past adherence or lack thereof, or discussed it with him).

ANALYZING LIABILITY IN A HARASSMENT CASES



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EEOC Cases Cited in "Religious Garb and Grooming in the Workplace: Rights and Responsibilities"

EEOC v. Family Foods, Inc. d/b/a Taco Bell, No. 5:11cv00394 (E.D.N.C. consent decree entered April 2012) (settlement of case alleging failure to accommodate long hair worn pursuant to employee's Nazirite religious beliefs).

EEOC v. Alamo Rent-A-Car, LLC, 432 F. Supp. 2d 1006 (D. Ariz. 2006) (Muslim employee assigned to non-customer contact position due to her religious headscarf).

EEOC v. Red Robin Gourmet Burgers, Inc., 2005 WL 2090677 (W.D. Wash. Aug. 29, 2005) (denying employer's motion for summary judgment in case involving employer that had refused to accommodate an employee whose religious beliefs precluded him from covering his Kemetic religious tattoos to comply with employer's dress code, and therefore needed an exception).

EEOC v. 704 HTL Operating, LLC and Investment Corporation of America, d/b/a MCM Elegante Hotel, 11-cv-00845 JCH/LFG (D.N.M. consent decree entered Nov. 2013) (settlement on behalf of individual whom employer hired for hotel housekeeping position but then barred from working unless she removed her Muslim head scarf).

EEOC v. Lawrence Transportation Systems, Civil Action No. 5:10CV 97 (W.D. Va. consent decree entered August 2011) (settlement on behalf of applicant for storage company loading position who alleged he was not hired due to his Rastafarian dreadlocks).

EEOC v. LAZ Parking, LLC, Case No. 1:10-CV-1384 (N.D. Ga. consent decree entered Nov. 2010) (settlement on behalf of Muslim parking facility employee who was terminated for refusing to remove her hijab).

EEOC v. Comair, Inc., Civil Action No. 1:05-cv-0601 (W.D. Mich. consent decree entered Nov. 2006) (settlement on behalf of Rastafarian airline applicant alleging he was not hired because he refused to cut his hair to conform with the company's grooming standards).

EEOC v. Pilot Travel Ctrs. LLC, Civil Action No. 2:03-0106 (M.D. Tenn. consent decree entered April 2004) (settlement on behalf of Messianic Christian maintenance worker who wore beard as part of his religious practice, and was terminated for refusing to shave in compliance with employer's no-beard policy).

EEOC v. United Galaxy Inc., d/b/a Tri-County Lexus, No. 2:10-CV-04987 (D.N.J. consent decree entered Nov. 2013) (settlement of case alleging car dealership violated Title VII religious accommodation obligation when it refused to hire as a sales associate an applicant who wore a beard, uncut hair, and a turban pursuant to his Sikh faith, unless he agreed to shave his beard to comply with the dealership's dress code).

Draper v. Logan County Pub. Library, 403 F. Supp. 2d 608 (W.D. Ky. 2005) (public library employee's First Amendment free speech and free exercise rights were violated when she was prohibited from wearing a necklace with a cross ornament).

U.S. v. Washington Metro. Area Transit Auth., No. 1:08-CV-01661 (RMC) (D.D.C. consent decree entered Feb. 2009) (lawsuit filed and settled by U.S. Department of Justice on behalf of city bus driver applicants and employees who were denied religious accommodation to wear skirts instead of pants, and to wear religious head coverings).

EEOC v. Brink's Inc., No. 1:02-CV-0111 (C.D. Ill.) (consent decree entered Dec. 2002) (settlement of case alleging that messenger employee was denied reasonable accommodation when she sought to wear culottes made out of uniform material, rather than the required trousers, because her Pentecostal Christian beliefs precluded her from wearing pants).

EEOC v. Scottish Food Systems, Inc. and Laurinburg KFC Take Home, 1:13-CV00796 (M.D.N.C. consent decree entered Dec. 2013) (settlement of case alleging denial of accommodation to Pentecostal Christian employee in food service position who adhered to a scriptural interpretation that women should wear only skirts or dresses, and therefore needed an exception to restaurant's requirement of uniform pants).

EEOC v. Fries Restaurant Management d/b/a Burger King, No. 3:12-CV-3169-M (N.D. Tex. consent decree entered Jan. 2013) (Pentacostal Christian woman denied uniform exception).

EEOC v. Grand Central Partnership, Civil Action No. 08-8023 (S.D.N.Y. consent decree entered Aug. 2009) (settlement, along with policy and procedure changes and related training, in case alleging failure to accommodate long dreadlocks and short beards worn pursuant to Rastafarian religious practice by workers performing sanitation, maintenance and public safety duties; company grooming policy had required that long hair, including dreadlocks, be worn inside hats, which was impracticable; settlement included agreement to allow the dreadlocks to be worn down but clipped back in neat ponytails).

EEOC v. United Parcel Service, 94 F.3d 314 (7th Cir. 1996) (genuine issue of material fact regarding whether the employer reasonably accommodated the employee's religious practice of wearing a beard precluded summary judgment for the employer).

EEOC v. United Parcel Service, Civil Action No. 08-cv-1806 (M.D. Pa. consent decree entered Feb. 2010) (settling Title VII claim of failure to accommodate package delivery employee whose religious practice of wearing long hair and beard necessitated exception to company's grooming code).

EEOC v. Imperial Security, Inc., Civil Action No. 2:10-CV-04733 (E.D. Pa. consent decree entered Nov. 2011) (exception to uniform requirement of private security company).

United States v. New York State Dep't of Corr. Servs., Civil Action No. 07-2243 (S.D.N.Y. consent decree entered Jan. 2008) (settlement of case brought by U.S. Department of Justice, providing for individualized review of correctional officers' accommodation requests with

respect to uniform and grooming requirements, and allowing employees to wear religious skullcaps such as kufis or yarmulkes if close fitting and solid dark blue or black in color, provided no undue hardship was posed).

EEOC v. Heartland Employment Services, LLC d/b/a ManorCare Health Services-Citrus Heights, Case No. 2:08-cv-00460-FCD-DAD (E.D. Cal.) (consent decree entered May 2010) (denial of Sikh employee's request to wear kirpan); *EEOC v. Healthcare and Retirement Corp. of America d/b/a Heartland Health Care Center - Canton*, Case No. 07-13670 (E.D. Mich. consent decree entered Dec. 2009) (same).

EEOC v. Sunbelt Rentals, Inc., 521 F.3d 306 (4th Cir. 2008) (reversing summary judgment for the employer and remanding the case for trial, the court ruled that a reasonable fact finder could conclude that a Muslim employee who wore a kufi as part of his religious observance was subjected to hostile work environment religious harassment when fellow employees repeatedly called him "Taliban" and "towel head," made fun of his appearance, questioned his allegiance to the United States, suggested he was a terrorist, and made comments associating all Muslims with senseless violence) ("we cannot regard as 'merely offensive,' and thus 'beyond Title VII's purview,' ... constant and repetitive abuse founded upon misperceptions that all Muslims possess hostile designs against the United States, that all Muslims support jihad, that all Muslims were sympathetic to the 9/11 attack, and that all Muslims are proponents of radical Islam").

Additional Examples or Details of Resolved EEOC Cases Involving Religious Garb or Grooming (more examples can be viewed in the press releases in the Newsroom on www.eeoc.gov)

EEOC v. Abercrombie & Fitch Stores, Inc., 135 S. Ct. 2028 (2015) (ruling that Title VII's disparate treatment provision prohibits actions motivated by a desire to avoid accommodating a religious practice, whether or not the employer had actual knowledge of the need for accommodation.)

ABM Security Services (PHDO) filed 7/18/12, resolved 7/22/13($65,000) - defendant private security firm refused to provide Charging Party (Muslim) with the religious accommodation of permitting her to wear a head scarf (khimar) with her uniform and terminated her because of her religion.

Morningside House of Ellicott City (PHDO) filed 9/26/11, resolved 8/6/2012 ($25,000) - defendant assisted living facility refused to hire Charging Party (Muslim) because she refused to remove her religious headscarf.

Autozone (NYDO) filed 9/28/10, resolved 3/29/12 ($75,000) - Charging Party is a Sikh. After converting to the Sikh religion, he was harassed, denied the reasonable accommodations of wearing a turban and a kara (bangle) for his sales associate position and discharged in retaliation for complaining of discrimination.

Kaze Japanese Steakhouse (CTDO) filed 9/7/10, resolved 1/26/12 ($4000) - Charging Party converted to Islam. She was denied the reasonable accommodation of wearing a hijab and discharged from her servicer position because of her religion.

Imperial Security (PHDO) filed 9/16/10, resolved 11/22/11 ($50,000) - Charging Party is Muslim. She was denied the reasonable accommodation of being allowed to wear her khimar at work and discharged from her security guard position because of her religion. Other Muslim employees were also denied accommodations.

LAZ Parking (ATDO) filed 5/7/10, resolved 11/16/10 ($46,000) - Charging Party was denied a reasonable accommodation (wearing a hijab) and discharged because of her religion, Muslim.

White Lodging Services Corp. (INDO) filed 7/4/06, resolved 7/21/10 ($40,000) - A Marriott hotel did not hire four Muslim women for housekeeping jobs because the women wore religious head coverings.

Heartland Employer Services (HCR Manor Health Care Services) (SFDO) filed 2/28/08, resolved 6/7/10 ($30,000) - a nursing home denied a Sikh from wearing a kirpan, a small, dull ceremonial knife worn by Sikhs as a religious symbol. Charging Party was also constructively discharged.

Ivy Hall Assisted Living (ATDO) filed 9/30/08, resolved 1/28/10 ($43,000) - Charging Party, a housekeeper, was denied a religious accommodation to wear a traditional religious head covering, a hijab, and was discharged for violating defendant's dress code.

HCR Manor Health Care Services (INDO) filed 8/30/07, resolved 12/18/09 ($15,000) - a healthcare facility denied Charging Party, a Sikh, the religious accommodation of wearing a kirpan, a small, dull ceremonial knife she wore as a religious symbol, and then discharged her because of her religious practice.

Champion Security Services (DADO) filed 6/26/08, resolved 1/21/09 ($24,000) - a security firm refused to accommodate and refused to hire a Sikh security guard because of his religious practices of wearing a beard and turban.

National Wholesale Liquidators (NYDO) filed 6/21/07, resolved 10/23/08 ($255,000) - South Asian employees were subjected to religious, racial and ethnic taunts and at least one female worker was sexually harassed and subjected to discrimination on the basis of her religion, Sikh, when her manager told her to remove her religious head covering because she "would appear sexier without it."

Project Group of Illinois (CHDO) filed 3/29/07, resolved 10/9/08 ($25,000) - a Palestinian Muslim was subjected to derogatory remarks about her head covering and was referred to as a terrorist.

Chriskoll d/b/a Burger King (PHDO) filed 3/21/06, resolved 12/3/07 ($16,150) - Charging Party is a Muslim and was hired by defendant as a food handler. Defendant refused to

provide Charging Party with a religious accommodation for his beard and discharged him after Charging Party refused to comply with defendant's appearance policy.

Client Services, Inc. (SLDO) filed 9/12/07, resolved 4/1/08 ($65,000) - Charging Party is Muslim and wears a head scarf for religious reasons. Defendant refused to accommodate and discharged Charging Party from her part-time position for wearing the head scarf.

Folks, Inc. (ATDO) filed 12/18/07, resolved 5/19/08 ($40,000) - Defendant refused to provide Charging Party with an accommodation for the religious head covering she wore and rescinded its job offer to her because of religion, Muslim.

Mid-State Petroleum d/b/a The Pop Shop (CTDO) filed 9/28/06, resolved 3/4/07 ($40,000) - Charging Party is Muslim and was not hired as a clerk in a convenience store because her religious head covering violated defendant's dress code.

AAA Parking (ATDO) filed 9/21/06, resolved 6/7/07 ($29,500) - Charging Party is Muslim. She was fired from her cashier job after showing up to work wearing a head covering in recognition of the religious holiday of Ramadan.

Alamo Rent A Car (PXDO) filed 9/27/02, resolved 6/11/07 ($287,640) - Charging Party is Muslim. She was denied a reasonable accommodation when defendant refused to permit her to cover her head during Ramadan. She was then disciplined, suspended and discharged.

Regency Health Associates (ATDO) filed 9/28/05, resolved 8/1/07 (unfavorable court order) - Charging Party is Muslim. She was not accommodated and was discharged from her medical assistant job because her head covering did not conform to defendant's dress code.

Russell Enterprises d/b/a McDonalds (CTDO) filed 2/5/05, resolved 8/5/05 ($25,000) - Charging Party is Islamic. He was denied a religious accommodation to defendant's requirement that he be clean shaven.

The Herrick Corporation d/b/a Stockton Steel (SFDO) filed 1/18/00, resolved 3/18/03 ($1.11 million) - Four Charging Parties were hassled during their daily Muslim prayer obligations, mocked because of their traditional dress and repeatedly called "camel jockey" and "raghead" based on their national origin (Pakistani) and religion (Islam).

American Airlines (CDO) filed 8/28/02, resolved 9/3/02 - defendant did not hire Charging Party and other females as passenger service agents because their Muslim head coverings.

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U.S. Equal Employment Opportunity Commission

What You Should Know About Religious and National Origin Discrimination Against Those Who Are, or Are Perceived to Be, Muslim or Middle Eastern

Recent tragic events at home and abroad have increased tensions with certain communities, particularly those who are, or are perceived to be, Muslim or Middle Eastern. EEOC urges employers and employees to be mindful of instances of harassment, intimidation, or discrimination in the workplace and to take actions to prevent or correct this behavior. The information provided below highlights what you should know about EEOC's outreach and enforcement in this area.

Applicable Law

Employers may not make employment decisions-including hiring, firing, or promoting-on the basis of national origin or religion under Title VII of the Civil Rights Act of 1964. With respect to discrimination against those who are Muslim or Middle Eastern, this includes employment decisions based on prejudices, lack of knowledge about particular groups or religious practices, or avoidance of a religious accommodation.

Similarly, co-workers, supervisors, and customers may not harass individuals because of their religion or national origin or because they are thought to be of a specific religion or national origin. Harassment can take the form of offensive jokes, slurs, name calling, physical assaults or threats, displaying offensive objects or pictures, and interfering with work performance as well as other actions. Employers must guard against workers harassing their fellow employees as well as against managers harassing employees. Employers are responsible for preventing or promptly correcting illegal workplace harassment.

Employers also must reasonably accommodate religious practices or dress, unless it is an undue hardship. The law prohibits retaliation against someone who complains about a discriminatory practice, files a charge, or assists in an investigation of discrimination.

EEOC Enforcement and Litigation

In the initial months after the 9/11 attacks, the EEOC saw a 250% increase in the number of religion-based discrimination charges involving Muslims. As a result, EEOC initiated a specific code to track charges that might be considered backlash to the 9/11 attacks. In the 10 years following the attacks, EEOC received 1,036 charges using the code, out of more than 750,000 charges filed since the attacks. Of the charges filed under the code, discharge (firing) was alleged in 614 charges and harassment in 440 charges. Because the use of the code has declined in recent years, EEOC is re-emphasizing the use of this code for events that may be a result of backlash to the Paris, San Bernadino, or other incidents.

The number of charges alleging discrimination on the basis of Muslim religion and Middle Eastern national origin can be seen in this table, (which may or may not be backlash-related incidents). In addition, EEOC also tracks charge information based on religion and national origin.

Since 2001, EEOC has filed or settled a number of lawsuits alleging discrimination on the basis of national origin and religion against the Muslim, Sikh, Arab, Middle Eastern, and South Asian communities.

A few recent and notable cases include:

- *EEOC v. Abercrombie & Fitch Store, Inc.* EEOC sued Abercrombie & Fitch alleging that the company violated Title VII after it refused to hire a Muslim woman because of her religious practice of wearing a hijab. The Supreme Court agreed with the EEOC that an employer violates Title VII when a motive for not hiring an applicant is to avoid providing religious accommodation, even if the employer does not actually know whether or not the employee will need one. If an applicant proves that one of an employer's motives for not hiring her was that it suspects she might need a religious accommodation, she can prevail on a claim of disparate treatment based on religion, even if she never asked for accommodation during the hiring process.
- *EEOC and NTW, LLC d/b/a National Tire and Battery National Tire and Battery agreed to pay $22,500 to a former employee and also provide harassment training to its managers. EEOC alleged that the company violated Title VII when it subjected an Arab Muslim employee to harassment because of his religion and national origin and failed to promptly correct the behavior once the company learned of the harassment.*
- *EEOC v. Rizza Cadillac et al. EEOC sued Rizza Cadillac car dealership, alleging that the company violated Title VII*

by subjecting three Arab Muslim employees to a hostile work environment based upon their national origin and religion. In June 2014, the car dealership entered into a consent decree that required it to pay $100,000 in relief, provide training to members of its workforce, and satisfy other reporting and posting requirements.

EEOC protects all workers of all faiths who have experienced discrimination based on their religion. Some recent cases included an Evangelical Christian forced to retire after refusing to use new biometric fingerprint screening for time clock saying he believed it to be a "mark of the beast" and forbidden by his religion; Rastafarians and others whose religious grooming requirements conflicted with their employer's dress code; a Seventh Day Adventist who refused to work on his Sabbath; and a member of the Hebrew Israelite faith whose religion forbade him from plucking out a hair for a drug test.

Outreach

EEOC has outreach program coordinators in offices across the country who meet with groups representing employers and community-based organizations to provide information about discrimination based on religion and national origin. EEOC has asked each of its outreach program coordinators to reach out to community partners who may need additional EEOC resources at this time. In December, EEOC's General Counsel, David Lopez, addressed a coalition of Christian, Jewish, Muslim, Sikh, Buddhist, Hindu, and Humanist leaders at the White House, and shared information on the protections provided by the laws EEOC enforces.

EEOC Chair Jenny R. Yang has issued a statement condemning discrimination on the basis of Muslim religion and Middle Eastern national origin which accompanied two resource documents explaining federal laws prohibiting discrimination against individuals who are, or are perceived to be, Muslim or Middle Eastern.

- Questions and Answers for Employers: Responsibilities Concerning the Employment of Individuals Who Are, or Are Perceived to Be, Muslim or Middle Eastern
- Questions and Answers for Employees: Workplace Rights of Employees Who Are, or Are Perceived to Be, Muslim or Middle Eastern

Additional information on religious discrimination includes the following:

- Fact Sheet on Religious Garb and Grooming in the Workplace: Rights and Responsibilities
- Religious Garb and Grooming in the Workplace: Rights and Responsibilities

Religion & Your Job Rights

It is illegal for your employer to treat you differently or harass you because of your religious practices or beliefs (or because you do not have religious practices or beliefs). You have the right to ask for certain workplace changes (called "reasonable accommodations") because of your religious practices or beliefs if you need them to apply for or do a job.

Examples

1 John applies to work at a coffee shop during summer break. Marcus, the manager, assigns John to work a shift that begins at 7:00 a.m. John explains that he attends Mass every Wednesday at 7:00 a.m. and asks if he can work a later shift on those days. There are other shifts available, so Marcus agrees and schedules John to work later shifts on Wednesdays, and tells other managers to do the same. Marcus responded appropriately by changing John's schedule to accommodate his religious practice.

2 Samara applies to work as a grocery store cashier after school. Samara is Muslim and wears a hijab (a veil that covers her head) for religious reasons. Tim, the store manager, offers Samara a back room job. He tells her having "someone who prays to the same God as terrorists" working at the front of the store would make customers uncomfortable. Tim discriminated against Samara by assigning her to work in the back room, away from customers, and by not hiring her for the cashier position because she is Muslim.

3 Archana, a student, works at a clothing store. As part of her religious beliefs, Archana wears a bindi (a red dot) on her forehead. Mary, the store owner, tells her to "remove that ridiculous dot." Archana explains that she wears the bindi because she is Hindu. Mary replies that "wearing a red dot to show your religious beliefs is silly," and "anyone can do it." Mary draws a circle on her forehead and says, "See, now I'm Hindu." Over the next week, Mary hands out red dot stickers to employees and customers, telling them to put them on their foreheads because the store is offering a "red dot discount" to Hindus. Mary harassed Archana because of her religious belief.

Need to File a Complaint?

If you think you have been discriminated against, you can file a formal complaint, called a "charge of discrimination," with EEOC. We may mediate or investigate your charge and take legal action to stop any illegal discrimination.

We accept charges from applicants, employees (full-time, part-time, seasonal, and temporary), and former employees, regardless of citizenship and work authorization status.

Our services are free, and you do not need a lawyer to file a charge. For more information about how and when to file a charge, visit https://www.eeoc.gov/youth/filing.html.

Keep In Mind

The law protects traditional religions, such as Buddhism, Christianity, Hinduism, Islam, and Judaism, and newer or **less common religions**, such as Rastafarianism. The law also protects people who **do not have religious beliefs**.

Some religions may be associated with a certain national origin. **It is illegal for an employer to discriminate against or harass employees because of their actual or perceived religion, national origin, or both.**

If you need a workplace change because of your religious beliefs or practices, let your employer know. Your employer has to make a workplace change because of your religious beliefs or practices if it would cause little to no burden on the business. Talk to your supervisor or review your company handbook to find out who you should contact.

Your boss can't require you to attend prayer meetings, or prohibit you from praying during breaks. Your boss must excuse you from participation in an activity that is not religious, but conflicts with your religious beliefs, if it would pose little or no burden on the business.

Don't harass co-workers, managers, customers, or anyone else at work because of their religious beliefs.

Report discrimination. If you believe that you were discriminated against because of your religion, or because you asked for a reasonable accommodation, tell your parents, your teacher, your employer, another trusted adult, or EEOC.

It is illegal for your employer to retaliate against you (punish you) for reporting discrimination or participating in a discrimination investigation or lawsuit.

You may have additional rights under other federal, state, or local laws or your company's policies.

Learn more about your rights as a young worker at **www.eeoc.gov/youth**.
You can also email us at **youth.atwork@eeoc.gov** or call us at **1-800-669-4000 (TTY: 1-800-669-6820)**.

Religious Discrimination

EEOC New Investigator Training

Types of Religious Discrimination Under Title VII

- Disparate Treatment Based on Religion -- Treating applicants or employees differently based on their religious beliefs practices – or lack thereof -- in any aspect of employment
- Segregation – Segregating employees based on religious beliefs or practices, e.g. assigning individuals who wear religious garb to non-customer contact positions

Types of Discrimination (cont'd)

- Religious Harassment– Subjecting employees to harassment because of their religious beliefs or practices – or lack thereof – or because of the religious beliefs or practices of people with whom they associate
- Reasonable Accommodation -- Denying reasonable accommodation for sincerely held religious beliefs or practices – or lack thereof – if accommodation will not impose an undue hardship on the conduct of the business
- Retaliation--Retaliating against an applicant or employee because he or she engaged in protected activity, e.g., because of requesting or receiving a religious accommodation

"Religion" Broadly Defined

"Religious" beliefs and practices under Title VII are not limited to established religions. Also includes, for example:

- Atheist or agnostic beliefs
- Beliefs that are new, uncommon, not part of a formal church or sect
- Beliefs with few adherents, or which are idiosyncratic, illogical, or unreasonable to others
- Moral or ethical beliefs as to what is right or wrong that are sincerely held with the strength or traditional religious views

Is the Religious Belief or Practice "Sincerely Held"?

- Title VII's accommodation requirement only applies to religious beliefs that are "sincerely held."
- Employer should not automatically assume that a practice is not sincere just because it is novel, the belief or degree of observance changed over time (e.g., employee converts, or becomes more observant), or it is only observed on a particular holiday (e.g., only wearing a Muslim headscarf during Ramadan).

"Religious Organization" Exception

(By Statute)

- "Religious organizations" and "religious educational institutions" can prefer co-religionists for hiring/firing, but cannot discriminate on other bases (race, sex, age, disability, etc.)
- If Respondent raises an exemption as a defense, investigate to determine if it applies. Relevant facts may include:
  - –Do its articles of incorporation state a religious purpose?
  - –Is it affiliated with or supported by a church or other religious organization?
  - --Are its day-to-day operations religious (*e.g.*, are the services the entity performs, the product it produces, or the educational curriculum it provides directed toward propagation of the religion)?
  - –Is it not-for-profit?

Ministerial Exemption

(Based on First Amendment)

- Courts generally hold no EEO claims are allowed against a religious institution by any clergy or others offering religious instruction, leading rites, etc.
- Example: Parochial school teacher who teaches only math can bring an ADA claim, but parochial school teacher who provides math and religious instruction cannot.

Disparate Treatment

Disparate Treatment

- Same analysis for other bases of discrimination. The employer cannot take an employment action because an individual has or lacks a particular religious belief or practice.
- Applies to recruitment, hiring, discipline, discharge, promotion, work requirements, privileges of employment etc.

Disparate Treatment

Recruitment

Chandran, the president of a company that owns several gas stations, needs managers for the new convenience stores he has decided to add to the stations. He posts a job announcement at the Hindu Temple that he attends and asks other members of the Temple to refer only Hindu friends or family members who may be interested in the position. He does no other recruitment.

By limiting his recruitment to Hindus, is Chandran engaging in unlawful discrimination?

Disparate Treatment

Discipline

Joanne, a retail store clerk, is frequently 10-15 minutes late for her shift several days a week when she attends Mass at a Catholic Church across town. Her manager, Donald, has never disciplined her for this tardiness, and instead filled in for her at the cash register until she arrived, stating that he understood her situation. On the other hand, Yusef, a newly hired clerk who is Muslim, is disciplined by Donald for arriving 10 minutes late for his shift even though Donald knows it is due to his attendance at services at the local Mosque.

Is Donald engaging in unlawful disparate treatment?

Disparate Treatment

Wages and Benefits

Janet, who practices Native American spirituality, is a newly hired social worker for an agency that provides tuition reimbursement for professional continuing education courses offered by selected providers. Janet applied for tuition reimbursement for an approved course that was within the permitted cost limit. Janet's supervisor denies her request for tuition reimbursement, stating that since Janet believes in "the supernatural and other voodoo" she "won't make a very good caseworker."

If these facts are established, does the evidence show unlawful disparate treatment based on religion?

Disparate Treatment—Religious Expression

- Title VII's prohibition on disparate treatment based on religious beliefs also can apply to disparate treatment of religious expression in the workplace.
- Charges involving religious expression may present claims not only of disparate treatment, but also of harassment and/or denial of reasonable accommodation.

Garb and Grooming

- Examples of religious garb and grooming practices: wearing religious clothing or articles, observing a religious prohibition against wearing certain garments, or adhering to shaving or hair length observance.
- Disparate treatment, segregation, harassment, and retaliation relating to religious garb and grooming are prohibited.
- As a religious accommodation, employers must make exceptions to their usual rules or preferences to permit applicants and employees to follow religious dress and grooming practices if doing so would not pose an undue hardship.
- When an exception is made as a religious accommodation, the employer may nevertheless retain its usual dress and grooming expectations for other employees, even if they want an exception for secular reasons.

Disparate Treatment Defenses?

- "Customer or Co-worker preference" is not a defense.
- Security requirements generally may be adopted if done for nondiscriminatory reasons and applied in a nondiscriminatory manner.
- Due to the religious organization and ministerial exceptions, the bona fide occupational qualification defense rarely arises and is VERY narrow.

Customer Preference

Customer Preference

Jasjit, who wears a turban as part of his Sikh religion, is hired to work as a cashier at a convenience store. A few weeks after Jasjit begins working, the manager notices that the work crew from the construction site near the store no longer comes in for coffee in the mornings. When he inquires, the crew complains that Jasjit, whom they mistakenly believe is Muslim, makes them uncomfortable in light of the September 11th attacks. The manager tells Jasjit that he has to let him go because of the customers' discomfort.

Does this constitute discrimination based on religion?

Religious Harassment

Religious Harassment

- Proved in same manner as harassment on other bases
- Some unique fact patterns in religious harassment cases
  - Harassment as result of religious expression by co-worker or manager (notwithstanding obligation to accommodate religious practices including religious expression, it is an undue hardship to accommodate unwelcome harassment)
  - Religious Coercion--tangible employment action
  - Hostile Work Environment
  - Reasonable Person Standard

Harassment Based on Coercion

Ahmad was raised as a Muslim but no longer practices Islam and sometimes attends Christian services. His supervisor, Fadl, is a devout Muslim who lectures Ahmad about abandoning Islam and advises him to follow the teachings of the Quran. Fadl says that if Ahmad expects to advance in the company, he should join Fadl and other Muslims for weekly prayer sessions in Fadl's office. Notwithstanding this pressure to conform his religious practices in order to be promoted, Ahmad refuses to attend. He was subsequently denied a promotion for which he applied even though he was the most qualified.

Do Fadl's actions constitute unlawful discrimination? How should this case be analyzed?

Hostile Work Environment Harassment

- Was it based on religion?
- Was it unwelcome?
- Was it severe or pervasive (alters the conditions of employment by creating an intimidating, hostile, or offensive work environment)?
- Is there a basis for employer liability?

Harassment – Reasonable Person

Although he hired employees of all religions, the Director of "Get Drug Free Today" required employees to sign a statement that they would support the values of the Church of Scientology. He regularly chastised those whose conduct did not conform to those values.

Would a reasonable person perceive this to be offensive?

Hostile Environment – Severe or Pervasive

Bob, a supervisor, occasionally allowed entirely spontaneous and voluntary prayers by employees during office meetings. During one meeting, he referenced Bible passages related to "slothfulness" and "work ethic." Amy complained that Bob's comments and the few instances of allowing voluntary prayers during office meetings created a hostile environment.

If Amy files a charge, will the evidence establish that the alleged harassment was "severe or pervasive"?

Hostile Environment – Severe or Pervasive

Ihsaan is a Muslim. Shortly after recent terrorist attacks, Ihsaan came to work and found the words "You terrorists go back where you came from! We will avenge the victims!! Your life is next!" scrawled in red marker on his office door.

If Ihsaan files a charge, will the evidence establish that the alleged harassment was "severe or pervasive"?

Hostile Environment

Betty is a Mormon. During a disagreement regarding a joint project, a co-worker, Julian, tells Betty that she doesn't know what she is talking about and that she should "go back to Salt Lake City." When Betty subsequently proposes a different approach to the project, Julian tells her that her suggestions are as "flaky" as he would expect from "her kind." When Betty tries to resolve the conflict, Julian tells her that if she is uncomfortable working with him, she can either ask to be reassigned, or she can "just pray about it." Over the next six months, Julian regularly makes similar negative references to Betty's religion.

Do Julian's remarks create a hostile environment?

Hostile Environment

While eating lunch in the company cafeteria, Clarence often overhears conversations between Dharma and Khema. Dharma, a Buddhist, is discussing meditation techniques with Khema, who is interested in Buddhism. Clarence strongly believes that meditation is an occult practice that leads to devil worship and complains to their supervisor that Dharma and Khema are creating a hostile environment for him. The supervisor takes no action.

Does this constitute a hostile work environment based on religion?

Harassment - Employer Liability

- **Harassment by Supervisors or Managers**
  - Employer automatically liable if harassment results in a tangible employment action
  - If supervisor harassment does not result in tangible employment action, employer can avoid liability if it proves as an affirmative defense:
    - Employer exercised reasonable care to prevent and promptly correct any harassing behavior AND
    - Employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by employer

Harassment - Employer Liability

- Harassment by Co-Workers
  - Employer is liable if it:
    - Knew or should have known, and
    - Failed to take prompt and appropriate corrective action
- Harassment by Non-Employees
  - Employer is liable if it:
    - Knew or should have known
    - Could control the harasser's conduct or otherwise protect the employee, and
    - Failed to take prompt and appropriate corrective action

Liability – Harassment by Co-worker

Jennifer's employer, ABC, Inc., had an anti-harassment policy and complaint procedure that covered religious harassment. All employees were aware of it, because ABC widely and regularly publicized it. Despite his knowledge of the policy, Jennifer's supervisor frequently mocked her religious beliefs. When Jennifer told him that his comments bothered her, he told her that he was just kidding and she should not take everything so seriously. Jennifer never reported the problem. When one of Jennifer's co-workers eventually reported the supervisor's harassing conduct, the employer promptly investigated, and acted effectively to stop the supervisor's conduct.

Jennifer files a religious harassment charge. Respondent asserts in its position statement that it is not liable because Jennifer never made a complaint under the company's internal anti-harassment policy and complaint procedures.

Is the employer liable?

Liability – Harassment by Non-employee

Tristan works for XYZ, a contractor that manages Crossroads Corporation's mail room. When Tristan delivers the mail to Julia, the receptionist, he gives her religious tracts, attempts to convert her to his religion, and persists even after she tells him to stop. Julia reports Tristan's conduct to her supervisor, who tells her that he cannot do anything because Tristan does not work for Crossroads. The harassment continues.

If Julia files a harassment charge, can Crossroads successfully defend on the ground that the harasser was not its employee?

Reasonable Accommodation & Undue Hardship

Reasonable Accommodation & Undue Hardship

- An employer is required to **reasonably accommodate** an individual's sincerely held religious beliefs, practices, or observances *unless* doing so would impose an **undue hardship** on the conduct of the employer's business.
- "Reasonable" means it is feasible and it would effectively accommodate the religious conflict.
- **"Undue hardship" under Title VII is a far lower standard for employer to meet than the "undue hardship" defense to an ADA accommodation claim.**
  - Title VII: more than "de minimis" burden on operation of the business
  - ADA: significant difficulty or expense
- Religious accommodation cases must be analyzed on a case-by-case basis.

What is Reasonable Accommodation?

- Any feasible adjustment that will allow the employee to comply with his/her religious beliefs (i.e. eliminate the conflict).
- Accommodation requests often relate to work schedules (time off or change of schedule to accommodate religious services or Sabbath observance), exceptions to employer dress and grooming rules to accommodate religious garb or grooming practices, or religious expression or practice while at work (e.g. prayer breaks, or being excused from an employer-sponsored workplace religious observance).

Denial of Religious Accommodation--Elements of Claim

- Accommodation was needed for a "sincerely held" religious belief or practice
- Employer was aware of need for religious accommodation (e.g., CP requested it, or employer otherwise knew or suspected)
- Employer failed to accommodate the charging party
- Employer liable for denial of accommodation unless it can prove that any reasonable accommodation would have posed an undue hardship on the operation of its business

Accommodation Process-Element #2

Notice of Conflict between Religion and Work

- Employer on notice of need for accommodation
  - **No "magic words"** to request, as long as employer knows it is religious
  - *Abercrombie* scenario: employer's non-hire of applicant violates Title VII when **motivated by belief or suspicion accommodation** would be needed
- If employer needs clarification, it can **discuss request with employee, and in some instances seek corroborating information**
- **Individual obligated to cooperate** with the effort to determine a feasible, effective accommodation
- **Employee not entitled to preferred accommodation**; issue is whether employer offered equally effective alternative.

Discussion of the Request=An Interactive Process

- Title VII does not require employer to discuss religious accommodation with the employee before denying the request. It is advisable however.
- Employee must cooperate with employer requests for reasonable information.
- Employer may ask additional questions, if necessary, to understand the request and the need for accommodation.

Accommodation Process

Diane requests that her employer schedule her for "fewer hours" so that she can "attend church more frequently." The employer denies the request because it is not clear what schedule Diane is requesting or whether the change is sought due to a religious belief or practice. Diane files a charge alleging denial of accommodation, and respondent asserts in its position statement that her statements did not constitute an accommodation request.

Was Diane's statement sufficient to put Respondent on notice of her conflict between a religious observance and a work requirement?

Reasonable Accommodation

Rachel, who worked as a ticket agent at a sports arena, asked not to be scheduled for any Friday night or Saturday shifts, to permit her to observe the Jewish Sabbath from sunset on Friday through sunset on Saturday. The arena wanted to give Rachel only every other Saturday off.

Is the arena's proposed accommodation reasonable?

Reasonable Accommodation

Tina, a newly hired part-time store cashier whose sincerely held religious belief is that she should refrain from work on Sunday as part of her Sabbath observance, asked her supervisor never to schedule her to work on Sundays. Tina specifically asked to be scheduled to work Saturdays instead. However, her employer offered to allow her to work on Thursday, which she found inconvenient because she takes a college class on that day.

If Tina files a charge alleging denial of reasonable accommodation, can she prevail?

Reasonable Accommodation

Yvonne, a member of the Pentecostal faith, was employed as a nurse at a hospital. When she was assigned to the Labor and Delivery Unit, she advised the nurse manager that her faith forbids her from participating "directly or indirectly in ending a life," and that this proscription prevents her from assisting with abortions. She asks the hospital to accommodate her religious beliefs by allowing her to trade assignments with other nurses in the Labor and Delivery Unit as needed. The hospital concludes that it cannot accommodate Yvonne within the Labor and Delivery Unit because it is not feasible given the work of that unit. The hospital instead offered to permit Yvonne to transfer to a vacant nursing position in the Newborn Intensive Care Unit, which did not perform any such procedures.

Did the hospital violate Title VII?

Undue Hardship-Element #4

- An employer can refuse to provide a reasonable accommodation if it would pose an undue hardship on the conduct of its business.
- Undue hardship may be shown if the accommodation would pose a "more than *de minimis* burden" on the operation of the employer's business.
- Case-by-case determination--Relevant factors may include:
- the type of workplace;
- the nature of the employee's duties;
- the identifiable cost or other burden of the accommodation in relation to the size and operating costs of the employer, and
- the number of employees who in fact need a particular accommodation.

Undue Hardship - Examples

- Entails more than de minimis monetary cost (more than ordinary administrative expenses)
- Infringes on other employees' job rights (e.g., seniority) or benefits under a CBA
- Impairs workplace safety
- Causes co-workers to carry the individual's share of burdensome or potentially hazardous work
- Constitutes potential harassment of co-workers or customers

Undue Hardship - Safety

Patricia alleges she was terminated from her job as a steel mill laborer because of her religion (Pentecostal) after she notified her supervisor that her faith prohibits her from wearing pants, as required by the mill's dress code, and requested as an accommodation to be permitted to wear a skirt. Management contends that the dress code is essential to the safe and efficient operation of the mill, and has evidence that it was imposed following several accidents in which skirts worn by employees were caught in the same type of mill machinery which Patricia operates.

Has the mill's evidence established undue hardship?

Would the result be different if the mill had no evidence of any such past accidents at its own facility or any other?

Undue Hardship
Security Considerations

Harvinder, a Sikh who works in a hospital, wears a small (4-inch), dull and sheathed kirpan (miniature sword) strapped and hidden underneath her clothing, as a symbol of her religious commitment to defend truth and moral values. When Harvinder's supervisor, Bill, learned about her kirpan from a co-worker, he instructed Harvinder not to wear it at work because it violated the hospital policy against weapons in the workplace. Harvinder explained to Bill that her faith requires her to wear a kirpan in order to comply with the Sikh Code of Conduct, and gave him literature explaining that the kirpan is a religious artifact, not a weapon. She also showed him the kirpan, allowing him to see that it was no sharper than butter knives found in the hospital cafeteria. Nevertheless, Bill told her that she would be terminated if she continued to wear the kirpan at work.

Is the employer liable for denial of a religious accommodation?

Undue Hardship – Seniority Systems and Collective Bargaining Rights

- An accommodation poses an undue hardship if it would deprive another employee of job preference guaranteed by bona fide seniority system or collective bargaining agreement.

Co-worker Complaints

- Undue hardship requires more than proof that some co-workers complained
- General disgruntlement, resentment, or jealousy of co-workers does not constitute undue hardship
- Undue hardship could be proven based on evidence that accommodation actually infringed on the rights of co-workers or disrupted work

Common Methods of Accommodation

- Flexible scheduling and use of accrued or unpaid leave
- Voluntary substitutes or swaps of shifts
- Lateral transfer and/or change of job assignment
- Modifying workplace practices, policies and/or procedures

Accommodation
Schedule and Break Changes/Prayer at Work

Rashid, a janitor, tells his employer on his first day of work that he practices Islam and will need to pray at several prescribed times during the workday in order to adhere to his religious practice of praying at five specified times each day, for several minutes, with hand washing beforehand. The employer objects because its written policy allows one fifteen-minute break in the middle of each morning and afternoon. Rashid's requested change in break schedule will not exceed the 30 minutes of total break time otherwise allotted, affect his ability to perform his duties, or otherwise cause an undue hardship for his employer.

Must the employer grant the accommodation request?

Accommodation
- Blanket Policies Prohibiting Time Off

A large employer operating a fleet of buses has a policy of refusing to accept driver applications unless the applicant agrees that he or she is available to be scheduled to work any shift, seven days a week.

Does the employer have to make an exception for an employee who needs a different schedule as a religious accommodation?

Accommodation – Undue Hardship

- Costs of Overtime and Premium Wages
  - Regular v. Infrequent
- Substitutes and Shift Swaps
  - Employer need not require co-workers to forego seniority rights to certain shifts
  - But employer must allow employees to voluntarily swap or substitute shifts as a means of religious accommodation
- Change of Job Tasks and Lateral Transfer

Accommodation - Transfer

An electrical utility lineman requests accommodation of his Sabbath observance, but because the nature of his position requires being available to handle emergency problems at any time, there is no accommodation that would permit the lineman to remain in his position absent undue hardship.

Is the employer required to consider alternative reasonable accommodations and offer one if it can be provided without undue hardship?

Accommodation Undue Hardship

- Modifying Workplace Practices, Policies and Procedures

  Examples: Exceptions to Dress & Grooming Standards, or other Employer Workplace Rules

Religious Garb/Grooming and Disparate Treatment

Samantha, a practicing Muslim who wears a headscarf for religious reasons, applied for a sales position at a large clothing store. The first-line hiring supervisor rated her qualified for the position based on her experience. However, because Samantha wore a headscarf, the manager suspected that it was because of her religion. When she relayed this concern to the top manager, she was told not to hire Samantha because the company's policy did not allow head coverings.

Was not selecting Samantha for this reason a violation of Title VII?

Note on Abercrombie fact patterns

- **There are a variety of fact patterns and possible legal theories that may be raised in an Abercrombie type of case. The decision is new and enforcement ramifications are still being considered. Therefore, before dismissing a charge involving this type of situation, be sure to confer with your supervisor and the legal unit.**

Accommodation – Exceptions to Dress and Grooming Rules

Prakash, who works for CutX, a surgical instrument manufacturer, does not cut his facial hair because of his Sikh religious observance. When he seeks a promotion to manage the division responsible for sterilizing the instruments, his employer tells him that, to work in that division, he must cut his beard because it may contaminate the sterile field. When Prakash explains that he cannot trim his beard for religious reasons, the employer offers to allow Prakash to wear two face masks instead of trimming his beard. Prakash thinks that wearing two masks is unreasonable and files a charge alleging denial of accommodation.

What is the likely result?

Accommodation/Undue Hardship

- Use of Employer Facilities
- Excusing Union Dues

Investigative Steps-Religious Accommodation

- nature of the belief or practice that CP claims R has failed to accommodate (e.g., dress, grooming, holy day observance, etc.) and what accommodation was sought
- If disputed by R, determine whether CP's beliefs are "religious" in nature. If not disputed by R, we generally do not question whether CP's beliefs are "religious" in nature. It is not the EEOC's role to determine what beliefs are/are not "religious."
- If disputed by R, determine whether CP "sincerely holds" the particular religious belief or practice at issue. Again, if this is not disputed by R, it is not EEOC's role to determine whether persons who file charges have "sincerely held" religious beliefs.
- Determine R's response, if any, to an accommodation request. Was an accommodation offered, and if so, what? The investigator should obtain R's statement of all attempts to accommodate CP, if any attempts were made.
- If R asserts that it did not accommodate CP's request because it would have posed an undue hardship, obtain all available evidence regarding whether or not a hardship would in fact have been posed, i.e., whether the alleged burden is more than *de minimis*
- Where there is more than one method of accommodation available that would not cause undue hardship, the investigator should evaluate whether the accommodation offered is reasonable by examining: (1) whether any alternative reasonable accommodation was available; (2) whether R considered any alternatives for accommodation; (3) the alternative(s) for accommodation, if any, that R actually offered to CP; and (4) whether the alternative(s) the employer offered eliminated the conflict
- If R asserts CP failed to cooperate with R in reaching an accommodation, obtain any available evidence regarding the relevant communications, including whether CP refused any offer of reasonable accommodation

Religious Expression

Religious Expression

- Expression cases may involve different forms of discrimination.
  - Disparate Treatment
    - Employer cannot, based on religion, permit one employee to display a Bible but disallow another similarly situated employee to display a Quran
  - Harassment
    - Employer must take action once on notice to stop unwelcome religious expression that is potential harassment of co-workers
- Reasonable Accommodation
  - Employer must accommodate a belief or practice of engaging in religious expression, unless the expression poses an undue hardship, i.e. disrupts work, could be mistaken as employer's own message, is potentially harassing of co-workers or customers, etc.

Religious Expression

Susan and Roger are members of the same church and are both employed at XYZ Corporation. Susan works as an architect in a private office on an upper floor, where she occasionally interacts with coworkers, but not with customers. Roger is a security guard stationed at a desk in the front lobby of the XYZ building through which all employees, customers, and other visitors must enter. At a recent service at Susan and Roger's church, the minister distributed posters with the message "Jesus Saves!" and encouraged parishioners to display the posters at their workplaces in order to "spread the word." Susan and Roger each display the poster on the wall above their respective work stations. XYZ orders both to remove the poster despite the fact that both explained that they felt a religious obligation to display it, and despite the fact that there have been no complaints from co-workers or clients.

If Susan and Roger both file charges alleging denial of religious accommodation, what result?

Religious Expression - Impact on Customers and Work-Related Communications

Helen, an employee in a mental health facility that served a religiously and ethnically diverse clientele, frequently spoke with clients about religious issues and shared religious tracts with them as a way to help solve their problems, despite being instructed not to do so. After clients complained, Helen's employer issued her a letter of reprimand stating that she should not promote her religious beliefs to clients and that she would be terminated if she persisted. She did continue and was terminated. She files a charge alleging denial of accommodation because the employer did not permit her to engage in these discussions with clients, which she asserts her religious beliefs require her to do.

If the employer asserts undue hardship, what is the likely result?

Related Forms of Discrimination

- National Origin, Race and Color—there may be some overlap
- Employer-Sponsored Programs—Accommodate those who asks to be excused for religious reasons from religious services/programs

Retaliation

- EEOC has taken the position that even if an accommodation request is legally denied, the making of the request is still "protected activity" for which an applicant or employee cannot be subject to retaliation.

RESOURCES

Resources

- EEOC Compliance Manual: Religious Discrimination
  www.eeoc.gov/policy/docs/religion.html

- Questions and Answers: Religious Discrimination in the Workplace
  www.eeoc.gov/policy/docs/qanda_religion.html

- Best Practices for Eradicating Religious Discrimination in the Workplace
  www.eeoc.gov/policy/docs/best_practices_religion.html

Resources (cont'd)

- Religious Garb and Grooming in the Workplace: Rights and Responsibilities

www.eeoc.gov/eeoc/publications/qa_religious_garb_grooming.cfm

- Fact Sheet on Religious Garb and Grooming In the Workplace

www.eeoc.gov/eeoc/publications/fs_religious_garb_grooming.cfm

Resources (cont'd)

- Questions and Answers for Employers: Responsibilities Concerning the Employment of Individuals Who Are, or Are Perceived to Be, Muslim or Middle Eastern.
  https://www.eeoc.gov/eeoc/publications/muslim_middle_eastern_employers.cfm
- Questions and Answers for Employees: Responsibilities Concerning the Employment of Individuals Who Are, or Are Perceived to Be, Muslim or Middle Eastern.
  https://www.eeoc.gov/eeoc/publications/muslim_middle_eastern_employees.cfm
- Youth@ Work Fact Sheet: Religion & Your Job Rights
  https://www.eeoc.gov/youth/downloads/religion.pdf
  https://www.eeoc.gov/eeoc/newsroom/release/7-22-16.cfm

Resources (cont'd)

- Fact Sheet: What You Should Know About Religious and National Origin Discrimination Against Those Who Are, or Are Perceived to Be, Muslim or Middle Eastern

http://www.eeoc.gov/eeoc/newsroom/wysk/religion_national_origin_2016.cfmIn 2016

CONDUCTING AN

EFFECTIVE INTERVIEW

INVESTIGATIVE INTERVIEWING

TABLE OF CONTENTS

This course emphasizes the "how to" skills of investigative interviewing. The purpose of this training is to help you become more aware of the interviewing skills you already have and to develop some new skills to improve the way you plan for and conduct your investigative interviews.

WHAT IS AN INTERVIEW?

An interview is a conversation with a purpose. Regardless of the specific purpose, the interview is essentially a method of collecting information.

WHY DO WE CONDUCT INTERVIEWS?

- To learn what the witness knows
- To assess credibility
- To identify other relevant information

WHAT ARE THE GOALS OF AN INTERVIEW?

- Develop investigative information
- Learn what the witness knows
- Draw out relevant information
- Determine credibility
- Create a written interview record

INTERVIEWING IS A KEY SKILL

Interviewing is a skill that we learn and develop over a lifetime.

- **Must be Learned and Practiced**
- **It is Used Every Day**
- **It Sets the Direction for All Other Work**

  As an Investigator, you conduct interviews almost every day with a variety of different people and for a variety of reasons. The way you plan for and conduct your interviews affects how successful they are.

- **Good Interviews Can Bolster Cases**

  Compelling stories
  Identifying leads to other information
  Strong record via well-documented interview notes

- **Poor Interviews Can Ruin Cases**

  Missing information due to questions not asked
  Failing to follow up on answers provided
  Errors due to assumptions and misunderstandings
  Lack of documentation of interview

Not a Natural Conversation

- **Need to Control the Interview**

PREPARING FOR THE INTERVIEW

- **Know the facts of the case**
    - Basis
    - Issue
    - Theory of Discrimination
        - Disparate Treatment
        - Disparate Impact
- **Determine who should be interviewed**
    - Charging Parties
    - Respondent witnesses (usually supervisors and managers
    - Third-party witnesses (co-workers, former employees, non-employees)
    - CP's identified witnesses
- **Know the witnesses' alleged role in CP's allegations**
    - What knowledge does the witness have?
- **Prepare relevant topics**
    - Use a script of pre-prepared questions or
    - An outline of topics
- **Decide where the interview will take place**
    - On the telephone
    - In person at our offices
    - In person at other location

BEGINNING THE INTERVIEW

Introduce yourself (handshake, eye contact)

- Identify yourself: by name, role, agency, provide business card, as appropriate
- Identify your witness: make sure you're talking to the right person
- Establish Rapport and Control
- Administer the Oath to the Witness

Explain the purpose of the interview

- purpose of the EEOC
- why you are there, what your role is (under what authority)
- Simple and to the point
- how the information will be used
- record of the interview (note taking)

- **Explain your role as an objective fact-finder**

- **Address confidentiality issues**

- **Discuss the importance of giving truthful information**

- **Explain protection against Retaliation**

[Note: You can find a statement about your legal authority found in Section 24 of EEOC's Compliance Manual in the Appendix to the section on the Charge Process.].

CONDUCTING THE INTERVIEW

- **Ask open-ended questions**

- **Ask one question at a time**

- **Listen to what the witness says**
- **Ask follow-up questions**
- **Remain objective** (do not display any strong emotional reactions) (Develop a poker-face)
- **Remain in control of the interview** (stay on topic)
- **Take notes and document your observations** (catch key phrases, use quotation marks around verbatim expressions)
- Keep credibility assessments and other comments separate from the interview record
- **Immediately make an Interview Record for the file** Typed record of interview

TWO TYPES OF INTERVIEW QUESTIONS

The Two Types of Questions – can help provide accurate details and clarification

Closed Questions

Can usually be answered "Yes" or "No"

Examples: Do you . . ., Did you . . ., Was she . . ., Is that . . .
Discover little new information
Are used for wrapping up and confirming a subject
Limit the information flow

Open Questions

Cannot be answered "Yes" or "No"

Examples: Who, What, When, Where, Why, How, Tell me . . ., Explain . . ., Describe . . .
Can only be answered with a story
Discover new information
Keep the witness talking

Here are some closed questions, with sample open questions to use instead.

Questions to which "Yes" or "No" is the only answer, or the most likely answer:

Closed: "Are you a machinist?"
Open: "**What** is your job?"
More Open: "**Tell me** your history with the company."

Closed: "Did you tell John?"
Open: "**Who** did you tell?"

Closed: "Were you interviewed in person?"
Open: "**Tell me** about your interview."

Questions which offer a choice of suggested answers are also "closed":

Closed: "Did you go to the storeroom or the workshop?"
Open: "**Where** did you go?"

Closed: "Was the letter from your supervisor or from the HR Department?"
Open: "**Who** was the letter from?"

Closed: "Was that in March or April?"

Open: "**What** month was that?" or "**When** was that?"

"W" QUESTIONS– Also Called "Open" or "Indirect" Questions– Include:

Who
What
When
Where
Why
How
Tell me about . . .
Explain . . .
Describe . . .
Give me an example . . .

EXERCISE: QUESTION FORMULATION

Rephrase each of the questions below to use the "W" or open method.

Did she have a college education?

Have you talked with Patsy about this?

Have a lot of the contracts been late?

Does that sound right to you?

Do you have copies of that?

Did you have a summation of her overtime?

Did he seem upset about what happened?

Has he always been your supervisor?

Do you know if he works another job?

Do you know who might cover for him when he's late?

Do you know anything about Paula -- like how long she's been here?

Is there anything else you remember?

Do you have anything else to add?

Do you have any questions for us?

SEQUENCE OF QUESTIONS

Good interviewers follow several principles. Mistakes result from violating the principles of good interviewing.

Initially obtain background information

- Full name
- Employment history with the company
- Current position
- Time in position
- Duties
- Name of Supervisor

Let the witness tell the story

Example:

Mistake: Suggesting the "Right Answer"
Principle: Let the Witness Tell the Story

Mistake: "Did you report it to your boss?"
This is a closed question.
Other problems include: The witness may try to please you by saying yes, even if they didn't "report it to the boss."
The witness may feel accused of making a mistake and get defensive.

Better: "**Who** did you report it to?"

Even Better:"**What** did you do about it?"

Mistake: What did you do? Write a letter?"
This takes a good open question and turns it into a closed question.

Better: "**What** did you do?"

Ask positive questions

Example:

Mistake: Negative Questions
Principle: Ask Positive Questions

Mistake: Didn't you tell her to stop?

Better: **What** did you say or do?

Mistake: Weren't you going to the office?

Better: **Where** were you going?

Mistake: That wasn't in July, was it?

Better: Was that in July?

Even Better: **When** was that?

Focus on Actions

Example:

Mistake: Asking for Conclusions or opinions
Principle: Focus on Actions

Mistake: "Were you sexually harassed?"
Whether sexual harassment occurred is our decision, after we gather lots of information. The witness probably doesn't know the legal standards for sexual harassment, or may misunderstand what that term means. Even if they are knowledgeable, their opinion or conclusion proves nothing.

Better: "**What** happened?"

Mistake: "Did she understand you?"
The witness can't know someone else's thoughts; ask about behaviors.

Better: "**How** do you know?" "**What** did she **do**?"
"**What** did she **say**?" "**What happened** next?"

Clarify inexact terms

Mistake: Relying on Slang or Inexact Terms

Principle: Clarify Inexact Terms

Mistake: "Was he talking loudly?"
What's "loudly?" Different people have different standards and perceptions, and yours will not be the same as those of the witness. Ask for specifics and clear examples.

Better: "Where were you when you heard him say that?"
If the answer is, "I was sixty feet down the hall with my door closed" or "I could hear him over the sound of the printing press" then you have a better idea of the volume of the incident.

Mistake: "Where did Joe grab you?"
What does "grab" mean? What if the witness wanted to say that Joe pinched her, or patted her, but not that he "grabbed" her?

Better: "What did Joe do?" or "Where did Joe touch you? Tell me what happened."

Witness says: "When I made that mistake, she really took my head off."
Ask: "What did she do? What did she say?"

Use active listening

EXERCISE: ACTIVE LISTENING

Active Listening Exercise

- You will be split into two groups; speakers and listeners.
- The speakers will each be paired with a listener and will recount an event that changed their lives. The listeners will practice their active listening skills and summarize the story back to their speakers at the end of the activity.
- The listeners will now leave the room for a moment to allow the speakers to think of their stories.

Active Listening Exercise Questions

- How did you feel during the activity?
- Was it difficult to tell your stories? Why?
- Was it difficult to ignore your partner during the story?
- What have you learned?
- Have you ever experienced this type of treatment or acted this way before?
- How would you feel if you were treated this way when seeking help after being discriminated against?

Active Listening Exercise Lessons

- When a person comes to the EEOC to seek help, they have experienced a hurtful and often dehumanizing event. Such events can be just as emotional as events shared in this activity so they deserve your full attention and proper respect.
- Listening to a charging party is essential to obtain the party's confidence and document the case. In this exercise, you have observed how detrimental rude behavior can be in such a situation.
- Not listening (to the verbal or the non-verbal message) is a common practice in today's society. It is your duty to show that the EEOC cares enough about its mission to listen to every person's case.

WITNESS CHALLENGES

Witnesses bring challenges to interviews.

Most witnesses are not skilled at describing events, due to

- **lack of practice**
- **emotional investment**
- **fears**
- **assumptions about the listener's knowledge**

Most people won't lie outright, but may

- **omit**
- **exaggerate**
- **rely on the interviewer's assumptions**
- **give the shortest possible answer; yes/no, if possible**
- **answer only the questions asked; won't volunteer information**
- **display hostility**

RECOGNIZING HOW PERSONALITIES MAY AFFECT THE INTERVIEW

Another important aspect of interviewing is, of course, dealing with different types of personalities. **Who carries the responsibility for dealing with different types of witness personalities?**

> You do! Regardless of personalities, you need to get the information.

We frequently have the opportunity to pre-think who our witness is and how we will approach them. Of course, many times we have to interview our witness cold and that can be more difficult.

- How many of you frame questions in your mind or on paper before

you pick up the telephone to make a contact?

- How many of you ask others about your witnesses before you contact them? When you receive a charge for investigation and a respondent attorney letter is in the file, do you ever ask around to find out what type of person he/she is?

There may be a pit-fall when you have pre-conceived notions about how a witness will respond. You may leave yourself with a closed mind. "I just knew he wouldn't cooperate with me."

Remember that your own biases (conscious and unconscious) may influence how you approach a witness. Many of us are influenced by our witness' age, disability appearance, reputation, language skills, accents, clothing, mannerisms, odors, etc.

We're going to discuss a few tactics for dealing with different witness types. I cannot promise that they will fit every situation or that they will always get the results you want, but as a general rule, they should serve you well in most situations.

- **Be courteous and reassure the witness**
- **Control your reactions**
- **Listen carefully and ask questions to focus on the story**
- **Be professional**
- **Be respectful**
- **Be non-judgmental**
- **Be objective**
- **Be sensitive to customs and traditions**

- **Be sensitive and accommodating to language barriers**
- **Be aware of your own bias and perceptions**

CULTURAL SENSITIVITY AND INTERVIEWING TECHNIQUES

Many individuals who contact the EEOC have recently experienced a very stressful life event, such as being fired from a job. These callers, regardless of their race, color, national origin, religion, age, sex, or gender identity are often going to be upset and angry. It is crucial for you to be professional, sensitive, non-judgmental and objective throughout your conversations with people who contact the EEOC for assistance.

CULTURAL ISSUES

All of us have been influenced by our heritage and culture. Our reactions to discrimination – being fired from a job because of discrimination, being denied a promotion because of discrimination, or being subjected to sexual, racial, ethnic or religious harassment – are influenced by this heritage and culture.

In some cultures, it may be embarrassing for victims of discrimination to talk about their experience. For example, in some cultures, victims of egregious sexual harassment, particularly sexual assault, may not initially want to talk about the harassment because they have been taught to be more passive, to defer to men, and not to bring attention to themselves. They may also fear cultural isolation for reporting the harassment.

Insensitivity or impatience on your part could cause a person to keep quiet. You must exercise patience, avoid any comment or tone of voice that might be construed as judgmental, and understand that the individual seeking assistance may be relying on different cultural perspectives.

LANGUAGE BARRIERS

You should also be sensitive to the fact that there may be language barriers that prevent the person from adequately communicating the details of discriminatory events. . In this situation, you should utilize the appropriate language assistance service. Your office's Language Access Officer will be able to help you. As a representative of the EEOC, you must be patient and sensitive to language and literacy issues. A caller's failure to respond to a question or comment may be due to a language barrier and not to an unwillingness to cooperate.

Witness Types

- passive, introverted, apathetic, very quiet frightened
- arrogant, evasive, manipulative, intelligent
- hostile, aggressive, angry, violent
- talkative, overeager, rambles, won't respond to what you want

QUESTIONING TECHNIQUE FOR DIFFERENT WITNESS TYPES

Now, let's talk about how you might handle these different types of witnesses.

What types of questions would you use?

What kind of wording would you use?

How would you approach them, in general?

- **totally passive, introverted, apathetic, very quiet, frightened**

- ✓ use probing questions to draw the person out
- ✓ use an example to motivate
- ✓ don't put on the spot
- ✓ be gentle
- ✓ use open questions
- ✓ hook into something personal

- **arrogant, evasive, manipulative, intelligent**

  - ✓ be persistent
  - ✓ remain in control, but not too dominant
  - ✓ ask the same question 3-4 times in different ways
  - ✓ don't be intimidated
  - ✓ project confidence

- **hostile, aggressive, angry, violent**

  - ✓ take time; let them vent
  - ✓ remain open, listening
  - ✓ they will wind down
  - ✓ then pick up with low-key questions
  - ✓ set the rules - "this is what we do"
  - ✓ be firm, but not so they blow up

- **talkative, overeager, rambler**

  - ✓ give good orientation on time limits
  - ✓ use direct, closed questions
  - ✓ maintain control, gently
  - ✓ "Now let's focus in on"
  - ✓ do not confront with "This is the 3rd time I'm asking you. . ." or "You are going way off track"
  - ✓ do not insult

The following tips should prove helpful when interviewing charging parties who are reluctant to discuss their allegations of

discrimination:

- Speak in a gentle, supportive manner, bearing in mind the experience and/or harm that s/he may have endured. Be patient and nonjudgmental. Examples:

  "I know this is hard for you."
  "Take your time."

- Assure the person that you are there to help. Make every attempt to put the person at ease. Examples:

  "This is important."
  "I want to hear about it."

- Treat the person with respect and listen carefully, Try to focus him/her to relate the events. Example:

  "You mentioned a truck. How did you get in the truck?"

You, the interviewer, will have reactions, too. These can include shock, embarrassment, or taboos. Be aware of your own reactions, so that you can contain them and dedicate yourself to helping the witness describe the events.

EXERCISE: DIRECT/INDIRECT QUESTIONS

Would you say that you treated that employee unfairly?

How was the employee treated with respect to...? How were others treated?

Have you ever used marijuana?

There is an allegation that you may have used marijuana. What is your reaction?

Did Mr. Smith try to bribe you to drop this charge?

Has Mr. Smith discussed this charge with you? What did he say?

Did you see who started the argument in the coffee shop?

Tell me or describe what happened in the coffee shop?

Do you have any prejudices against minorities?

Have you ever worked with minorities? What was your experience?

Did you sexually harass anyone on the job?

There is an allegation. . . What is your response?

EXERCISE: LEADING QUESTIONS

You oppose the Union, don't you?

What is your view of the union? How do people here feel about the union?

When was the last time you left work early?

Do you ever have to leave work early?

Every witness I have spoken to believes that Mr. Jones started the fight. How do you feel about it?

What do you know about the fight? (leave off the preface) Did you see the fight between. . . ? Tell me what you saw?

Who is responsible for the lack of communication: your supervisor or you?

Do you think there is a lack of communication? Problem? What do you think is the cause?

How did this practice limit your opportunities?

Do you think that the practice had an impact on your opportunities? Did this practice affect your opportunities? How?

CONCLUDING THE INTERVIEW

- Summarize and review with the witness what he/she said
- Get any corrections from the witness
- Ask if he/she has any questions
- Do not make any promises or predictions
- Explain the possibility that they may be contacted in the future to provide follow-up information
- Provide your contact information if the witness wishes to contact you with additional information
- Thank the witness for their cooperation

CREATE A WRITTEN INTERVIEW RECORD

Every Interview Record Should Include:

- Charge Number
- Name of the Witness
- Interviewer's Name

APPENDIX

SAMPLE Opening Statement

Thank you for meeting with me today. I want to take a moment and explain why we are here and what we are going to be doing today.

I'm an investigator with the Equal Employment Opportunity Commission. We are a federal agency that investigates claims of employment discrimination. When a person has a problem related to a job–maybe they apply for a job and aren't hired, or they lose a job, or they think they are treated badly on a job–and they think this was because of unlawful discrimination, they can contact our office and file what's called a "charge of discrimination." We investigate charges of discrimination based on a person's race, color, religion, sex, national origin, age, disability, family medical history, or genetic information, and on retaliation if a person has protested one of these forms of discrimination.

The fact that a charge is filed, and that we investigate it, does not necessarily mean that a violation of law has occurred. By filing a charge, a person raises issues that fall under the laws the EEOC enforces. We need to find out what really happened. And one of the best ways to find out what really happened is to talk to people who were there, who saw and heard what happened; or who were involved in what happened; or know something about the way the employer handles certain situations. And it's my understanding that you [worked with CP, supervised CP, etc.] and can help us understand what was going on.

Now, what's going to happen today is that I have a list of things I'd like to discuss with you. They are not so much questions as they are areas that I need to know more about– how does something work, what happens in this situation, things like that. I want to make sure you understand that the

EEOC is objective in regard to the charges we investigate. That means I'm here to gather the facts to find out what happened. We do not take one side or the other. If any of my questions are unclear, please ask me to rephrase them. If I ask something and you don't understand what I'm asking, please let me know.

Do you have any questions before I get started with my questions?

Charging Party Interviews

Prior to an initial interview at Intake, you should have reviewed the PCP's information available from the Intake Questionnaire or the Online Inquiry, and the topics raised by the charging party, to guide your inquiry.

For the interview with the CP prior to a determination, you should review the Interview Notes, a position statement, CP's response, and other documents in the file to sufficiently prepare.

Regardless of how much information you have prior to interviewing a charging party, there are standard areas of information you should obtain.

Generally, the following information should be covered in a charging party interview and written statement.

Contents of the Charging Party Statement

Background on CP's employment with R, including description of job duties.

Background facts concerning the workplace and events which led up to the alleged discriminatory act(s).

Facts which set the stage for the alleged discriminatory act(s). Who, what, when, where, how, and why?

Description of the alleged discriminatory act(s).

Facts regarding the alleged discriminatory officials.

Facts which establish the elements of the prima facie case.

Facts regarding similarly-situated employees.

Facts that address the reasons R gave for its actions (or anticipated reasons).

Facts that specifically address each defense put forth by R in response to the allegations (if known).

Facts that explain R's standard policies and procedures regarding the alleged

discriminatory act(s).

Facts that provide leads for gathering more information.

Identification of potential witnesses and individual credibility issues.

Facts relating to damages – how this has affected CP.

Facts relating to mitigation – CP's efforts to limit damages, such as a job search and their next employment.

Respondent Interviews

Interviews with respondent officials can and should be carefully planned. These interviews are conducted later in the investigation, after you have detail from the charging party and usually a written response from the employer with associated records. The respondent's written position statement will generally deny the allegations and indicate a legitimate explanation for the employer's actions.

Information is Respondent's position statement needs to be verified through testimony and/or documents. During the interview, respondent witnesses should be expected to review all the facts from the beginning. To the degree that witness testimony is consistent with the previously-submitted position statement, and charging party's rebuttal statement has been addressed, dismissal of the charge may be appropriate. But careful analysis of the allegations and the position statement, and thorough questioning based on planning, attentive listening, and W questions can reveal inconsistencies, omissions, and deceptions; which may lead to a reasonable-cause determination.

Preparation is the key to an effective interview. Create an interview plan using the information already obtained from the charging party and from the respondent position statement. This does not mean writing out each of the questions you will ask. Rather, you are creating a road map to guide your interview. This road map will show the main events that occurred or that are in dispute, and areas where you will need more information. Using the road map, ask open questions to obtain as much detail as you can.

You can and should deviate from your road map as the interview develops. To the extent that you listen and ask "W" or open questions, witnesses will reveal new information and amplify what you knew already. Be curious. Explore, explore, explore! Each topic on the road map, and any new topics raised by the witness, should be exhausted.

Return to your road map after fully exploring each topic. When you are stuck for what to ask next, a good question is "What happened next?" When you think you have fully explored each topic, ask, "What else?"

Contents of the Respondent Witness Statement

Background on witness' employment with R, including job history and description of current job duties.

Background facts concerning the workplace: type of business, kinds of work

done, number of employees, other offices or work locations.

Facts that explain R's standard policies and procedures regarding the alleged discriminatory act(s).

Contact(s) with the CP; recollections of the CP.

Facts that set the stage for the rest of the story. Description of the CP's job in general and how it relates to the rest of R's business.

Facts that establish the elements of the prima facie case.

Events that led up to the alleged discriminatory act(s). Usually R will criticize CP here (performance, attendance, behavior). Who, what, when, where, how, and why?

Description of each of R's actions relevant to the charge (performance coaching, attendance warnings, formal discipline, etc). Who, what, when, where, how, and why?

Facts relating to similarly-situated employees.

Information about CP's replacement, if applicable, with that person's race, age, etc., as relevant.

Descriptions and copies of relevant written records.

Identification of potential witnesses and their potential biases.

Third-Party Witness Interviews

Unlike a charging party, who usually is eager to talk, or a respondent witness, who if not eager to volunteer information is often motivated to dispute the allegations, a third-party witness usually has no particular motive to tell us anything.

An effective technique can be "asking for help in understanding" or telling the witness that they may have "important information." (Most people want to be helpful and want to feel important.)

A current respondent employee is probably concerned about retaliation – of losing his or her job for talking to the Commission – regardless of what they may know or say. For this reason, you should always contact current non-supervisory employees directly, without involving any employer representative. Assure the witness that the employer does not know you are contacting them, and explain the protections against retaliation that are included in all the laws we enforce. It helps not interviewing them at respondent facility. If you are on an on-site, make arrangements to interview them off-site.

If this doesn't work, you might offer to keep the witness' comments confidential, but explain that this confidentiality is limited; it applies only as long as the matter under investigation remains an investigation. If the matter becomes a formal legal proceeding (i.e. a lawsuit), whether filed by the Commission or privately by the charging party, confidentiality ends; and the witness' statements become part of the record available to both sides. As with all interviews, rely on your "W" questions.

SAMPLE
RECORD OF INTERVIEW

Charge No: 299-00-0999
Witness: Sexton, Virgil
[x] Charging Party [ ] CP Attorney [ ] Respondent [ ] R Witness [ ] Other

Method of Contact: Telephone at (815) 555-6834

Investigator:
Others Present: none
Purpose of Interview: Intake
Date of Interview: March 7, 2017 10:00 a.m. - 10:47 a.m.

I started working for Farm Parts in 1992. I was promoted to Foreman in 1999 and in 2008 became shift supervisor. During my shift, the Foreman, reported to one of the Shift Supervisors. Shift Supervisors were basically responsible for the day to day operation of the plant and to make sure everything ran smoothly. As shift supervisor, I reported to Marvin Winters, who is the Plant Manager. Before him, I used to report to Hank McGraw, the former plant manager. I liked my work and have always received good performance reviews.

In December 2016, I received a raise based on my review. In late December, Winters called me in to talk to me. He said that the company was reducing the number of shift supervisors from six to two. Now, instead of being responsible for one section of the plant shift supervisors are responsible for the whole plant. Winters told me that the company had decided to cut back on the number of shift supervisors in order to save costs. William Ryerson and Norm Jackson are the shift supervisors who kept their jobs. They are both white and I am pretty sure

they are both younger than me. I don't understand why I was chosen to be demoted. I have always gotten good performance reviews. I was also the only Black shift supervisor. When I was demoted, on January 6, 2015, my salary went from $28 an hour to $25.50 an hour.

As a result of being demoted, I have been more depressed and have had

difficulty sleeping. I also feel humiliated at work because my workers think I have done something wrong to be demoted. I don't think it was right that the company demoted me.

People who have knowledge of my demotion are Mr. Winters, as well as Milt Robinson, Raymond Miller, Edgar Herdosky, and Steve Jacobsen. They are the other shift supervisors who got demoted. I think they are also older than Ryerson and Jackson.

_____

Virgil Sexton
March 7, 2017
Page 2 of 2

EEOC COMPLIANCE MANUAL, VOLUME 1, §§24.2 and 24.9
Statutory and Regulatory Authority for Investigations and Subpoenas

(a) Title VII/ADA - Investigations are authorized by § 709(a) of Title VII, 42 U.S.C. 2000e-8(a), and 29 CFR § 1601.15. Subpoenas are authorized by § 710 of Title VII, which incorporates § 11 of the National Labor Relations Act, as implemented by 29 CFR § 1601.16. ADA § 107 incorporates Title VII investigative and subpoena powers for ADA cases.

(b) ADEA - ADEA § 7(a), 29 U.S.C. § 626(a), incorporates the investigative and subpoena authority in §§ 11 and 9 of the FLSA (see EPA below). The EEOC's investigative authority is set out at 29 CFR § 1626.15(a) and § 1626.16 covers subpoenas.

(c) EPA - Investigations are authorized by § 11 of the FLSA, 29 U.S.C. 211. Subpoenas are authorized by § 9 of the FLSA, which incorporates §§ 9-10 of the Federal Trade Commission (FTC) Act of 1914, as amended, 15 U.S.C. §§ 49 and 50 (this authority was not modified by the FTC Improvement Act of 1980). This authority is implemented by 29 CFR §§ 1620.30- .31 (see § 24.5).

Suggestions for Further Reading

Subject: Active Listening:
Parent Effectiveness Training, Dr. Thomas Gordon (Chapters 3 & 4)
The book is focused on parent/child communication, but the principles of active listening are applicable to interactions between people of any age or relationship.

Subject: Non-Verbal Communication
How to Read a Person Like a Book, Gerard Nierenberg & Henry Calero
Most communication is non-verbal. This book contains descriptions and sketches of a wide variety of body movements and posturing, and suggests interpretations for each.

Subject: Detecting Deception
The Truth About Lying, Stan B. Walters
This book reviews the signals of nervousness, stress, evasion and outright lying, and tells you how to handle the situation if you think you've uncovered a lie.

Subject: Negotiation
Getting to Yes, Roger Fisher & William Ury
This landmark book discusses effective negotiation. Although these skills are not interview techniques, the principles will be useful in many areas of your work.

SLIDE SHOW

"Interviews"

Video Discussion Guide
And
Video Script

"INTERVIEWS"

Synopsis and Message of the Film

The quality of an investigative file is often dependent on the ability of an Investigator to obtain useful information during interviews with witnesses. A good interviewer is a juggler. She keeps her eye on the "ball" (a **good interview)** by juggling:

- **attitude** (open mindedness, flexibility, patience, and focus) with
- **skill** (knowing how, when, and why to use of variety of questioning techniques, effective planning, active listening, and maintaining control of the interview) and
- **knowledge** (understanding what information she is looking for, given the nature of the case, and constantly evaluating the answers received.

In a series of realistic sequences, this film shows an Investigator at work on two unrelated discrimination cases. In the first case, seven black employees of a logging company file charges of race discrimination after their employer tested them for drug use. In the second case, a Hispanic electrician, in a company with few Hispanics in supervisory positions, is ranked as the number two candidate for a foreman position, but is not selected. After he complains that the selection was discriminatory, he is passed over for a night supervisory position. This time, another Hispanic electrician was selected. He alleges that he was discriminated against because of his national origin in the first selection and that he was retaliated against in the second selection for publicly stating that he wasn't selected for the foreman position because of his national origin.

This film will present the practical application of the fundamental attitudes, skills, and knowledge necessary to a successful interview by showing the Investigator at work on these two investigations. If she drops just one ball, her balance might be lost!

Learning Objectives

After viewing the film, discussing the concepts presented, and doing the post-film exercises, the viewer will be better able to:

- Recognize and control biases;
- Engage in critical and sympathetic listening;
- Use communication skills effectively and flexibly to maintain control of the investigation;
- Plan, execute and redirect the investigation according to the substance of the case.

Suggested Applications

This film is an excellent tool for presenting, in a workshop setting, the practical applications of the key concepts of a good interview. After the participants have seen the film, they should discuss the concepts presented and then practice and apply these concepts through the post-film exercises. The training session will generally take 3-3 1/2 hours.

Opening the Session

Explain the purpose of the film and the learning objectives. Let the participants know they will discussing the concepts presented in the film after viewing. Distribute the "Suggested Questions" and give the participants a few minutes to become familiar with them. Suggest that they listen and watch for the answers as the film proceeds.

Before showing the film, lead a short discussion on the characteristics of a successful interview, planning and preparation and documenting an interview. Then, conduct the exercise "When Your Buttons Are Pushed" to practice how to overcome judgments that investigators may make in the course of their work. This exercise teaches techniques for recognizing and controlling potential biases.

Discussion and Post - Film Exercises

After the film, use the Discussion Leader's Questions to stimulate discussion. At the conclusion of the training, ask participants to list the components of a good

interview and discuss how these components interrelate.

Pre–Film Discussion

CHARACTERISTICS OF SUCCESSFUL INTERVIEWERS

What are the characteristics of a successful interviewer?

A successful interviewer:

- prepares and plans for the interview
- treats the witness with respect and displays professionalism
- maintains objectivity and neutrality throughout the interview
- maintains control of the interview
- listens well and concentrates on the answers given
- probes answers to ensure accuracy and completeness
- is flexible (i.e., not glued to the plan)
- does not assume that the witness knows what the Investigator knows
- does not reveal what the Investigator knows in every situation
- follows up with the witness while the witness is there

During the interview, LISTEN to the witness. Focus on the witness's meaning and do not think about the next question to ask until the witness is finished. You may miss a key piece of information that could give you a valuable lead.

PLANNING AND PREPARATION

The need to be prepared for your interviews cannot be overemphasized. The purpose of an investigative interview is to obtain reliable and relevant information. Therefore, you should know what you need to ask and why.

An Investigator who understands the theory of the case being investigated is more likely to understand what evidence is relevant, i.e., likely to prove or disprove the case.

How do you plan for an interview?

- Know the elements of proof and the theory of discrimination for your case. See Models of Proof

- Prepare a general outline for the interview. A written format should be used to facilitate the interview and note-taking.
    - List questions or topics to be discussed on a sheet of paper.
    - Leave ample space to record answers and add follow-up questions.

- Schedule and confirm the time and place for the interview.
    - Do not set time limits on an interview. You may short-change a witness and yourself. If time constraints are a concern, try to schedule a follow-up interview.

DOCUMENTING THE INTERVIEW

Documenting the interview is a critical step in an investigation. **An interview is only as good as the statement or interview notes that end up in the case file.** Good interview preparation and note-taking facilitate documentation of the interview. Many Investigators find it useful to prepare the interview notes on a laptop computer as the interview is being conducted. This facilitates review and signing of the statement, if necessary.

Try to complete all interview documentation as quickly as possible while the interview is fresh in your mind.

Pre-Film Exercise

WHEN YOUR BUTTONS ARE PUSHED

1 You contact the Respondent, who tells you he has no time (or does not wish) to discuss this matter.

- **What judgments do you form? What do you think is going on?**
- **What are some alternative explanations for the response?**
- **What strategies can you pursue to accomplish your goals?**

Discussion - make sure the following points are covered:

- Judgments: Respondent is avoiding the issue because of guilt.
- Alternative explanations: Maybe s/he is just very busy or afraid; maybe s/he does not understand the process or that it is to her/his advantage to cooperate.
- Strategies: Explain to the respondent that:
  - You want to give him or her an opportunity to respond to the charges.
  - The role of the Investigator is to make a finding of cause/no cause at the conclusion of an objective investigation; the file will be incomplete and out of balance without a management response.
  - You have a right to expect cooperation; cooperation is required.

  Usually the respondent will be convinced that it is to his or her advantage to cooperate with these explanations. If this strategy fails, you might suggest that another meeting time would be more beneficial and get commitment for another date.

  If the respondent is still refusing to cooperate, enlist your supervisor's help to resolve the situation.

2 You contact a witness who is reluctant to talk with you and expresses that he is fearful of retaliation.

- **What judgments do you form?**
- **What strategies can you pursue to accomplish your goal(s)?**
- **Do you feel that you can guarantee confidentiality to a witness?**

Discussion - make sure following points are covered:

- Judgments: Witness is just looking for an excuse not to get involved and the fear of retaliation is groundless; or, on the other hand, the witness is going to be retaliated against if they speak to investigator.
- Strategies: Explore with witness the nature of the inquiry and his or her basis for such perceptions. Encourage the witness to cooperate and at the same time explain the protections that exist. Explain that anyone who gives information to the EEOC is protected under the law from retaliation. However, from a practical standpoint, the Investigator cannot guarantee that the witness will not be retaliated against, only that the witness can file a charge with EEOC if s/he believes retaliation has occurred and we will promptly investigate. The Investigator can only guarantee confidentiality, if the case does not go to court.
    - Emphasize that the EEOC is committed to eliminating discrimination and in order to do this, the Investigator must have accurate information true to the witness' best knowledge and belief.
    - The witness may be required to cooperate (subpoena).
    - The Investigator may make a note in the file concerning the fear of retaliation, so that if anything happens, there will be a record.

3 The respondent tells you that the reason the charging party received a poor evaluation is because he never does anything on time. You then find that the charging party continually breaks appointments, doesn't have the materials he promised you, and so forth.

- **What judgments do you form?**
- **What can you do to neutralize those judgments?**
- **What strategies can you pursue to accomplish your goals?**

Discussion - make sure the following points are covered:

- Judgments: Respondent's complaints must be true.
- Neutralizing tactics/Strategies: Maybe the charging party is just nervous or is truly having scheduling problems. Address this issue with the charging party directly and work on setting up a mutually convenient time.
  - Do not tell the respondent that you are having the same problems with the charging party.
  - Do not discuss the problems you had with the charging party in your determination letter (relevancy and neutrality issues). Although you may want to note it in your file.

Trainer: Ask group for other examples of behavior that irritates/concerns them in interviews and discuss possible strategies with the group.

Pass out the Suggestion Questions Handout before showing the Film.

SUGGESTED QUESTIONS

1. What is the purpose of an EEOC investigative interview?

2. What are the functions of an Investigator's introductory remarks to a witness?

3. What makes an interview successful?

4. Why is it important that an Investigator be objective and open-minded?

5. How can an Investigator control his/her prejudices?

6. Why are good "people" skills (rapport) important to the success of an interview?

7. What techniques might an Investigator use to put an angry or defensive witness at ease? A reticent witness?

8. What does an Investigator need to watch for when dealing with an ingratiating witness?

9. What is active (sympathetic/critical) listening?

10. How does active listening aid a witness in opening up and expressing himself/herself?

11. What hampers effective listening?

12. How can these barriers to effective listening be neutralized?

13. What is an open-ended question? Closed questions? What are the advantages and disadvantages of each? Under what circumstances is each technique used?

14. Why is it important that the Investigator control the interview?

15. How might this be done?

16. What hampers this control?

17. What preparation and planning is important to the success of an EEOC investigation?

18. Why is it important that the Investigator understand the applicable theory of discrimination or standard of proof?

POST FILM DISCUSSION
Part I
(Scenario I)

Question 1:

Has Eve lost control of her investigation in this case?

Answer 1:

Yes. She's lost sight of the allegation and substance of the case - whether race was a factor in selecting only black loggers for testing.

Question 2:

What questions need to be asked/answered to resolve the allegation?

Answer 2:

Is there evidence that black loggers who were tested had smoked marijuana?

Is there evidence that white loggers had smoked marijuana but were not tested? Why wasn't the white member of the team tested?

How did the company deal with reports of drunkenness? Are these two acts similar? Do the disciplinary records reflect how the company responded? Were the work crews segregated?

Question 3:

Did Eve need to ask the charging party whether he had been smoking marijuana? Whether others, not tested, had been? Why or why not? When would be the best time to ask a witness whether he had smoked marijuana?

Answer 3:

Yes, the answers to these questions go to equal treatment. Eve should have asked this question at the end of the interview, after trust had been established and/or after other necessary information had been obtained.

First, she could have asked him to describe the sequence of events that led up to the testing and asked him to tell her why he thought the testing was discriminatory. The question concerning others' marijuana most likely would have come up in the context of these open-ended questions.

Eve lost her objectivity and did not establish rapport with the charging party. Her questions, "Do you deny that you smoked marijuana?" and "isn't it the case that the smell of marijuana was pretty intense on the bus?" are prosecutorial in tone.

Question 4:

How could Eve control or neutralize her bias?

Answer 4:

An interview guide and investigative plan would have given Eve critical support and focus for the interview. It would have helped her to focus on the disparate treatment aspects of the case.

Question 5:

How could Eve improve her communication with the charging party?

Answer 5:

Eve has failed to establish rapport with the charging party. Her opening statement (that she is investigating the charge and that she wants a clear statement from him) puts him on the defensive. She could have diffused some of this tension by explaining the investigative process, what information she needed, how this information was going to be used, and explaining that her role is an objective fact finder. She also could have opened the interview with some very general, open-ended questions about

the charging party's employment with the company, the racial make-up of the work units, his job duties, his current employment status, etc.

Question 6:

How could Eve alleviate the charging party's anger?

Answer 6:

- Allowing him to vent;
- Listening sympathetically but being careful not to agree or disagree with his position;
- Using open-ended, non-threatening questions;
- Refocusing on the substance of the case and the information she needed to collect.

Question 7:

The respondent is very ingratiating to Eve. What should Eve watch for?

Answer 7:

She should make sure that she focuses on the purpose of the interview -- to obtain information -- and her investigative plan and prepared questions. The danger with an overly pleasant witness is: he may provide only what he wants you to hear, and worse, he may make you reluctant to spoil the relationship by delving into sensitive areas. The bottom line is that Eve needs to maintain control of the investigative process. Maintaining control must be a clear goal whether you have a seemingly cooperative or uncooperative witness.

Question 8:

What are the key questions that must be answered in order to resolve this case?

Answer 8:

- Whether or not the white coworkers on other crews should have been tested also.
- Whether or not the white worker on charging party's crew was

deliberately excluded from the testing, i.e. did respondent know in advance of scheduling the testing that the white worker would be absent?

- Was discipline consistent in cases of similarly situated white workers who committed the same or similar offenses?

POST FILM DISCUSSION
Part II
(Scenario II)

Identify the elements of proof for Renaldo Aguilar's retaliation case. Then, explain the information Eve needs, or has, that resolves these questions.

RETALIATION

1	ELEMENT:	Whether the charging party (CP) opposed a practice/policy he believed was prohibited by Title VII.
	INFORMATION:	CP alleges he stated publicly that national origin was a factor in his non-selection to the first (Assistant Foreman) position; Green (Selecting Official) stated he heard CP had "shot his mouth off"; Sanchez (co-worker witness) stated he heard CP complain about discriminatory practices at the union meeting and suggests that the Investigator check the union meeting notes.
	CONCLUSION:	CP has met the requirements of this element.
2	ELEMENT:	Whether respondent (R) knew or should have known of CP's opposition.
	INFORMATION:	CP heard from Green (selecting official) that Cruz (one of the panelists) said he didn't appreciate being bad-mouthed by CP. Green states he heard that Cruz was insulted by CP's remarks. CP states Luna (selectee) told him Cruz solicited Luna's application because otherwise "the job would be wide open for our recent civil rights convert, Renaldo." Cook (another panelist) says he heard Cruz say that CP's making such a fuss over the first selection showed that he wouldn't make a good supervisor.

Sanchez says it's a matter of record in the minutes of the union meeting.

CONCLUSION: All three panelists knew of CP's opposition and the nature of it (non-selection because of CP's national origin).

3 ELEMENT: Did CP suffer adverse action as a result of the opposition?

INFORMATION: CP was denied a promotion for which he alleges he was qualified.

4 ELEMENT: Is there a causal connection between CP's opposition and his non-selection for the second promotion?

Questions to resolve Causal Connection:

Is there evidence of a retaliatory motive?

The clearest evidence is probably Cook's statement that Cruz said CP's making such a fuss about not being selected because of his national origin showed that CP wouldn't make a good supervisor. There are other statements that are hearsay and as yet uncorroborated.

This is probably enough to make CP's prima facie case and, in the legal sense, shift the burden to R to articulate a legitimate non-discriminatory reason for its actions.

What was the timing of the action?

Union records and promotion records establish the dates as being 2-3 months apart. Consider whether the close proximity strengthens the causal link.

Did R's treatment of CP change, or was CP treated differently than similarly situated employees who had not opposed, complained, etc?

This question can be answered by examining CP's treatment in the promotion process. Again there is a causal connection for purposes of making the prima facie case.

5 ELEMENT: Does R articulate a legitimate non-discriminatory reason for CP's non-selection?

INFORMATION: Green and Cook both say that CP's writing skills were the key factor in his non-selection. Also, Cook says Cruz stated CP wasn't "management material."

CONCLUSION: Yes, R has given a legitimate non-discriminatory reason.

6 ELEMENT: Is R's reason (defense) pretextual?

INFORMATION:

Was there a legitimate safety concern that required writing skills? Did CP possess these writing skills?

- Eve will check accident reports for accidents attributed to errors in the logbook.
- Eve will check to see if anything else occurred between the first and second selections to make safety a critical issue.
- Sanchez states that writing skills were not critical for the job; technical skills and ability to work with the men are.
- CP states his writing skills are perfectly adequate and suggests Eve check the logbook.

Were writing skills a criterion for previous position?

- CP suggests Eve check Ashton and Laurel selections.
- Green and Cook acknowledge that this was not a criterion for the Foreman position.
- Criteria not usually formulated for every position.

Cruz's Motive

- See Element 4 (establishing the causal connection has also resulted in establishing motive on Cruz' part).
- Eve will interview Luna to follow-up on information CP has given her.
- Cook states Cruz said CP is too hotheaded for the Shift Supervisor position because of the fuss he made about the other job.

- Also, if information shows the writing requirement was a pretext, then it is likely that Cruz proposed it as a retaliatory act.

Did R recruit Joe Luna for the Night Supervisor position? (so CP's national origin claim would look like "hogwash")?

- Eve will interview Luna and others to determine whether Luna was encouraged by R to apply
- Have applicants in previous positions been encouraged to apply? What is the general practice? (Eve questions Green on this; Sanchez states he's never been encouraged to apply.)

CONCLUSION: A prima facie case has been established. The remaining question is whether or not R's legitimate non-discriminatory reason will withstand scrutiny. If it doesn't, then absent some new defense, or surprise development in the case, the charge appears to warrant a cause finding.

How does Eve continue the Investigation in the second Act?

1. She's focused on the substance of case

- She has planned and prepared. She knows what she's looking for.
- She doesn't allow Green to distract her.
- She confirms facts and details; obtains information and leads for corroboration; displays good follow-up techniques.
- She identified the key decisions and decision makers.
- She established the chronology necessary to address retaliation.
- She leaves the door open for re-contact if needed (Green).
- She's persistent. If she doesn't get a direct answer the first time, she asks the question again, in another way.
- She's flexible. She recognizes and analyzes her facts and prepares accordingly, but she is ready to try several methods to uncover hard-to-get information. She varies her techniques based on the demeanor of witnesses.
- She has an open mind.

2. She displays good "people" skills

- She allows Green to vent; she calms him down by deferring to his expertise; she starts the interview by asking him neutral questions to avoid defensiveness; she refuses to be baited by him and remains calm; she's

sensitive to the dynamics of the interview and changes the direction of the questions when appropriate.

- She puts Sanchez at ease by asking neutral, open-ended questions.
- She establishes rapport with panelist Cook by verifying information with him, and this leads to more direct information and possible evidence of motive.
- She effectively capitalizes on the neutrality of Sanchez and Cook to obtain valuable information.
- She exhibits poise, professionalism and an open mind and confidence at all times.
- She keeps communication flowing so her technical skills could be maximized.

3. <u>She's displayed good technical skills</u>

- She asks leading questions when necessary.
- She uses both open-ended and closed questions when appropriate.
- She uses her technical skills to zero-in on specifics.
- She asks narrow questions and keeps asking them until she gets the needed information.
- She asks follow-up questions that pin down sources of evidence on motive; she develops leads to corroborate.
- She displays effective listening skills. She hears and analyzes the information she's given, then responds or follows-up accordingly.

POST - FILM DISCUSSION
Part III
(Questioning and Listening)

OPEN-ENDED/CLOSED QUESTIONS

What is an open-ended question? A closed or narrow question?

Open-ended = a very broad, general question that allows the witness to talk.
Closed = a very narrow question that limits the witness's response.

What are the advantages of an open-ended question?

- Helps the witness relax and become involved in the interview.
- Conveys interest and trust in the witness by giving the witness the opportunity to decide what information to provide; easy to answer; helps establish rapport.
- Reveals what the witness thinks is important, primary.
- Often reveals a witness' prejudices, biases.
- Allows the witness to communicate information that the investigator might not think to ask for.

What are the disadvantages?

- Time consuming; encourages those who talk endlessly.
- Investigator must be proficient in taking control of the interview (stopping and redirecting the witness tactfully, for example) and must be skilled in recording the answers.
- Witness may concentrate and elaborate on information that is irrelevant or may hold back information that is important to the investigation.
- Not useful for obtaining details/specifics.

Examples of open-ended questions in the film (did they work?)

- Tracy: "What's the story?" "Tell me about your case"
- Eve to Green: Aguilar was ranked fifth out of seven applicants for night shift position. How did you arrive at this rating?
- Eve to Green: How are vacancies announced?
- Eve to Green: Please describe how you arrived at those criteria?
- Eve to Sanchez: Tell me what skills you think are needed for the Night Supervisor job.
- Eve to Cook: Did you feel any other factor influenced the second decision?

(Cook responds that Cruz stated CP was too hot headed for the job since he made a fuss about not getting the Foreman position).

- Eve to CP: How do you know what Cruz thought? (CP responds with evidence on motive - that Cruz, as Hispanic professional, doesn't represent interest of the group).

What are the advantages of closed or narrow questions?

- Interviewer can control the interview more effectively.
- Interviewer can ask for detailed or specific information without waiting for it (good 'probing' technique).
- Recording the answers is easier.
- Requires less exertion on the part of the witness.
- Often gets a direct answer - "yes" or "no".

What are the disadvantages?

- May convey to the witness that the investigator is not really interested.
- Gives the witness no opportunity to communicate additional valuable information which the investigator may have overlooked.
- Can be too restrictive and result in leading the witness.
- Can distort testimony by not allow the witness to fully explain an answer.
- May compel the witness to take a particular position which is not consistent with the full story.

Examples of closed or narrow questions in the film (did they work?)

- Eve to CP in first scenario: "Do you deny that you were smoking marijuana?
- Eve to Green: "Did you know Aguilar had complained that the selection on the Assistant Foreman's job was biased against Hispanics?"
- Eve to Sanchez: Did you need to do a lot of writing when you were acting as night supervisor? (as opposed to open-ended – how much writing did you have to do?)

WHAT IS THE PURPOSE OF ACTIVE LISTENING?

Purpose of active listening:

- Shows interest and understanding - Helps witness "open up"
- Helps define the testimony ("it seems that"; "it sounds like" etc.)
- Focuses on particular points (you've mentioned five reasons for your selection)

- Acknowledges and responds to the witness as a whole person.

Examples of active listening in the film

- Tracy: "You seem to be upset, "What is the story?"
- Tracy: "What case are you talking about?
- Eve to Green: "You said that all the candidates for this position were inside men. How are vacancies announced?"
- Eve to Green: (Green states vacancies posted and have policy for promoting from within). Eve asks, "Are specific people encouraged to apply?"
- Eve to Sanchez (He states that night supervisor position is basically field work, and there's not a lot of writing): "So you wouldn't rate writing skills as critical to the position?
- Eve to Green: "Aguilar ranked 2nd for Asst Foreman job but 5th for Night Supervisor. Did writing skills make the major difference?"
- Eve to Green: "Did you use only the application to determine writing ability?"
- Eve to Sanchez: "Did you need to do a lot of writing when you were the night supervisor?"
- Eve to Sanchez: "Did anyone encourage you to apply for this or any other position?"

What can hamper active listening in an interview? What are some possible neutralizers?

- Deflected attention (lack of privacy, interruptions, noise, emotionally "loaded" space, etc.) -- Possible neutralizer: move, reschedule.
- Perception by the interviewer that the topic is boring -- Possible neutralizer: determine relevancy to issues and if irrelevant, divert to new topic.
- Emotional involvement, prejudice -- Possible neutralizer: recognize and control prejudices.
- Difficulty in understanding the subject matter -- Possible neutralizer: request clarification.

VIDEO SCRIPT

"INTERVIEWS"

To get information we have to talk to people and listen. This is something we do all the time. However, as an EEOC investigator, gathering information in a formal interview can be very complex. It requires many different abilities, ranging all the way from good communication skills to expertise in the laws we enforce. As a listener in an interview, good communication means being aware of your own thoughts and feelings as well as those of the speaker. Emotion, such as anger, dislike, defensiveness, and prejudice are common and we frequently encounter them in our jobs, but they sometimes cause us not to hear what is being said and sometimes to hear things that are not being said. Human dynamics are not to be taken lightly, but there is also no substitute for technical knowledge and good planning. That means you must perfect both the arts of effective communication and good planning, a road map that identifies exactly what you want and how you will get it. Because we cannot always know in advance which interview will be difficult or absolutely critical, each one requires its own carefully thought out plan. Then there are those investigations where just one interview or the answer to one question will tip the scales. But we all know that getting it isn't all that easy. It doesn't happen by chance. Before we look at these things at work, let's examine some more of the qualities of a good interviewer. You have to be sensitive and follow all the leads and detours, but you can never take your eyes off the ball. The interviewer needs to be objective. That means suspending judgment and developing a purpose and commitment to getting exactly what you need. At the same time you must be flexible, curious, skeptical, and very patient. You juggle your people skills and your technical skills all at once. That's what makes it interesting.

Ugh!

Hey, Eve, you sure seem upset. What's the problem?

I just wish I hadn't pulled this assignment. I just plain don't like this case! I'm fed up with all the drug abuse! Why I saw this kid barely out of grammar school, smoking a joint out in the park yesterday. And on the news, that train collision, the brakeman was stoned!

What case are you talking about?

Here a bunch of guys going out into the forest to work with heavy equipment and chain saws. They smoke dope in the bus transporting them! I gather the company got an anonymous tip. Anyway, the guys admit the bus reeked of marijuana. The company says that several of the workers tested positive for marijuana use. Now these turkeys are claiming it's race discrimination. You'd think they'd spend their time a little bit worrying about their own safety or whether they're going to be arrested. I sure wouldn't want to work next to a guy with a chain saw who was stoned. It's disgusting!

You know it might be real hard to keep from pre-judging in this case.

Aw, come on, Tracy, we're pro's. This won't be the first or the last case I don't like. I can handle it.

Uh, Mr. Martin, my name is Eve Harris. I've been assigned by the EEOC to investigate your allegation of race discrimination against the ACME Logging Company. I would like to get a clear statement from you with regard to why you think your race was the reason for your discharge. Are you ready to proceed?

Sure, but I thought I was pretty clear when I filed my charge. Those guys were gunning for the black workers. We walked right off the bus and they were waiting with those little cups. Herded the black workers off for

testing! And passed the white guys right by! Can you beat that?

Well, Mr. Martin, I understand that the marijuana smell was pretty intense on the bus. It was in an area where the seven black workers who were tested had been sitting. Isn't that the case?

Wait a second, lady. Are you the cops or what? I'm not saying who smoked grass or who didn't; or if anybody smoked it. I'm saying that if the company thought we were doing wrong on the bus, why didn't they treat us all the same?

Mr. Martin, the company has provided us with information indicating that four of the seven men tested positive. Do you deny that you were smoking marijuana?

If I had known that the EEOC already made its mind up about my case, I wouldn't have shown up. I don't have to sit here and listen to this!

Mr. Martin certainly was no help.

That figures.

Yes, please come in.

I'm Eve Harris from the EEOC.

Nice to meet you. Please, make yourself comfortable.

Thank you.

And, uh, can my secretary get you some coffee?

Oh, no thanks, but I appreciate your offering. As you know, I want to go through the events leading up to the drug testing. And I also have some questions on the materials that you sent us.

Oh, and did you have any trouble finding the parking space I reserved for you?

Oh, no, I drove right into it.

I'll be happy to give you anything else you need. You know, we think this charge is ridiculous. The company is determined to enforce its anti-drug policies. We had three accidents in that forest. One was serious. That logger lost three fingers! We're not going to risk lives and pay out huge sums in liability if we can screen out the abusers. I've made copies for you of all the drug test results and of the accident reports. So you can see this company is not inventing the risks.

Oh, yes, and you have been such a big help. Let me see now, what was it I needed? Oh, yes…

Les, you know I think we can wrap this case up with a no cause finding. The company's evidence shows they had prior accidents and had notified workers that drug use was strictly prohibited. They received an anonymous tip that Crew C members were marijuana users. All the crew members on Crew C on the bus that day were black. And they tested all the Crew C team. Four of the seven tested positive. They fired those four. They seem to have a good non-discriminatory defense given the safety concerns.

Eve, I've reviewed your file here. And it looks to me like you win the Olympic Gold Medal for jumping to conclusions.

Why? What do you think I missed?

Well, don't you want to know why they didn't bother to test the white member of the team?

Well, yeah, but...

If the company was responding to an anonymous tip about Crew C solely

for safety reasons, the absent white member would still be a hazard, if he used drugs. Even if he wasn't on the bus that day. What about other reports of marijuana use?

Well, I thought that....

Did they have any?

Yeah, but they...

How did they respond to those? What about prior disciplinary records that might show what they did if someone was drunk on the job? I'd like to see that data broken down by black and white workers. Do you really think we've covered all the possibilities in pretext here?

No.

Don't you think that we should take a look at whether we have segregated crews? Sounds like all black, all white crews might be the norm for this company.
Les, I thought the only issue before us was whether the respondent had legitimate non-discriminatory reasons for testing the charging parties as opposed to others on the bus.

Eve, I don't think that we can answer that question on the record here. Let's first think about what constitutes a legitimate non-discriminatory reason. Just because some of those tested positive, what about the guys who weren't tested? We're never going to know if they committed the same offense. Do you really feel confident that race wasn't a factor in selecting just the black loggers on Crew C?

You know, Les, as I listen to you, I begin to think that I was so wrapped up in whether they actually smoked the marijuana that I lost sight of what I was doing.

Yeah, suppose some of them did smoke, it might offend you, but would

that answer our equal treatment questions? This sounds more like a mixed motive case to me. I'm afraid we have a lot of unanswered questions here, Eve.

You know, Les, I have to admit, my mind may have been made up early on this one. I felt the charging party was guilty, but you're right, he could still be a victim of discrimination.

Let's take another look at your investigative plan. It may help you get more objective evidence. At least it'll serve as a check.

Clearly Eve lost her objectivity when she failed to follow her own plan. Her bias led her to judge this case by focusing on the charging party's behavior rather than his treatment. She allowed her disapproval of him and her rapport with the respondent's attorney to deter her from obtaining pertinent evidence. We all bring bias to our work, but the effective interviewer controls it by maintaining an awareness, an open mind, and a good plan. Watch Eve on her next case. See if you can identify some of the interviewing skills and techniques that make this a better investigation.

OK, I need to understand the promotion process here and I need to get the timing straight.

Hi! You look busy. Am I interrupting?

Yeah, hi, Tracy, I am kind of busy. I've been preparing for interviews, but come on in; I can use you as a sounding board. You can sure interrupt.

Sure, OK, what's this about?

Well, Mr. Aguilar, an Hispanic electrician, applied for a promotion to the Assistant Foreman at DelCo Electronics. A non-Hispanic was selected. Mr. Aguilar was pretty vocal about his dissatisfaction with that selection. Then he applied for a position as night supervisor. The job title is different, but he says the jobs have always been very similar. But he says the

criteria were changed after he protested the Assistant Foreman promotion. And they were changed to screen him out. He was passed over again, but this time an Hispanic applicant was selected.

Doesn't that really weaken his case?

Oh, I don't know yet. Aguilar was ranked much lower the second time. Anyway, the basis for his charge is retaliation on the second promotion, not national origin. He thinks that on the second promotion it was because he had stated pretty publicly that he thought his national origin was a factor in passing him over.

So, the retaliation charge comes in with the second promotion.

Yeah.

But the two jobs weren't the same, so doesn't that make this kind of messy?

No, because the same panel did the ranking for both positions, and I can see that the criteria seem to have been altered for the second position.

Well, let me ask you this, Eve, does the company change the criteria every time they fill this position or has it remained the same until now?

Um, I don't know. You know, that's a good thing for me to find out. The panel seems to have added more importance to writing skills. Mr. Aguilar says his writing skills are average, but not great. He also says that the position doesn't require much writing. He believes the criteria were deliberately altered to screen him out.

Ah ha, so that's how this became a retaliation charge.

That, plus he thinks that management specifically recruited the Hispanic who was eventually selected. Just to make sure that Aguilar's claims of national origin discrimination would look like hogwash.

Eve, I think I'd better let you go on plotting this road map. This sounds like a lot of detours to get around this story.

I'll tell you one thing. I intend to be prepared to see all the signs this time. And I'm going get back to making my interview guide.

OK, thanks a lot, bye-bye.

I often wonder how EEOC justifies spending tax dollars on something like this. We hired a Hispanic for the position. We sent you all the data that you wanted. Ron Aguilar was not as qualified for the job as Joe Luna. And Joe, who we have selected, is Hispanic.

In her mind: "I'll just let him vent."

I mean how can we be discriminating? Joe was clearly the better-qualified candidate. I, you know, I feel like you are wasting my time with this.

Ah, Mr. Green I understand that you may feel frustrated, but please keep in mind that I am charged with conducting a fair and impartial investigation. And that the more complete the file, the more likely I will be representing your position. I appreciate the promotion data you sent me, and I know you want the record to be as accurate and complete as possible.

Well, I understand that you've got a job to do. I mean I do, too, but I don't understand why every time somebody has a complaint around here, they run to some federal agency! What do you need?

In her mind: "I need to calm him down. Maybe a neutral question."
Um, I'd like to check my perception of your promotion procedures so that I'm sure that my understanding of them is accurate.

Sure.

OK, now, as I understand it, a panel of three rates promotion applicants.

Then your personnel department screens applicants for meeting the basic criteria in a written job description. They then evaluate the candidates against those. Am I right so far?

You got it. On the money.

OK, now I understand that the same panel evaluated Mr. Aguilar for both the Assistant Foreman and the Night Supervisor position. Is that correct?

Yeah, it was me, Carlos Cruz, and John Cook. Carlos is a Senior Safety Engineer and John's Foreman from the Mechanics and Energy Division over at the Laurel plant.

Please tell me how you arrived at the ratings for the second position you filled, the Night Supervisor position.

I sent you all the notes already! It's already there!

In her mind: "I need to get some specifics!"
Yes, thank you, and I've reviewed them. Now I noticed that Mr. Aguilar was ranked 5th out of seven applicants for the night supervisor position. How did you arrive at this rating?

Well, we selected the criteria you see written down. We ranked the seven candidates, all inside men. Each panel member did an independent ranking. You take everything you know about the candidate. You know, experience, type of technical training, jobs they've been doing, their evaluations, you know. And then try to give them a rank on each of those criteria. Joe Luna was first on John and Carlos' ranking, he was second on mine. Aguilar was either fourth, sixth, I don't remember. When we polled the averages, Joe was first. I saw no reason to go outside the ranking and offered Joe the job. He's number one. I mean, I didn't care whether he was Hispanic any more than I care that Aguilar is Hispanic.

And you said that all the candidates for the position were inside men. How were the vacancies announced?

Well, the vacancies are posted at designated bulletin boards in both the Laurel and Ashton plants. We do have a policy of promoting from within. We state that on our advertisements.

Um, are specific people encouraged to apply?

I can't say what any, you know, individual supervisor does with regard to encouraging a man to apply. I didn't specifically ask anyone to apply for this position.

Ah, do you know whether any person solicited applications from any of the candidates?

Heck, I have enough to remember to do my own job around here! Ah, ask them!

In her mind: "I need more on this, but I'd better switch gears."
Ah, did you know that Mr. Aguilar had complained that the selection on the Assistant Foreman's job was biased against Hispanics?

Yeah, I heard that Reynaldo shot his mouth off about that, it'd be sour grapes. I mean he didn't get the job, right. Carlos was pretty insulted, though, I mean he felt it was like saying he was going to stab another Hispanic in the back.

So you knew about Mr. Aguilar's complaint before the panel met on the Night Supervisor's position?

Sure, but it, it didn't influence our decision if that's what you're trying to imply!

Mr. Green, I'm just trying to get the timing straight and to make sure that the facts on the record are accurate, that's all.

OK, all right.

Now, did you personally hear Mr. Cruz express anger over Mr. Aguilar's accusations?

No, it was one of those things you hear, ah, by the water cooler, I guess. I don't recall who told me.

Now, from the dates on the promotions, it looks like about three months passed between the first promotion on the Assistant Foreman job and the second one for the Night Supervisor job, is that right?

That's about what I remember. Recommendations are dated, so they'll be on that information I already gave you. It's more accurate than my memory!

Now, I believe you said earlier that the panel chose the four or five key criteria they would apply in evaluating the applicants. Please describe for me how you arrived at those criteria.

We had the job description, we asked the supervisors of the position to list the four or five most important skills. After discussing the job and reviewing the suggestions, we then picked the key criteria.

Ah, do you choose different criteria each time you fill a position?

No!

Ah, under what circumstances do you change them?

Well, it depends on where the emphasis is at the time!

In her mind: "I need to pin this down."
OK, now, I noticed that you emphasized writing skills as a key criterion for the Night Supervisor position. Tell me how that criterion was chosen and why it was so important to the Night Supervisor position.

Well, we have three shifts operating on a day. Each shift supervisor has to do a summary log for the next guy. I mean, what's been done, and what's need of repair, you know, stuff like that. That we follow up on and so forth. The panel felt that whether or not a guy could keep good log notes made a difference in the quality of the job.

OK, from the job descriptions, it would appear that the Assistant Foreman has to do a lot of writing. Was writing skills a criterion for that job as well?

Obviously they're not the same job. The Night Supervisor has to write log reports so the day supervisor on the next shift can follow what was done, what needs to be done and follow-up. If he is illiterate, the chance for error is great. The Assistant Foreman, though, writes summary reports and then the secretary can clean it up when she types it.

Um, Mr. Aguilar rates second for the Assistant Foreman job, but fifth for the Night Supervisor position. Did writing skills make the major difference?

Sure, Reynaldo's writing isn't great. You can see the difference in his application than Joe's. Aguilar misspelled and I can't even read the handwriting sometimes. You know, Joe, on the other hand, has good prose.

In her mind: "I need to be careful here."
Did you use only the application to determine writing ability?

Well, what else could we use? I mean, we didn't, weren't going to give them a writing sample. I mean, it was really a communication issue here. You judged on what you had before you at the time. I mean, who was likely to communicate better in writing.

Ah, when did you select writing skills as a criterion?

We selected all the criteria before we even opened the applications.

Was writing skills required for other Night Supervisor positions?

I don't know!

When did you learn that Mr. Aguilar was an applicant for the second promotion?

You mean did we set Aguilar up? The answer's no! We chose the criteria that would be job related. Ask the shift supervisors whether they think they need to write. I really resent the implication that we just sat around here and concocted something in order to shaft this guy.

Mr. Green, I was only trying to determine the chronology of events. Did you know who the applicants were when you chose the criteria?

No!

So Mr. Aguilar's writing skills were not an issue in the Assistant Foreman job, but they became an issue for the shift supervisor?

Just like the other applicants! Look, I really need to get back to my real work here! I mean, I'm getting behind, when are we going to wrap this up?

Well, Mr. Green, why don't we conclude our initial interview right now. I do want you to be aware that I may have follow-up questions, but I promise you I will take no more of your time than is absolutely necessary. Thank you so much for helping me to clarify procedure, and I'll be talking with you soon.

Eve has successfully illustrated skills and techniques that have kept her investigation on track. First, she did not allow Mr. Green to distract her from her goal. She exhibited poise and diffused his hostility. Eve remained in charge of the interview and obtained the needed information. She varied her techniques from open-ended questioning, as appropriate, and asked leading questions when necessary. She identified hearsay evidence for later follow-up. Eve focused on the promotion process, identifying the key decisions and decision-makers. More importantly she

established the chronology necessary to address retaliation. So far, Eve is remaining open and following her plan.

Ah, Mr. Sanchez, as I indicated, I'll be taking down your responses to my questions in an affidavit form. At the end of our interview, I'd like you to read it, and if it in fact is accurate, I'll ask you to sign it. Is that all right?

I guess so.

OK, it appears that you have been an electrician here for 8 years. Is that right?

Yeah, that's right.

Ah, you were Acting Night Supervisor in Laurel for a few weeks. Tell me what skills you think are needed for that job.

You mainly need certain technical skills. Experience with high voltage electricity is probably the most important thing. Though I guess it helps to know something about low voltage electricity, too. But, ah, I think hands-on experience with high voltage equipment is the most important thing.

After technical skills and experience, what other skills would you look for?

A supervisor has to be able to work with the men. Um, he needs to get them to take their responsibility seriously, he has to try to get them to work as a unit, cause, ah, one man's job can't be done unless everybody else is doing theirs. Reynaldo is pretty good at this and the men respect his ability.

Um, do you need to do a lot of writing as an Acting Night Supervisor and did you do a lot of writing when you were the Night Supervisor?

No. In fact that's one of the things I liked about the job. It's basically fieldwork. You don't have to involve yourself in a lot of bureaucratic messes like writing reports.

So you wouldn't rate writing skills as critical to the position?

No, no, in fact the most writing you did is at the end of a shift. You had to make a few notes so that the next shift supervisor knows what happened in the previous shift. It takes about fifteen minutes.

Fifteen minutes. Ah, did you personally hear Reynaldo Aguilar make the statement at the union meeting about not being selected for the Foreman position because he was a Hispanic?

Me and a dozen other guys, yeah.

OK, was that before the Night Supervisor job was posted?

I think it was about a month or two before. But, ah, you can check the minutes of the union meeting if you need an exact date.
Did anyone encourage you to apply for this or any other promotion?

(Laughter) About the only thing I'm encouraged to do around here is work. If I want a job I have to scratch for it just like the next guy.

Do you know whether anyone else was encouraged to apply?

Not really. But the grapevine has it that management asked Joe Luna to apply.

In her mind: "I need to corroborate this someway."

Ah, Mr. Cook, now that we've discussed the process, are you ready to proceed?

Ah, well Miss, I don't know that you get comfortable at this sort of thing, but I'm ready.

Well, there are just a few points I would like to clarify about the evaluation

of Mr. Aguilar for both the Assistant Foreman and Supervisor positions. I noticed that you ranked Mr. Aguilar number one for the Assistant Foreman position, but number four for the Night Supervisor. Can you describe how you arrived at your ranking?

Well, it isn't so easy to remember what your reasoning is, um, we do have to keep notes and I've kept a copy of mine. Reynaldo was, in my view, the most experienced man in high voltage work. I felt the technical skills were real important. Both Carlos and Harry ranked him second for the Assistant Foreman job. They both thought that Bill Forester who was selected for the position had demonstrated more management potential.

In her mind: "Hmm, what's management potential?"

The men all liked Reynaldo, but I think that they respect Bill a little bit more. It was a close call since Bill was my number two choice, and Reynaldo was their number two choice.

What about the shift supervisor position?

Well, Carlos felt strongly that, ah, we hadn't considered written skills enough in our last selection. You know that Carlos is one of the plant's safety engineers. He claimed that a number of accidents in the plant had resulted from shift logs that were either inaccurate or so cursory that no one could really follow them. It was clear that written skills were not Reynaldo's strong suit. Um, Joe Luna appeared to be a good writer, at least from his application.

Did you personally know of any accidents that could have been caused by errors in the log books?

No, but Carlos would be in a better position to know that then I would.

Were there any other factors that influenced the second decision?

Well, Carlos said that Reynaldo's making such a fuss about the first

selection proved to him that Reynaldo was really too hotheaded to be a good supervisor. On the other hand, Harry Green said that it was time that good Hispanic workers got an opportunity to move up in the company, and he thought that Joe Luna could fit that bill.

Ah, did you think that Mr. Cruz was angry at Mr. Aguilar?

Ah, more insulted, I guess. Look, I guess I feel that there were good reasons for both the selections. You know, sometimes the distinctions that exist between candidates are real fine. I believe that the selections we made were fair.

Eve has effectively capitalized on the neutrality of both Sanchez and Cook. She took advantage of the rapport and moved her investigation farther down the road. She asked direct questions and developed specific lines of inquiry. That provided clues to motive and leads to corroborate hearsay. Eve's people skills kept communication flowing so that her technical skills could be maximized.

Mr. Aguilar, I wanted to go over some testimony with you. I've had an opportunity to interview a number of witnesses and review data since we last talked. I'd like to confirm some facts and details with you.

Anything you need, Ms. Harris. Just ask.

OK, did Mr. Cruz ever let you know he had heard you complain about bias in the Assistant Foreman selection?

Carlos Cruz wears a three-piece suit and works in an office with a window. I wear a uniform with a tool kit. I don't have much of an opportunity to hear Mr. Cruz's opinions about things. I did hear through the grapevine, though, that he thought it was a low blow that I would raise prejudice when he was on the promotion panel.

OK. How do you know what he thought?

Well, I never spoke to him directly about that, but it wouldn't be the first time a minority professional thinks he has to keep his people down. You know, they try to be so fair, but the white guys don't and it turns out no one protects our interests.

In her mind: "Um, this could be good evidence of a motive. I wonder what would be the best way to corroborate this hearsay. I wonder if Carlos would admit it if I asked him directly?"
What grapevine do you mean? Can you tell me the names of some specific witnesses who can testify that Mr. Cruz made statements about your initial complaint?

I heard it from a couple of people. In fact, Harry Green told me he didn't care if I complained to the Pope. But he said that Cruz really didn't appreciate that he was being badmouthed by his people.

OK, Mr. Aguilar it appears that their main reason for ranking you low on the supervisor position was your writing skills. How would you assess those skills?

I have a high school diploma and an Associates degree in electronics. I don't write novels, but no one's ever complained about my ability to write plain English. What's more, I've never heard that it's a major factor on a Night Supervisor job. All you have to do is log notes. Um, in fact, if you check the selections at Laurel and Ashton, I'll bet no one's ranked that very high.

OK, Mr. Aguilar, what makes you think that Joe Luna's application was solicited by management?

Ms. Harris, I don't know if Joe will tell you what he told me, but before the selection was made he told me that he had met Cruz in the hallway and Cruz had asked him if he had seen the posting for the Night Supervisor job. And he said sure. Then Cruz told him that he had a good work record, that he'd hope he'd give it shot. Then he said, otherwise the job would be wide open for the recent civil rights convert, Reynaldo.

In her mind: "Wow! I've finally got it! Let me get the who, what, where, when to document this."

In this last interview, Eve met with the charging party to confirm facts and details. She drew upon her technical skills to zero in on specifics. Eve asked narrow questions and kept asking them until she got what she needed. She was persistent. She's now pinned down the sources of evidence that will address motive.

Hi Eve! How far along are you on the Aguilar file?

Oh, hi, Les. I think I'm really making progress. The case is shaping up! He filed his charge on retaliation and I think I've found the smoking gun. I just haven't been able to document it yet.

Great! You mean you have some direct evidence?

Well, not quite, but I'm close! In fact I'm so close; it's making me a little nervous. I have one critical witness to interview and I feel very strongly that the direct evidence is there, but I'm equally sure that it's going to take just the right approach to get it.

Well let's talk about the possibilities here. The worst is that he could clam up either because he knows he has the key or because he doesn't trust EEOC or just out of uncertainty.

Yeah.

What if the interview fails? Is there a fall back position for resolving this case?

Yes, I'm very suspicious of the addition of the "writing skills" criteria. I think when I go back through the criteria applied to other Supervisor selections, and when I see if there were errors attributed to poor log notes, I'll be in a better position to tell whether the writing skills requirement made sense, or

whether it was just a pretext for discrimination.

What would you do next? Eve's effective interviewing has brought her investigation to the brink of resolution. Direct evidence from Carlos Cruz, assuming it is reliable, will make the strongest case, but it's usually the hardest to get. You have just seen some of the complexities of investigative interviewing in action. Many of the techniques and skills demonstrated by Eve Harris are those that you, as an investigator, employ every day - sometimes purposefully and sometimes almost by instinct. But it's still rather confirming to see them in use and to know that they are the accepted tools of the trade. Methods that help uncover the kind of hard to get information that confronts us during the course of an investigation. Successful interviewing is the ability to approach a situation with a confidence and control that says, "I know what I need, and I intend to get it!" You can achieve this by careful planning, strategizing and maintaining an awareness of human interaction. You become a better interviewer the same way.

CONDUCTING AN EFFECTIVE INTERVIEW

NEW INVESTIGATOR TRAINING
2017

What is an interview?

- An interview is a conversation with a purpose.
- Regardless of the specific purpose, the interview is essentially a method of collecting information.

Why do investigators conduct interviews?

- To learn what the witness knows
- To assess witness credibility
- To identify and obtain other relevant information

Goals of an interview

- Develop investigative information
- Learn what the witness knows
- Draw out relevant information
- Determine credibility
- Avoid assumptions
- Create a written interview record

Interviewing is a Key Skill

- Must be learned and practiced- it is not a natural conversation
- It is used everyday – designed to obtain facts/information
- Interviews set the direction for all other work
- Good Interviews: can BOOST a case
- Bad Interviews: can RUIN a case

Interview Preparation

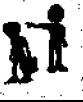
- Know the facts of the case
- Determine who should be interviewed
- Know the witnesses' alleged role in CP's allegations or Respondent's defense
- Prepare relevant topics for coverage during the interview
- Decide where the interview will take place
- Decide the sequence of witnesses to be interviewed

The Interview

- Introduce yourself (name, role, agency)
- Identify your Witness (are you talking to the right person?)
- Establish Rapport and Control
- Define the purpose of the Interview
  - Explain role as a neutral fact finder
  - Explain how the information obtained will be used
  - How the record of the interview will be maintained
- Administer Oath to Witness

Conducting the Interview

- Address confidentiality issues
- Discuss the importance of giving truthful information
- Explain protection against retaliation



Conducting the Interview

- Remain objective and neutral at all times (NO emotional reaction)
- Stay in control of the interview (on topic)
- Take notes and document your observations.
- Keep credibility assessments and other comments separate from the interview record
- Prepare an interview record for the file (obtain signatures as appropriate)

Two Types of Interview Questions

- Closed Questions
  - Can usually be answered "yes" or "no"
- Open Questions:
  - Gives the witness an opportunity to elaborate
  - Cannot be answered "yes" or "no"

Your Best Tool – the "W" Questions aka the "Open or Indirect Questions"

- Who
- What
- When
- Where
- Why
- How

Beginning the Interview Sequence of Questions

- Initially obtain background information
  - Full name and Contact Information
  - Employment history with the company
  - Current position
  - Time in position
  - Duties
  - Name of supervisor

Active Listening Exercise

- You will be split into two groups; speakers and listeners.
- The speakers will each be paired with a listener and will recount an event that changed their lives. The listeners will practice their active listening skills and summarize the story back to their speakers at the end of the activity.
- The listeners will now leave the room for a moment to allow the speakers to think of their stories.

Active Listening Exercise Questions

- How did you feel during the activity?
- Was it difficult to tell your stories? Why?
- Was it difficult to ignore your partner during the story?
- What have you learned?
- Have you ever experienced this type of treatment or acted this way before?
- How would you feel if you were treated this way when seeking help after being discriminated against?

Active Listening Exercise Lessons

- When a person comes to the EEOC to seek help, they have experienced a hurtful and often dehumanizing event. Such events can be just as emotional as events shared in this activity so they deserve your full attention and proper respect.
- Listening to a charging party is essential to obtain the party's confidence and document the case. In this exercise, you have observed how detrimental rude behavior can be in such a situation.

Active Listening Exercise Lessons (cont'd)

- Not listening (to the verbal or non-verbal message) is a common practice in today's society.
- It is your duty to show that the EEOC cares enough about its mission to listen to every person's case.

Common Witness Challenges

- Most witnesses are not skilled at describing events due to:
  - Lack of practice
  - Emotional investment
  - Fears
  - Assumptions about the listener's knowledge

Witness Challenges

- Most people won't lie outright; however, some may:
  - Omit
  - Exaggerate
  - Rely on the interviewer's assumptions
  - Give the shortest possible answer; yes/no, if possible
  - Answer only the questions asked; won't volunteer information
  - Display hostility

Dealing with Interviewing Challenges

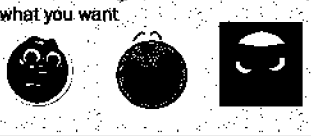
- Recognizing how personalities may affect the interview
- Be courteous and reassure the witness
- Control your reactions
- Listen carefully and ask questions to focus on the story
- Be professional
- Be respectful
- Be non-judgmental
- Be objective

Cultural Issues

- Be sensitive to customs and traditions
- Be sensitive and accommodating to language
- Be aware of your own bias and perceptions
- Be patient and sensitive to literacy issues

Challenging Witness Types

- Passive, introverted, apathetic, very quiet, frightened
- Arrogant, evasive, manipulative, intelligent
- Hostile, aggressive, angry, violent
- Talkative, overeager, rambles, won't respond to what you want



Concluding the Interview

- Summarize and review with the witness what he/she said
- Get any corrections from the witness
- Ask if he/she has any questions
- Do not make any promises or predictions
- Explain the possibility that they may be contacted in the future to provide follow-up information
- Provide your contact information if the witness wishes to contact you with additional information
- Thank the witness for their time and cooperation

Create a Written Interview Record

- Every interview record should include:
  - Charge number
  - Name of the witness
  - Interviewer's name
  - Date and time of interview
  - Method of contact
    - Phone interviews vs. In person interview
    - Location of in-person interviews
  - Identify others present
  - Factual Observations
  - Witness Statement (can be affidavit)

Create a Written Interview Record

An interview record does NOT include:

- Your thoughts
- Impressions
- Opinions
  - This type of information should be recorded in a separate document in the file and marked "confidential" (per FOIA considerations)

Have Fun!

Any Questions?

National Origin Discrimination

Case Study
Santiago V. CWS Engineering, Inc.
723-2017-02001

NATIONAL ORIGIN DISCRIMINATION

TABLE OF CONTENTS

DISCRIMINATION BASED ON NATIONAL ORIGIN

OVERVIEW

Title VII of the Civil Rights Act of 1964 protects workers from employment discrimination based on their national origin, in addition to race, color, religion, sex, opposition to practices made unlawful by Title VII, or participation in Title VII proceedings. In enacting this prohibition, Congress recognized that whether an individual (or her ancestors) is from China, Russia or Nigeria, or belongs to an ethnic group, such as Hispanic or Arab, she is entitled to be free from employment discrimination on that basis. Likewise, Title VII's protections extend to all employees and applicants for employment in the United States, whether born in the United States or abroad and regardless of work authorization or citizenship status. In some circumstances, its protection extends to U.S. citizens working in other countries

As the composition of the American workforce continues to become increasingly ethnically diverse, Title VII's prohibition against national origin discrimination is especially significant in ensuring equality in employment opportunities.

WHAT IS "NATIONAL ORIGIN" DISCRIMINATION?

Generally, national origin discrimination means discrimination because an individual (or his or her ancestors) is from a certain place or has the physical, cultural, or linguistic characteristics of a particular national origin group. Title VII prohibits employer actions that have the purpose or effect of discriminating against persons because of their real or perceived national origin.

A. Employment Discrimination Based on Place of Origin

National origin discrimination includes discrimination because of an individual's, or his or her ancestor's, place of origin. The place of origin may be a country (e.g., Mexico, China, Syria) or a former country (e.g., Yugoslavia). The place of origin may be the United States, such as when an employer discriminates against American workers in favor of foreign workers. The place of origin may be a geographic region that was never a country is closely associated with a particular national

origin group, such as Kurdistan or Acadia.

B. Employment Discrimination Based on National Origin Group or Ethnicity

A "national origin group," often referred to as an "ethnic group," is a group of people sharing a common language, culture, ancestry, race, and/or other social characteristics. Hispanics, Arabs and Roma are ethnic or national origin groups. National origin discrimination includes discrimination against American Indians or members of a particular tribe.

Employment discrimination against members of a national origin group includes discrimination based on:

- **Ethnicity:** Employment discrimination against members of an ethnic group, for example, discrimination against someone because he is Arab. National origin discrimination also includes discrimination against anyone who does not belong to a particular ethnic group, for example, less favorable treatment of employees who are not Hispanic.

- **Physical, linguistic, or cultural traits**: Employment discrimination against an individual because she has physical, linguistic, and/or cultural characteristics closely associated with a national origin group. For example, discrimination against someone based on her African-sounding accent or traditional African style of dress would constitute discrimination based on African origin.

National origin discrimination based on place of origin or national origin (ethnic) group includes discrimination involving:

- **Perception**: Employment discrimination based on the belief that an individual (or her ancestors) is from one or more particular countries, or belongs to one or more particular national origin groups. For example, Title VII prohibits employment discrimination based on the perception that someone is from the Middle East or is of Arab ethnicity, regardless of how she identifies herself or whether she is, in fact, from one or more Middle Eastern countries or ethnically Arab.

- **Association**: Employment discrimination against an individual because of his association with someone of a particular national origin.

For example, it is unlawful to discriminate against a person because he is married to or has a child by someone of a different national origin or ethnicity

- **Citizenship Status:** Employment discrimination based on citizenship status if it has the purpose or effect of discriminating based on national origin.

C. National Origin Discrimination That Overlaps or Intersects with Other Title VII Protected Bases

National origin discrimination often overlaps with discrimination based on race, color, or religion discrimination because a national origin group may be associated or perceived to be associated with a particular religion or race. For example, charges filed by Asian Americans may involve allegations of discrimination motivated by both race and ancestry (national origin). Similarly, discrimination against people with origins in the Middle East may be motivated by race, national origin, or even by the perception that they follow particular religious practices. The same set of facts may state a claim alleging multiple bases of discrimination.

Title VII also prohibits "intersectional" discrimination, which occurs when someone is discriminated against because of the combination of two or more protected bases (e.g. national origin and race). Some characteristics, such as race, color, and national origin are sometimes inextricably connected. Title VII prohibits employment discrimination based on any of the characteristics, whether individually or in combination. Because intersectional discrimination targets a specific subgroup of individuals, Title VII prohibits, for example, discrimination against Asian women even if the employer has not also discriminated against Asian men or non-Asian women.

D. Employment Discrimination and Human Trafficking

When force, fraud, or coercion is used to compel labor or exploit workers, traffickers and employers may be violating not only criminal laws, but also Title VII. In particular, Title VII may apply in trafficking cases if an employer's conduct is directed at an individual and/or group of individuals based on a protected category, such as national origin.

In trafficking cases, it is not unusual for employers to subject trafficked workers to harassment, job segregation, unequal pay, or unreasonable paycheck deductions, all of which are discriminatory if motivated by Title VII-protected status. Trafficking cases may involve multiple or intersecting bases of discrimination, such as national origin and sex. They often also involve retaliation for protected activity.

Cases involving human trafficking often include employer conduct that constitutes unlawful harassment, such as sexual, national origin, or racial harassment.

Analyzing National Origin Cases

National origin cases are often analyzed under the disparate treatment framework that we have discussed. Also, an employment policy or practice can have a disparate impact on the basis of national origin. There are some unique issues that may arise in national origin cases.

LANGUAGE ISSUES

Employers may have legitimate business reasons for basing employment decisions on linguistic characteristics. However, because linguistic characteristics are closely associated with national origin, it is important to carefully scrutinize employment decisions that are based on language to ensure that they do not violate Title VII.

A. Accent Discrimination

An accent can reflect whether a person lived in a different country or grew up speaking a language other than English. In this way, national origin and accent are therefore intertwined and discrimination or harassment based on accent may violate Title VII. Due to the link between accent and national origin, courts take a "very searching" look at an employer's reason for using accent as a basis for an adverse employment decision. Under Title VII, an employment decision may legitimately be based on an individual's accent if the accent "interferes materially with job performance." To meet this standard, an employer must provide evidence showing that: 1) effective spoken communication in English is required to perform job duties; *and* 2) the individual's accent materially interferes with his or her ability to communicate in spoken English.

Scenario: *Marie Carrero, a dental lab technician, applied for a supervisory job in the dental laboratory. Carrero speaks with a Filipino accent, but has no difficulties performing the duties of her lab technician position. The supervisory job requires excellent written and oral communication skills, including the ability to communicate with subordinates. The job also requires frequent oral briefings to senior department managers. The respondent manager who conducted the interview told Carrero several times during the interview that he was having trouble understanding her. Carrero did not get the job.*

Does Ms. Carrero have a claim of national origin discrimination?

What about the respondent's concern with understanding Ms. Carrero? Is this a legitimate basis for making an employment decision – whether you can understand the person you are interviewing and considering for a job? (And, if not, why not?)

B. Fluency Requirements

Generally, a fluency requirement is permissible only if required for the effective performance of the position for which it is imposed. The respondent should not require a greater degree of English fluency than is actually required for the relevant position, such as requiring written fluency when only oral fluency is actually required.

With American society growing more diverse, employers have increasingly required some employees to be fluent in languages other than English. As with English fluency requirements, a foreign language fluency requirement is only permissible if it is required for the effective performance of the position for which it is imposed.

The degree of fluency that may be lawfully required varies from one position to the next. Therefore, employers are advised to assess the level of fluency required for a job on a case-by-case basis because an individual's lack of proficiency in English may interfere with job performance in some circumstances, but not in others. For example, an individual may be sufficiently proficient in English to qualify as a research assistant but, at that point in time, may lack the fluency to qualify as a senior scientific writer who must communicate complex scientific information in English.

C. English-Only Rules and Other Restrictive Language Policies

Restrictive language policies or practices requiring the use of the English language at work are commonly known as English-only rules. These policies or practices may also involve languages other than English, for example, Spanish-only policies. Restrictive language policies implicate national origin because an individual's primary language is closely tied to his or her cultural and ethnic identity.

1. Policies Adopted for Discriminatory Reason

As with other workplace policies, a restrictive language policy violates Title VII if it is adopted for discriminatory reasons, such as bias against employees of a particular national origin. Thus, it would be unlawful **disparate treatment** to implement an overly broad English-only rule in order to avoid hearing foreign languages in the workplace, to generate a reason to discipline or terminate people who are not native English speakers, or to create a hostile work environment for certain non-English speaking workers.

2. Policies Applied in Discriminatory Manner

Regardless of whether a restrictive language policy was adopted for nondiscriminatory reasons, the policy may not be applied differently to employees because of their national origin. For example, if six languages other than English are spoken in a workplace, it would be facially discriminatory to prohibit employees from speaking one of those languages but not the others, e.g., a "no Russian rule," no matter the reason.

3. EEOC Guidelines on English-Only Policies

The EEOC's long-standing policy on English-only rules is that rules requiring employees to speak English in the workplace at all times will be presumed to violate Title VII.

- **Adverse Effect on National Origin Groups**. When an employer imposes an English-only rule, either in limited circumstances or at all times, employees with limited or no English skills and bilingual employees whose primary language is not English may be adversely

affected because they are prohibited from communicating at work—including for work-related purposes —in their most effective language. An English-only rule may also adversely impact these employees by subjecting them to discipline and termination for speaking their most effective language while imposing no comparable risk for native English-speaking employees. Finally, an English-only rule is likely in itself to create an atmosphere of inferiority, isolation, and intimidation that constitutes a discriminatory working environment.

The lawfulness of the rule may depend on whether it is applied at all times or only at specified times.

- **Rule applied at all times:** A rule requiring employees to speak only English in the workplace at all times, including breaks and lunch time, are presumptively unlawful. This is because language-restrictive policies may be applied only to those specific employment situations for which they are needed to promote safe and efficient job performance or business operations.

- **Rule applied at certain times:** The lawfulness of a limited language-restrictive policy – one that does not apply at all times or to all jobs, workplace situations, or locations – depends on whether the evidence shows that the policy is job-related and consistent with business necessity. The employer may satisfy this standard by providing detailed, fact-specific, and credible evidence demonstrating that the business purpose of requiring employees to speak a common language is sufficiently necessary to safe and efficient job performance or safe and efficient business operations to override its adverse impact; and that it is narrowly tailored to minimize any discriminatory impact based on national origin. It is not sufficient that the policy merely promotes business convenience.

To meet the burden of establishing business necessity, the employer must present detailed, fact-specific, and credible evidence showing that the language-restrictive policy is "necessary to safe and efficient job performance" or safe and efficient business operations. This burden cannot be met with conclusory statements or bare assertions about the business need for a language-restrictive policy.

Part of establishing business necessity is demonstrating that the language-restrictive policy actually serves the identified business need.

A language-restrictive policy is narrowly tailored when it applies only to those workers, work areas, circumstances, times, and job duties in which it is necessary to effectively promote safe and efficient business operations. This minimizes the adverse impact.

When the rule does not appear to be justified, consider whether it was adopted with the intent of creating a hostile environment. Investigators should ask whether there is other evidence that might suggest a hostile environment on the basis of national origin, such as jokes, slurs or suggestions to leave the country. If respondent says it adopted the policy because English-speaking employees were upset that their co-workers conversed in other languages and it was causing workplace disharmony, assess whether the employer would be able to address these concerns on an individualized basis without resorting to language-restrictive policies. A language-restrictive policy that has a disparate impact on a particular group cannot be justified if an employer can effectively promote safe and efficient business operations through a policy that does not disproportionately harm protected national origin groups.

CITIZENSHIP AND IMMIGRATION ISSUES

Title VII is violated whenever citizenship discrimination has the "purpose or effect" of discriminating on the basis of national origin.

For example, if an employer selectively enforced its U.S. citizenship requirement and refused to hire the charging party and other foreign nationals from the Middle East but hired foreign nationals from China and has no business justification for the distinction, then the employer has discriminated against the charging party based on her national origin.

As with other reasons asserted by a respondent, a citizenship requirement is unlawful if it is a pretext for national origin discrimination or is part of a wider scheme of national origin discrimination. Although Title VII applies regardless of immigration status or authorization to work, employers are prohibited by immigration law from hiring individuals who are not authorized to work.

Immigration status is not a factor in an EEOC investigation. An investigator should not inquire into a claimant's immigration status. Investigators should pursue all cases regardless of immigrant status and should not consider an individual's immigration status when examining the underlying merits of a charge. In addition, the EEOC does now allow employers to use immigrant status to avoid liability or to retaliate against claimants who pursue their rights under the laws we enforce.

Note: On November 21, 2016, the Commission issued its updated Enforcement Guidance on National Origin Discrimination, which updates and replaces the 2002 Compliance Manual section on the topic. The Enforcement Guidance on National Origin Discrimination is available on our web site. The EEOC also issued two short user-friendly resource documents to accompany the enforcement guidance: a Question and Answer publication and a Small Business Fact Sheet.

The Commission also issued internal talking points for EEOC staff, ***for internal use only, and not for public dissemination****.*

Human Trafficking

Scenario

Amir Patel is originally from Mumbai (Bombay), India and was recruited to work in the U.S. as a skilled Welder by Global Recruitment Company. He and other Indian skilled welders came from India to work for Vista Industries, Inc., an oil industry parts manufacturer, in April of 2010. They were promised a high-paying job at U.S wages, medical insurance and an apartment.

Once Mr. Patel arrived in the U.S. and reported to work, his passport and visa were taken from him, effectively limiting his movement to the site where he worked. Mr. Patel and the other Indian welders were paid $2.00 to $3.00 an hour to do everything from high-tech welding to cleaning toilets and mowing the lawns of company officials. In addition to his welding duties, Mr. Patel was forced to work in nearby tomato fields which were sprayed with chemicals so harsh that they left him with permanent scars. He was forced to work 13 hours a day, six days a week.

Mr. Patel and 35 other welders lived in two apartments without water, electricity, heat or gas. They had no beds or other furniture and no means to cook or store food. The welders did not have access to their passports or visas so they felt trapped and could not leave the site.

Mr. Patel and the other welders were told by John Needham, Crew Leader, that the police and immigration officials would be called to arrest them if they tried to leave and that neighbors were watching their every move. They were also told that any attempts to leave would result in harm to their families back in India.

Mr. Needham and other managers told the Indian welders that Americans did not like Indians and were angry at them because of 9/11. Mr. Patel was called "a dirty Indian" and "stupid and slow" when he would ask about the wages that he was originally promised.

Mr. Patel was denied necessary medical care and suffered from chronic hunger, weight loss, illnesses and fatigue.

On December 10, 2010, Mr. Patel complained about these conditions to Mr. Needham, but was again threatened with deportation. After he complained, he became extremely fearful that he would be sent back to India. Mr. Patel and the other welders were told to hide when federal inspectors were on the worksite or to "look happy" if they happened to be spotted. They were told that if they did not do so, they would be sent back to India. Mr. Needham told the welders that the inspectors said that they only had to feed the workers the first week of their employment and afterwards they were responsible for their own food and housing.

On January 15, 2011, Mr. Patel and three other welders snuck away from the worksite and contacted a Victims Rights Helpline from a pay phone. It was that conversation that prompted them to contact the EEOC. Mr. Patel is fearful and completed unaware of his rights and the laws enforced by the EEOC. Although he knows that he was mistreated, he is afraid that he will be sent back to India if he files a charge of discrimination.

How are you going to counsel Mr. Patel?

What PCHP charge category do you recommend that this charge be assigned? Why?

Note: In IMS, make sure also to enter in the Topics of Interest field that this charge raises a Human Trafficking issue.

Do you think this charge constitutes a class charge? Systemic charge? What's the difference between a class charge and a systemic charge?

INTRODUCTION TO SANTIAGO CASE STUDY

We have discussed the theories of discrimination, jurisdiction and threshold issues as well as some investigative tools and techniques commonly used to investigate charges.

Now, we are going to **apply** what we have learned thus far to our first case study, *Miquel Santiago v. CWS Engineering Inc.* In this case study, we will cover national origin discrimination in a promotion case. We will develop an investigative plan and conduct several interviews.

Miquel Santiago v. CWS Engineering Inc.

The charging party has visited your office and has completed an Intake Questionnaire and was interviewed by Intake staff in your office. He filed a charge. The case is now assigned to you for further investigation.

You called Mr. Santiago to set up an appointment to interview him in person in more detail about the discrimination charge he filed since you did not conduct his Intake interview. This case was categorized at Intake as an "A" case so it was not deemed eligible for mediation.

RECAP: THE INTERVIEW PROCESS

Before you conduct the interview with Miguel Santiago, let's discuss some key points regarding how to conduct the initial interview with the charging party. The initial interview of the charging party determines how the charge will be investigated and will aid in preparing the investigative plan.

What are the steps of a typical witness interview?

- Introduce yourself and identify the purpose of the interview
- Ask background questions
- Ask increasingly detailed questions
- Conduct follow up and seek clarification
- Identify other sources of evidence
- Close interview by explaining next step in the process and verifying address and phone number
- Document the interview

Why is documenting the interview so important?

Documenting the interview is a critical step in an investigation. **An interview is only as good as the statement or interview notes that end up in the case file.** Good interview preparation and note-taking facilitate documentation of the interview. Try to complete all interview documentation as quickly as possible while the interview is fresh in your mind. Many Investigators find it useful to prepare the interview notes on a laptop computer as the interview is being conducted. This facilitates review and signing of the statement, if necessary.

Generally, the following information should be recorded in the initial interview notes:

- the date the interview was conducted;
- the name of the interviewer; and,
- the name of the person interviewed.

Remember the who, what, when, where, why, etc. questions from our discussion on interviewing techniques? What do you think every interview should include?

For each allegation:

- establish **what** happened to the charging party; how was the charging party harmed?
- establish **who** (by name, title, relevant bases) was allegedly responsible for the actions taken against the charging party;
- establish **where** and **when** the action(s) occurred;
- identify **how** the information was obtained by the charging party (e.g., hearsay, direct observation, etc.)
- establish **why** the charging party believes the action was discriminatory;
- establish how **similarly situated** employees were treated as **compared** to the charging party. Identify people by name, title, and relevant protected bases;
- establish the charging party's work history, job title, duties (e.g., promotions, salary, disciplinary actions, performance evaluations, etc.), if relevant;
- establish the **identify of witnesses** by the nature and source of their testimony, and relevance of information–include name, relevant protected bases, home/work telephone numbers, home address, position held, etc. - **if the charging party does not have any witnesses, so state;**
- identify, as appropriate, the relevant composition of the workforce;
- include, if appropriate, a description of the charging party's physical and/or psychological work environment;
- include charging party's knowledge of work place policies and procedures.

A Note about Notes

The participants should understand that the interview notes are not a stenographic record, but rather a full but informal set of investigative notes, to be consulted if the Commission makes a determination on the merits.

There are different note-taking styles, but the note-taker must ensure that the notes are accurate and cover the essential information. The note-taker should not hesitate to interrupt the proceedings and ask for clarification or repetition if the point is especially important or the proceedings are moving too fast. On the other hand, the note-taker should not suspend note-taking for a long while (unless settlement discussions are under way, in which case it is off the record) as the person(s) being interviewed may believe that the interview is not being recorded.

To simplify the write-up:

- Do not rewrite repetitive statements or irrelevant conversation
- Include significant quotes, especially if they refer to the essence of the dispute, or if they are particularly revealing of attitude, demeanor, or overall position on the case.
- Concentrate on the details of the disputed incident, the sequence of statements and events, the time, place, and people present.
- Other than to assist persons with disabilities in the actual conduct of the interview, recording devices are not permitted.

Case Study
Miguel Santiago v. CWS Engineering, Inc.

Now that we have discussed key interviewing points, let's move on to the exercise. We have reviewed the documents requested in the *Santiago* case. Now we are ready to **prepare** for our interview with the charging party. How do we prepare for an interview?

INTERVIEW WITH CHARGING PARTY

MIGUEL SANTIAGO

OUTLINE/INTERVIEW PLAN FOR MIGUEL SANTIAGO

- What are the qualifications for the position?
- How does he meet those qualifications?
- Was he interviewed?
- Who was present during the interview?
- What happened during the interview?
- Does he know the national origin of the selectee?
- Does he know the selectee's qualifications?
- What was he told about his non-selection?
- Why does he believe his national origin played a role in the employment decision? Have him explain in some detail.
- Why does he believe he is as well qualified or better qualified than the selectee?

PROFILE OF MIGUEL SANTIAGO

Role Player Note: The individual playing Mr. Santiago should be prepared to answer questions about his qualifications for the Senior Budget Analyst position, the job requirements as listed in the vacancy announcement and why he believes the selection was discriminatory. The following information can be expected to be elicited by the participants, but should not be volunteered unless asked. Mr. Santiago is generally happy to talk with the Investigator, but is also anxious about the processing of his case and what the outcome will be.

Make sure that you tell the Investigator that you have a witness, Michelle DeWitt, who can support your claims that Dennis Hatcher is biased against Puerto Ricans. Insist that the Investigator interview DeWitt during the investigation of your charge.

Miguel Santiago filed a charge of discrimination on June 10, 2016, against CWS Engineering Inc., a publicly traded federal government contractor. CWS manufactures jet engine parts for the military.

Mr. Santiago alleges that on May 19, 2016, Dennis Hatcher did not select him for the position of Senior Budget Analyst because of his national origin, Puerto Rican, in violation of Title VII of the Civil Rights Act of 1964, as amended.

CWS Engineering Inc. has approximately 2,500 employees at the current time, down from 2,800 employees in 2012. As a result of the current economic situation, some of CWS' operations have been subjected to severe downsizing. Most of the downsizing was achieved through attrition and early-out retirement incentives. With the increase in federal government contracting, this fiscal year was the first year that the CWS Office of Budget was able to fill three senior management positions: Senior Budget Analyst, Senior Procurement Analyst and Assistant Director. These positions had been vacant for a couple of years.

Mr. Santiago was employed as a Budget Technician at Triangle Aerospace Company from 2010 to 2012. He worked there for two years performing budget analyses and reviews for the Office of

Operations and Development. He reviewed and analyzed various budget options and prepared memoranda for the Director of Operations and Development about the feasibility of budget options.

While at Triangle Aerospace Company, Mr. Santiago attended job-related training courses: FINFUN Basic and Advanced (at that time, FINFUN was the premiere financial accounting system); Lotus 123 Applications in Budgeting; and Basic Budget Practices. He is well versed on Quicken and Kiplinger's. He has also attended annual conferences regarding budget processes and industry practices.

Mr. Santiago applied and was selected for a Budget Analyst position at CWS Engineering Inc. in 2012. As a Budget Analyst, Mr. Santiago has been responsible for assisting with the development of budget options for the company and implementation of annual budgets. Mr. Santiago frequently works with managers to identify budget priorities and funding options, and monitors spending to ensure compliance with accepted company budget practices and policies.

Mr. Santiago progressed from performing relatively entry level Budget Analyst functions to those of a seasoned Analyst for almost three years, which he believes is a significant accomplishment. He received outstanding performance ratings in 2012, 2013 and 2014. He did not receive an outstanding performance rating in 2015, but believes that the new Director of the Office of Budget, Dennis Hatcher did not give anyone an outstanding performance evaluation. It is rumored that Mr. Hatcher believes ratings in the past were inflated by the prior Director of the Office of Budget, Melanie Perez, Puerto Rican.

Mr. Santiago believes that he was the best qualified candidate for the position because of his tenure in the Office of Budget at CWS Engineering Inc. and that Mr. Hatcher should have promoted from within the company. Mr. Santiago learned from Mr. Hatcher on May 19, 2016, that he was not selected for the position because Mr. Hatcher did not deem him to be the best qualified. Mr. Santiago does not know anything about the selectee, Alice Newton, but has been told by others that she is not Hispanic.

Mr. Hatcher became Director of the Office of Budget about two years ago after serving as Management Assistant to Valerie Simon, CEO of CWS Engineering Inc. Mr. Santiago believes that Mr. Hatcher is

prejudiced against Puerto Ricans because of comments Mr. Hatcher has made about Melanie Perez. Specifically, Mr. Santiago heard Mr. Hatcher say that Ms. Perez could not manage her way out of a paper bag. This comment was made in front of Mr. Santiago and one of his coworkers, Michelle DeWitt.

Mr. Santiago respected and admired Ms. Perez, who frequently asked him to perform additional duties and work on special projects. Since Mr. Hatcher arrived, Mr. Santiago has not enjoyed the same working privileges and has been excluded from working on special projects. Mr. Santiago insists that the Investigator interview Ms. DeWitt, who, according to Mr. Santiago, will confirm the ethnic slur made against Ms. Perez.

Mr. Santiago also claims Ms. DeWitt told him that she overheard Mr. Hatcher making fun of Ms. Perez' Latin accent by exaggerating her pronunciation of certain technical financial terms. Mr. Santiago does not really know if Mr. Hatcher did this since he did not see it.

He also believes the company has a corporate-wide animosity toward Hispanics because of their English-Only Policy which applies at all times in the workplace. Santiago does not have a copy of the policy but thinks it is posted on the employee bulletin board.

Mr. Santiago knows that the new Assistant Director, Maurice Brown, and the Senior Procurement Analyst, Sara Longfellow, were also hired from outside CWS Engineering Inc., but he does not know anything about their qualifications. He believes that the Office of Budget is operating more smoothly than it has in the past because there are enough people to do the work.

INFORMATION LEARNED FROM INTERVIEW WITH CHARGING PARTY, MIGUEL SANTIAGO

- Santiago meets the minimum qualifications for the Senior Budget Analyst position.
- Santiago was told by Hatcher that he was not the best qualified candidate and was not selected for that reason. Hatcher did not offer any specific details.
- Santiago does not know the qualifications of the selectee, Alice Newton. He only knows that she was not employed at CWS Engineering Inc. prior to her selection and is not Hispanic.
- Santiago heard Hatcher make a disparaging remark about the management skills of the former Director of the Office of Budget, Melanie Perez, Puerto Rican.
- Santiago states that a co-worker, Michelle DeWitt, also heard the comment about Perez's management skills and that she overheard Hatcher making fun of Perez' accent.
- Santiago believes these remarks show Hatcher's animus toward Puerto Ricans and toward Hispanics in general.
- Santiago believes CWS Engineering Inc.'s English-only Policy shows corporate-wide animus toward Hispanics.
- Santiago does not have a copy of the English-only Policy.

INVESTIGATIVE PLAN

What is the theory of discrimination in this case?

What is the basis? What is the issue?

What are the Elements of Proof in a promotion case?

Does Santiago have a prima facie case?

Are the comments made by Hatcher direct evidence of discriminatory animus?

What about the English-Only Policy?

Did Santiago provide evidence to rebut the company's articulated reason for the selection of Newton?

What do we need to find out from Hatcher?

What about the comments about Perez?

Do we need to interview Michelle DeWitt? Why or why not? When?

INTERVIEW WITH WITNESS

MICHELLE DEWITT

PREPARING FOR THE INTERVIEW

The purpose of this exercise is to demonstrate questioning techniques and to note reliability issues that can arise in an investigation. Investigators may encounter witnesses who do not tell the same story that the charging party or respondent has said they would. Investigators must still collect relevant evidence from these witnesses and include it in the case file.

In this case, you have decided to interview the witness to ask about the alleged ethnic slurs made by the Director of the Office of Budget, Dennis Hatcher.

After the interview, we will discuss the questioning techniques used and the reliability of the witness.

OUTLINE/INTERVIEW PLAN FOR MICHELLE DEWITT

- What is your current position? How long have you held this position? Where is your position in the organizational structure of the Office of Budget?

- What is your national origin?

- Who is your current supervisor? How long has that person been your current supervisor? Who was your previous supervisor?

- Do you attend meetings with Dennis Hatcher and the Budget Division staff? How often? Who attends?

- Has Dennis Hatcher ever made derogatory statements about the former Director of the Office of Budget, Melanie Perez? Were these statements ethnic in nature? What were the statements? When? How often? Who else heard these statements?

- Have you heard Dennis Hatcher make any other derogatory statements about any ethnic groups? When? How often? Who else heard these statements? What were the statements?

PROFILE OF MICHELLE DEWITT

Michelle DeWitt is a Budget Analyst. She has been employed by CWS Engineering Inc. for 5 years. Her mother is from Guyana and her father is Lithuanian.

She is one of two budget analysts in the Office of Budget who report to Dennis Hatcher. He has served as the head of the Office of Budget for about two years. There are two other divisions with five or six people in each division. One division is Planning and Procurement and the other is Resource Management. They both have division heads who report directly to Dennis.

DeWitt attends meetings with Dennis Hatcher and Budget Division staff about once or twice a month. They have more meetings if the budget cycle is coming to a close. They sometimes meet with him individually.

DeWitt states that it was clear to her that Dennis did not think much of Melanie. When he took over, he was pretty dismayed at the state of the office. DeWitt believes it was not Melanie's fault. The department had been downsized almost to nothing at all and Melanie just tried to stay afloat.

When asked if she overheard any specific remarks made by Hatcher about Perez, DeWitt responds that she overheard him say that Perez couldn't manage her way out of paper bag. She doesn't necessarily agree with that but it was evident to her that Dennis certainly thought so. She can't recall when he made that statement. When asked if Hatcher make any derogatory comment or connotation about Ms. Perez related to her ethnicity, DeWitt replies that she also overheard Hatcher making fun of her accent. When pressed as to what she heard, she says that a couple of times she heard Hatcher mimic how Perez pronounces certain words like "fee-seek-KaaaL" for "fiscal" or "prah-koorr-mint" for "procurement".

DeWitt states that she never heard Hatcher make any derogatory statements about any ethnic groups. She adds that she does not think Hatcher is a bad guy, just a bit hassled and frustrated most of the time.

DeWitt states that she disagreed with her latest performance rating given to her by Hatcher. She sounds very irritated about it even though it was almost one year ago. She said it was really frustrating because he refused to give anyone an outstanding because he thought Perez had inflated the performance ratings. Santiago mentioned to her that he too was upset with his rating.

DeWitt has seen the employer's English-only Policy on the bulletin board, and she has heard employees speaking languages other than English in the break room, and emphasizes that the policy applies at all times in the workplace.

INFORMATION LEARNED FROM WITNESS MICHELLE DEWITT

- Hatcher's "paper bag" statement about Perez, while critical, was not ethnic in nature.
- Hatcher did not give outstanding performance evaluations to anyone in 2015 because he believed that Perez inflated performance ratings.

- This witness has not heard Hatcher make any derogatory statements about any ethnic groups but she did hear him make fun of Perez's accent.

- DeWitt confirmed Santiago's statement that Hatcher criticized Perez's management skills and her subordinates' performance ratings.

- DeWitt confirmed the existence of the English-only Policy.

Discussion Of Questioning Techniques

- What did you think of the overall interview?
- What worked WELL and why?
- What did not work well, and why not?
- What questioning techniques were used?
- Were a variety of techniques used?
- Were they used effectively?
- Would you have done anything differently and, if so, what and why?
- What did you think of the content of the questions?
- Were they effectively tailored to elicit relevant evidence?
- Could any of the questions been rephrased?

EVALUATING EVIDENCE

AND ASSESSING CREDIBILITY

OBTAINING RELIABLE EVIDENCE

Before continuing our investigation of the *Santiago* case, let's briefly review some factors to consider in our efforts to obtain reliable evidence.

What is reliable evidence?

Reliable evidence is that which is trustworthy and believable.

In many cases, witness testimony may differ in varying degrees or be uncorroborated. This is often a challenge to the Investigator. On the other hand, many conflicts in testimony need not be resolved at all because they are not critical to the case.

We are going to have a brief discussion about methods to objectively determine reliability and resolve conflicts in testimony, prior to moving on to our next interviewing exercise.

Reliability of Witness Testimony

What are some of the factors you consider in evaluating the reliability of evidence?

- the witness's ability and opportunity to *perceive* events s/he describes to you
- the witness's *knowledge* and *expertise* on the matter being discussed
- the witness's ability to *recall* events

Ability and Opportunity to Perceive

What questions would you ask to ascertain whether the witness had the ability and opportunity to perceive events?

- Is the information firsthand?

- If not, who is the source of the information? Who told the witness? Did the source have firsthand knowledge? Is the source connected with either the charging party or the respondent? Does the source have any interest in the outcome of the case? Did the witness believe the source?
- What did the witness actually see or hear?
- How well the witness could see or hear? Were there circumstances that might have interfered with the witness's ability to perceive such as distance, noise, obstructions, or other distractions?
- Was the witness tired, medicated, upset, alert, etc., at the time of the event in question?

Knowledge or Technical Expertise

What questions would you ask to determine the knowledge or expertise of a witness?

- Is the witness knowledgeable as to the matters testified about? (For example, how long has the Director of Human Resources been in that position – three weeks or three years?)

- How much experience has the witness had in the area being discussed? (For example, did s/he actually perform the job duties for years as opposed to merely drafting position descriptions?)

Ability to Recall

What questions would you keep in mind when you are taking testimony from a witness whose memory may be at issue?

- How long ago did the event occur?
- Is this something the witness is likely or unlikely to remember because of its relative impact, unexpectedness, frequency of occurrence or its linkage to another important event in the witness's life?

    - An applicant may be more likely to remember what was said in his or her specific job interview than the personnel

officer who may have conducted many such interviews.
  - A person who does or sees the same thing repeatedly might be more likely to remember an incident that varied from the routine.
  - A person often better remembers events because they occurred on a birthday, a holiday, the last or first day on the job, etc.

- How does the witness's memory appear to be generally?
- Does the witness have memory aids such as notes, diaries, or tape recordings made at or near the time of events in question?
- Was the witness prompted? How?
- Were the answers suggested? By a representative? By the Investigator?
- Did the interview take place in a setting and manner conducive to recall?
- Does the witness merely have an inability to communicate as opposed to an inability to remember?

Content of Testimony

Consistencies in Testimony and Evidence

What should you look for when evaluating the content of testimony?

- Consistent does not automatically mean it is the most credible. Is it consistent because it's true?
- Is there objective evidence that shows the testimony is reliable?
- Is the testimony "believable?" Does it make sense in light of other evidence in the record?

Internal Inconsistencies and Contradictions

- Look for inconsistencies in statements that contradict facts given in prior testimony.
- Look for inconsistencies and contradictions between a person's testimony and their conduct.
- Look for inconsistencies or contradictions between witness testimony or statements and other evidence, such as

documents.

Records and Other Documents

What should you consider when evaluating the consistency of testimony with documents and records?

- Is testimony consistent with reliable records?
- Can the difference(s) be satisfactorily explained?
- Do documents exist that would support or rebut testimony?
- Does the witness supply existing documents in his or her possession or control that would support testimony? If not, why not? Is it because they might actually contradict the witness?
- Are records original? Complete? Unaltered? Accurate?
- When were records made in relation to matters being testified about?
- Who created and/or completed the documents?

Testimony of Other Witnesses

What should you consider when evaluating the consistency of testimony among witnesses?

- Are other witnesses or their testimony objectively more reliable?
- Can differences be explained?
- Do other witnesses contradict or corroborate each other and/or the witness in question and/or documentation?

Plausibility - Probability

Reliability often can be best determined by simply examining whether the story told by the witness is plausible. Ask yourself whether the witness's account is believable or likely in light of normal human behavior and experience, physical possibilities, etc.? In other words, ***does the story make sense****?*

Demeanor

What do you examine in a witness's demeanor?

Demeanor can include tone and pitch of voice; hesitancy or reluctance; facial expressions; gestures; body language; evidence of surprise; air of candor; cues from counsel.

Witness Interest, Bias or Motive

Remember that a witness's testimony may be influenced by the witness's bias or vested interest in the outcome of the investigation. You should determine as quickly as possible whether a witness may have a bias that could influence his or her testimony.

What factors should you keep in mind to assess interest, bias and motive when interviewing a witness?

- Could the witness derive some benefit from or be hurt by the outcome of the case, the outcome of his or her testimony, or the fact that s/he testified?
- Has this "interest" affected the testimony?
- Does the witness testify against such an "interest" that is important? For example, does a neutral witness testify that s/he has engaged in the same misconduct as charging party, when that might result in discipline of the witness?

INTERVIEW WITH DENNIS HATCHER

DIRECTOR, OFFICE OF BUDGET

OUTLINE / INTERVIEW PLAN FOR DENNIS HATCHER

- What qualifications was he seeking for the position?
- What selection criteria did he use?
- What procedures did he follow?
- Was he critical of Melanie Perez? In what way?
- Did he make any statements relating to her ethnicity?
- Did he give outstanding performance ratings to anyone in 2009? Why or why not?
- How is the English-only Policy enforced?

INTERVIEW WITH DENNIS HATCHER

We are now going to interview the Director of the Office of Budget at CWS Engineering Inc., Dennis Hatcher.

As you know, Dennis Hatcher is the selecting official for the position at issue in this case. In preparation for your interview, you should have reviewed the charging party's statement; the vacancy announcement for the position; the applications of Mr. Santiago and the selectee, Alice Newton; and the statement of Mr. Santiago's witness, Michelle DeWitt.

Following the Hatcher interview, we will discuss how it went, the information you obtained, and where the case stands as a result of the interview.

PROFILE OF DENNIS HATCHER

*[**Role Player Note:** Dennis Hatcher role players will have most of the information they need from the witness PROFILE. Hatcher role players should be natural; they should not take on the role of a totally hostile witness. They should not deviate too far from the basic factual scenario provided. The purpose of these exercises is NOT to demonstrate how good the role players are at stonewalling.]*

Dennis Hatcher is the Director of the Office of Budget at CWS Engineering Inc. His national origin is British. He was placed in this position two years ago after serving as the Management Assistant to Valerie Simon, CEO of CWS Engineering Inc. During the last couple of years with CWS Engineering, the company has seen dramatic downsizing and cuts in its budget. The result has been a severe shortage in qualified senior managers within the company. Recently the company received a couple of good federal government contracts that have prompted some new hiring.

When Mr. Hatcher became Director of the Office of Budget, he replaced Melanie Perez, Puerto Rican, who had left the Office of Budget in disarray. His first priority was to realign staff and fill critical positions to ensure that the budgetary operations of CWS Engineering were not at risk.

Mr. Hatcher received authority from Valerie Simon to fill three critical senior positions in the Office of Budget: Assistant Director, Senior Procurement Analyst, and Senior Budget Analyst. He selected Maurice Brown as Assistant Director and Sara Longfellow as the Senior Procurement Analyst. Both were outside hires. Mr. Hatcher believes Maurice Brown is from the West Indies. He does not know Sara Longfellow's national origin.

*[**Role Player Note:** You may refer to the Organization Chart for the Office of Budget for the names and national origins of employees in the Office of Budget.]*

Mr. Hatcher's second priority in the Office of Budget was to build a staff with sufficient budget experience and expertise to participate in the pilot project in which CWS Engineering could operate under a two-year budget cycle. Mr. Hatcher is a big proponent of the two-year budget

cycle and has participated in a task force to explore the viability of moving the company to a two-year budget cycle. He is anxious to show that the company can operate under such a system and that the benefits of the two-year budget cycle are tremendous in terms of ability to plan and implement programs within the company.

Because of Mr. Hatcher's priorities, he wanted a Senior Budget Analyst who was familiar with the operational requirements of a two-year budget cycle. He met Alice Newton while attending a workshop and was impressed with her quick mind and knowledge of the budget cycles. She also seemed to grasp the finer points of the two-year budget cycle. During the workshop several months ago, he told her that he would be filling a Senior Budget Analyst position and that he would really like her to apply for the position. He did not promise to hire her.

After the vacancy announcement for the Senior Budget Analyst position was posted and applications submitted, Mr. Hatcher received word from Rosemary Compton in the human resources office that two applicants were minimally qualified, Mr. Santiago and Ms. Newton. Ms. Compton included a transmittal memorandum that explained that Mr. Hatcher should review and evaluate the applications. Mr. Hatcher could base his selection on the applications or he could conduct interviews.

However, Mr. Hatcher already knew Mr. Santiago's background and his application did not reveal any additional information. He called Ms. Compton and told her that he had made his selection of Ms. Newton and to please notify her. He also informed Mr. Santiago that he had not been selected.

Mr. Hatcher was not aware that Mr. Santiago had alleged that the selection was discriminatory until he was notified of this interview by the human resources office. Mr. Hatcher was outraged that anyone would challenge his selection of Ms. Newton given her outstanding qualifications. He also believes that Mr. Santiago is just trying to get a promotion that he is not entitled to because of the lack of promotional opportunities that has persisted because of the downsizing. Mr. Hatcher told the human resources office this and also denied being motivated by national origin bias.

Since he was made aware of the charge, Mr. Hatcher has been trying to treat Mr. Santiago exactly the same because he does not want anyone to believe that he is retaliating against Mr. Santiago.

*[**Role Player Note:** Hatcher tells the Investigator that he followed the selection procedures as directed and based his selection on the applications. He admits that he knew Newton and encouraged her to apply, but that he did carefully consider both candidates.* ***He tells the Investigator that Newton was the best qualified candidate because she met the qualifications for the job and she had knowledge of the two-year budget cycle. According to Hatcher, Santiago did not have experience with the two-year budget cycle.]***

If asked, Mr. Hatcher confirms that he has been critical of the former Director, Ms. Perez, and her management style. Mr. Hatcher feels that he has spent the last two years cleaning up the mess in the Office of Budget that she created. He also admits that in his tirades he may have mispronounced some words as she did but it was not meant as discriminatory but just frustration.

He did not give any outstanding ratings in performance evaluations in 2015 because he thought Ms. Perez inflated prior performance ratings based on what he has seen of his employees' work.

Mr. Hatcher denies making any ethnic statements or slurs about any protected group.

He acknowledges the English-only Policy but has never had to enforce it since he rarely ventures beyond his budget folks and they all speak English. He understands the policy is to ensure that all employees are able to speak English given that the employer is a federal contractor. Hatcher suggests you speak with their human resources office.

INFORMATION LEARNED FROM DENNIS HATCHER

- Hatcher selected Newton because of her qualifications, primarily her experience and knowledge of the two-year budget cycle.

- He stated that he does not believe Santiago had this experience.

- Hatcher admits to being critical of Melanie Perez's management style, but denies making any ethnic slurs about her or anyone else.

- Admits mimicking her twice but claims it was out of frustration and not motivated by racism. Absent evidence of other harassing conduct, this does not meet the severe or pervasive standard required to make a hostile work environment claim.

- Hatcher did not give outstanding performance ratings to anyone in 2015.

- The English-only Policy does not appear to be enforced but we should ask for more information to determine if it rises to the level of national origin discrimination. Hatcher appears to bear little responsibility for the policy, and therefore, it seems to shed little light on whether Hatcher's selection of Newton was discriminatory.

NEXT STEPS: WHERE ARE WE

IN OUR ANALYSIS OF THIS CHARGE?

The company has articulated a legitimate, nondiscriminatory reason for the selection of Newton and the non-selection of Santiago.

Is there evidence of pretext? Is there a conflict between Hatcher's statement that he selected Newton because of her experience in the

two-year budget cycle and charging party's experience as reflected on his application?

What can we conclude?

- Miguel Santiago applied for the position and was not selected.
- Alice Newton, non-Puerto Rican, was selected.
- The main criterion for selection was experience with two-year budget cycles.
- Santiago had less experience with the two-year budget cycle than Newton.
- Santiago's witness, Michelle DeWitt, did support the allegation that Hatcher made a comment that the previous Puerto Rican Director of the Office of Budget, Melanie Perez, could not manage her way out of a paper bag. The statement, while critical, was not ethnic in nature. Under the circumstances, the statement does not suggest national origin bias.
- In contrast to the paper bag comment, Hatcher's mimicking Perez' accent does arguably suggest national origin bias. However, given the totality of the evidence, this would not rise to the level of creating a hostile work environment.
- The company's English-only policy states that English must be spoken by all CWS employees while performing job duties. Under the EEOC's English-only guidelines, such a broad policy is likely to be difficult to justify. Even if the policy does not affect charging party, there may be others who are affected. It also may be relevant to class-wide discrimination against Hispanics. Even if it is not enforced, the evidence shows that it is posted, so the employer should be required to remove it as the mere existence of the policy could affect the employment opportunities of workers who are not native English speakers.

It appears from the evidence that we have a case which will result in a mixed finding. With respect to the promotion issue, the conclusion should be that the case may be dismissed with a no cause finding because it is unlikely that additional investigation will result in a reasonable cause finding. We would conduct a Determination Interview (DI) with charging party and issue him a Dismissal and Notice of Right to Sue.

With respect to the English-only policy we have a couple of options. Although the policy may not have been enforced, it still has that potential to be enforced at all times given that it is currently posted on the employee bulletin board.

Minimally, we need to talk with Respondent's Human Resources office and ensure that the English-only policy is taken off the bulletin board.

If the employer agrees to rescind its policy, that policy change can be memorialized with a negotiated settlement agreement to which the Respondent and the EEOC are signatories. The charging party may not want to sign the negotiated settlement agreement as he would have to give up his right to sue.

If the employer is reluctant to rescind its English-only policy, we should issue a Reasonable Cause Letter of Determination on that issue alone. We would then enter into conciliation negotiations to address the need for a policy change. We should always be mindful that when we have "policy" cases there may be some affected class members that we are unaware of; therefore, before we close this case out completely, we should conduct a few interviews to make sure there are no harmed individuals.

END OF MODULE

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
INTAKE QUESTIONNAIRE

Please immediately complete the entire form and return it to the U.S. Equal Employment Opportunity Commission ("EEOC"). **REMEMBER**, a charge of employment discrimination must be filed within the time limits imposed by law, generally within 180 days or in some places 300 days of the alleged discrimination. Upon receipt, this form will be reviewed to determine EEOC coverage. **Answer all questions as completely as possible, and attach additional pages if needed to complete your response(s). If you do not know the answer to a question, answer by stating "not known." If a question is not applicable, write "n/a."** ***(PLEASE PRINT)***

1. Personal Information

Last Name: Santiago First Name: Miguel MI: A.

Street or Mailing Address: 41009 Winding Way Road Apt Or Unit #:

City: Running Park County: Fairfax County State: VA Zip: 22877

Phone Numbers: Home: (703) 899-0103 Work: (703) 366-5222

Cell: (703) 298-4455 Email Address: msant456@yahoo.com

Date of Birth: 1/21/66 Sex: Male X Female Race: Black Do You Have a Disability? Yes ☐ No ☐X

Please answer each of the next three questions. i. Are you Hispanic or Latino? Yes X No

ii. What is your Race? Please choose all that apply. American Indian or Alaskan Native Asian Black or African American X Native Hawaiian or Other Pacific Islander White

iii. What is your National Origin Puerto Rican

Provide The Name Of A Person We Can Contact If We Are Unable To Reach You:

Name: Jesus Santiago Relationship: father

Address: same City: State: Zip Code:

Home Phone: (703) 899-0103 Other Phone: ( )

I believe that I was discriminated against by the following organization(s): (Check those that apply)

Employer X Union Employment Agency Other (Please Specify)

2. Organization Contact Information

Organization #1 Name: CWS Engineering Inc.

Address: 2518 Grover Cleveland Parkway **County:** Fairfax
City: Alexandria **State:** VA **Zip:** 22399 **Phone :**(703) 366-5200

Type of Business: manufacturing Job Location if different from Org. Address: same

Human Resources Director or Owner Name: **Phone:**

Number of Employees in the Organization at All Locations: Please Check (✓) One

Less Than 15 ☐ 15 – 100 ☐ 101 – 200 ☐ 201 – 500 ☐ More 500 X

Organization #2 Name: n/a

Address: _____ **County:** _____

City: _____ **State:** ____ **Zip:** _____ **Phone :(____)** _____

Type of Business: _____ Job Location if not at Org. Address: _____

Human Resources Director or Owner Name: _____ **Phone:** _____

Number Of Employees In The Organization At All Locations: please check (✓) one

Less Than 15 ☐ 15 – 100 ☐ 101 – 200 ☐ 201 – 500 ☐ More 500 XX

3. **Your Employment Data** (Complete as many items as you can)

Date Hired: February 1, 2012 Job Title At Hire: Budget Analyst

Pay Rate When Hired: $49,284 pa Last or Current Pay Rate: $64,949 pa

Job Title at Time of Alleged Discrimination: Budget Analyst

Name and Title of Immediate Supervisor: Dennis Hatcher, Director, Office of Budget

If Applicant, Date You Applied for Job May 1, 2016 **Job Title Applied For:** Senior Budget Analyst (promotion)

4. **What is the reason (basis) for your claim of employment discrimination?**

FOR EXAMPLE, if you are over the age of 40 and feel you were treated worse than younger employees ***or*** *you have other evidence of discrimination, you should check* ***(✓) AGE****. If you feel that you were treated worse than those not of your race* ***or*** *you have other evidence of discrimination, you should check* ***(✓) RACE****. If you feel the adverse treatment was due to multiple reasons, such as your sex, religion and national origin, you should check all three. If you complained about discrimination, participated in someone else's complaint or if you filed a charge of discrimination and a negative action was threatened or taken, you should check* ***(✓) RETALIATION****.*

Race ☐ Sex ☐ Age ☐ Disability ☐ National Origin -XX Color ☐ Religion ☐ Retaliation ☐ Pregnancy ☐

Other reason (basis) for discrimination (Explain). _____

5. **What happened to you that you believe was discriminatory? Include the date(s) of harm, action(s) and include the name(s) and title(s) of the persons who you believe discriminated against you. (Example: 10/02/10 – Written Warning from Supervisor, Mr. John Soto)**

A) Date: May 19, 2016 Action: Not promoted

Name and Title of Person(s) Responsible: Dennis Hatcher, Director of the Office of Budget

B) Date: _____ Action: _____

Name and Title of Person(s) Responsible _____

Describe any other actions you believe were discriminatory:

I was not promoted to Senior Budget Analyst. A person was hired from the outside. Her name is Alice Newton, White. I believe I am more qualified because I have been with the company for five years. I think Hatcher does not like Puerto Ricans. He criticized Melanie Perez, Puerto Rican, and said she was not a good manager and he made fun of her accent. Also, the company discriminates because it has a policy that says I cannot speak Spanish on the job.

(Attach additional pages if needed to complete your response.)

6. **What reason(s) were given to you for the acts you consider discriminatory? By whom? Title?**

The Director of the Office of Budget, Dennis Hatcher told me I was not the best qualified

7. **Name and describe others who were in the same situation as you. Explain any similar or different treatment. Who was treated worse, who was treated better, and who was treated the same? Provide race, sex, age, national origin, religion, and/or disability status of comparator if known and if connected with your claim of discrimination. Add additional sheets if needed.**

	Full Name	Job Title	Description
1.	n/a		
2.			
3.			

Answer questions 8-10 only if you are claiming discrimination based on disability. If not, skip to question 11.

8. **Please check all that apply**:
   - ☐ Yes, I have an actual disability
   - ☐ I have had an actual disability in the past
   - ☐ No disability but the organization treats me as if I am disabled

9. **If you are alleging discrimination because of your disability, what is the name of your disability? How does your disability affect your daily life or work activities, e.g., what does your disability prevents or limit you from doing, if anything? (Example: lifting, sleeping normally, breathing normally, pulling, walking, climbing, caring for yourself, working, etc.).**

10. **Did you ask your employer for any assistance or change in working condition because of your disability?**
    YES ☐ NO ☐

    Did you need this assistance or change in working condition in order to do your job?
    YES ☐ NO ☐
    If "YES", when? _____To whom did you make the request? Provide full name of person_____How did you ask (verbally or in writing)? _____

    Describe the assistance or change in working condition requested?

11. **Are there any witnesses to the alleged discriminatory incidents? If yes, please identify them below and indicate what they will say. Add additional pages if necessary.**

	NAME	JOB TITLE	ADDRESS & PHONE NUMBER
A.	Michelle DeWitt,	Budget Analyst,	(703) 366-5221
B.			
C.			

12. Have you filed a charge previously in this matter with EEOC or another agency? YES ☐ NO XX

13. If you have filed a complaint with another agency, provide name of agency and date of filing:

n/a

14. Have you sought help about this situation from a union, an attorney, or any other source?
YES ☐ NO XX - If yes, from whom and when? Provide name of organization, name of person you spoke with and date of contact. Results, if any?

None

Please check one of the boxes below to tell us what you would like us to do with the information you are providing on this questionnaire. If you would like to file a charge of job discrimination, you must do so within either 180 or 300 days from the day you knew about the discrimination. The amount of time you have depends on whether the employer is located in a place where a state or local government agency has laws similar to the EEOC's laws. **If you do not file a charge of discrimination within the time limits, you will lose your rights. If you want to file a charge, you should check Box 1, below. If you would like more information before deciding whether to file a charge or you are worried or have concerns about EEOC's notifying the employer, union, or employment agency about your filing a charge, you may wish to check Box 2, below.**

BOX 1

X	I want to file a charge of discrimination, and I authorize the EEOC to look into the discrimination I described above. I understand that **the EEOC must give the employer, union, or employment agency that I accuse of discrimination information about the charge, including my name.** I also understand that the EEOC can only accept charges of job discrimination based on race, color, religion, sex, national origin, disability, age, or retaliation for opposing discrimination.

BOX 2

_____	I want to talk to an EEOC employee before deciding whether to file a charge of discrimination. I understand that by checking this box, I have not filed a charge with the EEOC. I also understand that I could lose my rights if I do not file a charge in time.

Miguel Santiago
Signature

June 10, 2016
Today's Date

PRIVACY ACT STATEMENT: This form is covered by the Privacy Act of 1974: Public Law 93-579. Authority for requesting personal data and the uses thereof are:

1. **FORM NUMBER/TITLE/DATE.** EEOC Intake Questionnaire (10/2006).
2. **AUTHORITY.** 42 U.S.C. § 2000e-5(b), 29 U.S.C. § 211, 29 U.S.C. § 626. 42 U.S.C. 12117(a)
3. **PRINCIPAL PURPOSE.** The purpose of this questionnaire is to solicit information in an acceptable form consistent with statutory requirements to enable the Commission to act on matters within its jurisdiction. When this form constitutes the only timely written statement of allegations of employment discrimination, the Commission will, consistent with 29 CFR 1601.12(b) and 29 CFR 1626.8(b), consider it to be a sufficient charge of discrimination under the relevant statute(s).
4. **ROUTINE USES.** Information provided on this form will be used by Commission employees to determine the existence of facts relevant to a decision as to whether the Commission has jurisdiction over allegations of employment discrimination and to provide such charge filing counseling as is appropriate. Information provided on this form may be disclosed to other State, local and federal agencies as may be appropriate or necessary to carrying out the Commission's functions. Information may also be disclosed to respondents in connection with litigation.
5. **WHETHER DISCLOSURE IS MANDATORY OR VOLUNTARY AND EFFECT ON INDIVIDUAL FOR NOT PROVIDING INFORMATION.** The providing of this information is voluntary but the failure to do so may hamper the Commission's investigation of a charge of discrimination. It is not mandatory that this form be used to provide the requested information.

Santiago Case Study
Investigator Intake Notes

CP thinks discriminated because of national origin, Puerto Rican
He was hired by CWS Engineering Inc. in 2012 as Budget Analyst
Worked for Triangle Aerospace Company as Budget Tech from 7/2010 to 1/2012
Sought promotion to Senior Budget Analyst at CWS
Job was announced with deadline of May 4, 2016
CP applied May 1, 2016
CP has Bachelors Degree in Finance/Accounting

Job Announcement: ability to develop, implement and oversee the annual budget for CWS. Person needs to know the budgeting process, policies and practices/team leader duties for Budget Division/have to prepare and analyze budget options/deal with senior management/give budget information clearly to senior managers in writing and verbally.

CP says he has 7 yrs. experience in budget. Knows process, policies and practices. Has been team leader when boss, Hatcher (non-Puerto Rican) out of office for long periods. Performs several budgetary functions regarding the annual budget. He analyzes budget estimates and justifications. Works well with senior managers and offers them advice formally and informally regarding budget planning and implementation.

Alice Newton got the job. CP doesn't know her or anything about her qualifications. She is not Puerto Rican and she's from the outside. Hatcher told him he was not selected. He did not give him specifics just that Alice was better qualified.

CP says– he received outstanding reviews before Hatcher came. (2012, 2013 & 2014) In 2015, Hatcher said no one in the office was Outstanding. He said that Melanie Perez (previous Director) inflated performance ratings. He said she "could not manage her way out of a paper bag". Perez is Puerto Rican, too. Dewitt was a witness to this comment.

There are 2 other Budget Analysts—Michelle DeWitt and Harold Sykes (neither Puerto Rican)
DeWitt told CP that she overheard Hatcher making fun of Melanie's accent. Because of this CP thinks Hatcher doesn't like Puerto Ricans.

CP states he saw an English-Only Policy posted on the employee bulletin board. Does not know how it is enforced.

CP doesn't know who else applied. This is the only position CP applied for.

Investigator explained EEOC's Charge Process including ADR.

Separate Intake Notes

CP wants retroactive promotion and back pay, apology from Hatcher and commitment by R to hire more Hispanics.

Note: Investigators should put settlement information in a separate memorandum.

Assessment: CP seems credible. He was relaxed and seemed to honestly think that he didn't get the job because he is Puerto Rican. CP seems to be qualified for the job based on the application. Because we don't know the qualifications of the selectee or the reason for is non-selection the charge could be evaluated as a B. However, this Investigator recommends this charge be categorized as a "A" because of the English-Only Policy since we don't know how broad its implementation or its impact may be.

Note: Investigators should put this type of information regarding impressions (government deliberative privilege) in a separate memorandum usually the Charge Assessment Form.

EEOC Form 5 (5/01)

CHARGE OF DISCRIMINATION

This form is affected by the Privacy Act of 1974. See enclosed Privacy Act Statement and other information before completing this form.

Charge Presented To: Agency(ies) Charge No(s):

- [ ] FEPA
- [X] EEOC — 723-2017-02001

and EEOC

State or local Agency, if any

Name *(Indicate Mr., Ms., Mrs.)*	Home Phone *(Incl. Area Code)*	Date of Birth
Mr. Miguel Santiago	(703) 899-0103	1/21/66

Street Address	City, State and ZIP Code
41009 Winding Way Road	Running Park, VA 22877

Named is the Employer, Labor Organization, Employment Agency, Apprenticeship Committee, or State or Local Government Agency That I Believe Discriminated Against Me or Others. (*If more than two, list under PARTICULARS below.*)

Name	No. Employees, Members	Phone No. *(Include Area Code)*
CWS Engineering Inc.	2,600	(703) 366-5200

Street Address	City, State and ZIP Code
2518 Grover Cleveland Parkway	Alexandria, VA 22399

Name	No. Employees, Members	Phone No. *(Include Area Code)*

Street Address	City, State and ZIP Code

DISCRIMINATION BASED ON *(Check appropriate box(es).)*

- [ ] RACE
- [ ] COLOR
- [ ] SEX
- [ ] RELIGION
- [X] NATIONAL ORIGIN
- [ ] RETALIATION
- [ ] AGE
- [ ] DISABILITY
- [ ] OTHER *(Specify below.)*

DATE(S) DISCRIMINATION TOOK PLACE

Earliest	Latest
5/19/2016	5/19/2016

- [ ] CONTINUING ACTION

THE PARTICULARS ARE *(If additional paper is needed, attach extra sheet(s)):*

I was hired by the CWS Engineering in February 2012. My current position is Budget Analyst. On May 1, 2016, I applied for a promotion to the position of Senior Budget Analyst. On May 19, 2016, I learned that a non-Puerto Rican candidate from the outside was selected for the position. The company has an English-Only Policy which I think discriminates against Hispanics.

The company told me that I was not the most qualified candidate. I do not know the reason for the English-Only Policy or how it is enforced.

I believe that I have been discriminated against because of my national origin, Puerto Rican, in violation of Title VII of the Civil Rights Act of 1964, as amended.

I want this charge filed with both the EEOC and the State or local Agency, if any. I will advise the agencies if I change my address or phone number and I will cooperate fully with them in the processing of my charge in accordance with their procedures.

I declare under penalty of perjury that the above is true and correct.

6/10/2016 — *Date*

Miguel Santiago — *Charging Party Signature*

NOTARY – *When necessary for State and Local Agency Requirements*

I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.
SIGNATURE OF COMPLAINANT

SUBSCRIBED AND SWORN TO BEFORE ME THIS DATE
(*month, day, year*)

PRIVACY ACT STATEMENT: Under the Privacy Act of 1974, Pub. Law 93-579, authority to request personal data and its uses are:

1. **FORM NUMBER/TITLE/DATE.** EEOC Form 5, Charge of Discrimination (5/01).

2. **AUTHORITY.** 42 U.S.C. 2000e-5(b), 29 U.S.C. 211, 29 U.S.C. 626, 42 U.S.C. 12117.

3. **PRINCIPAL PURPOSES.** The purposes of a charge, taken on this form or otherwise reduced to writing (whether later recorded on this form or not) are, as applicable under the EEOC anti-discrimination statutes (EEOC statutes), to preserve private suit rights under the EEOC statutes, to invoke the EEOC's jurisdiction and, where dual-filing or referral arrangements exist, to begin state or local proceedings.

4. **ROUTINE USES.** This form is used to provide facts that may establish the existence of matters covered by the EEOC statutes (and as applicable, other federal, state or local laws). Information given will be used by staff to guide its mediation and investigation efforts and, as applicable, to determine, conciliate and litigate claims of unlawful discrimination. This form may be presented to or disclosed to other federal, state or local agencies as appropriate or necessary in carrying out EEOC's functions. A copy of this charge will ordinarily be sent to the respondent organization against which the charge is made.

5. **WHETHER DISCLOSURE IS MANDATORY; EFFECT OF NOT GIVING INFORMATION.** Charges must be reduced to writing and should identify the charging and responding parties and the actions or policies complained of. Without a written charge, EEOC will ordinarily not act on the complaint. Charges under Title VII or the ADA must be sworn to or affirmed (either by using this form or by presenting a notarized statement or unsworn declaration under penalty of perjury); charges under the ADEA should ordinarily be signed. Charges may be clarified or amplified later by amendment. It is not mandatory that this form be used to make a charge.

NOTICE OF RIGHT TO REQUEST SUBSTANTIAL WEIGHT REVIEW

Charges filed at a state or local Fair Employment Practices Agency (FEPA) that dual-files charges with EEOC will ordinarily be handled first by the FEPA. Some charges filed at EEOC may also be first handled by a FEPA under worksharing agreements. You will be told which agency will handle your charge. When the FEPA is the first to handle the charge, it will notify you of its final resolution of the matter. Then, if you wish EEOC to give Substantial Weight Review to the FEPA's final findings, you must ask us in writing to do so within 15 days of your receipt of its findings. Otherwise, we will ordinarily adopt the FEPA's finding and close our file on the charge.

NOTICE OF NON-RETALIATION REQUIREMENTS

Please **notify** EEOC or the state or local agency where you filed your charge **if retaliation is taken against you or others** who oppose discrimination or cooperate in any investigation or lawsuit concerning this charge. Under Section 704(a) of Title VII, Section 4(d) of the ADEA, and Section 503(a) of the ADA, it is unlawful for an *employer* to discriminate against present or former employees or job applicants, for an *employment agency* to discriminate against anyone, or for a *union* to discriminate against its members or membership applicants, because they have opposed any practice made unlawful by the statutes, or because they have made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under the laws. The Equal Pay Act has similar provisions and Section 503(b) of the ADA prohibits coercion, intimidation, threats or interference with anyone for exercising or enjoying, or aiding or encouraging others in their exercise or enjoyment of, rights under the Act.

Investigative Plan - Santiago Case

Charge Number: 723-2017-02001

Issue: Promotion and English-only Rule
Basis: National Origin, Puerto Rican
Theory: Disparate Treatment

What we Know	**What we Need** How will we get it?
• Position was posted • Position was filled - Newton • Charging party applied and was not selected	• Job Qualifications - copy of vacancy announcement; interview with Hatcher and/or HR person • Selection procedures/persons involved - Interview with Hatcher • Selection criteria - Interview with Hatcher and/or HR person • Promotion policies and procedures the company follows - - RFI • List of applicants with national origin - RFI • Application packages for charging party and Newton - RFI • Confirmation of statements regarding previous manager - Interviews with Hatcher and witnesses • Organizational chart for the Office of Budget reflecting staff name, title and national origin – RFI • Copy of English-Only Policy - RFI • Procedures for Enforcement of Implementation of Policy – RFI • Discipline records for failure to follow policy – RFI • Copy of most recent EEO-1 • Employee list • EEO Training for Mgrs? RFI

REQUEST FOR INFORMATION
Santiago v. CWS Engineering Inc.
EEOC Charge Number 723-2017-02001

Please submit your response on or before June 25, 2016.

1. Documents that reflect the company's promotion policies and procedures in effect between 6/1/2014 and 6/1/2016.

2. Provide the vacancy announcement for the position of Senior Budget Analyst in question.

3. Identify all applicants for the position of Senior Budget Analyst by name and national origin.

4. The name and national origin of the person selected.

5. The name, national origin and title of the recommending and selecting official(s).

6. The employment applications and/or resumes, of all candidates for the Senior Budget Analyst position including Miguel Santiago.

7. A listing of all promotions where Dennis Hatcher was the selecting official from June 1, 2014 to the present, identifying the following:

    a. name
    b. national origin
    c. job title before promotion
    d. promotion job title
    e. and date of promotion

8. Provide a copy of any current company policy that addresses speaking only English in the workplace.

9. Provide documents which reflect how the English-Only Policy is communicated to employees.

10. Provide documents which reflect how the English-Only Policy is enforced.

11. Provide documents which reflect any discipline imposed by CWS Engineering for non-compliance with its English-Only Policy.

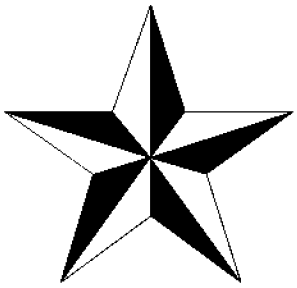
12. Provide documents which show the following for the individuals employed by CWS Engineering Inc. at the Alexandria location:

    a. name
    b. national origin
    c. job title
    d. home address
    e. home telephone number
    f. office telephone number

13. Provide a copy of CWS Engineering Inc.'s EEO policies and procedures currently in effect.

14. Provide documents which reflect training provided to all employees on CWS Engineering Inc.'s EEO policies and procedures.

Signed by: Investigator
Date: June 10, 2016



CWS Engineering Inc.
2518 Grover Cleveland Parkway
Alexandria, Virginia 22399

TO: EEOC Investigator

Response to Request for Information
Miguel Santiago v. CWS Engineering Inc.
EEOC Charge Number 723-2017-02001

In response to your request for information, the following information is provided:

1. Promotion policy: CWS Engineering Inc. always seeks to fill available positions with the most qualified candidate. We post available positions internally and externally. In order to be considered, one must apply. We do not have a "promote from within" policy like some of our competitors.

2. Copy of the vacancy announcement for the position of Senior Budget Analyst.

   See attached.

3. The names and national origins of all applicants for the position:

   Miguel Santiago – American from Puerto Rican
   Alice Newton – American of German descent

4. The name and national origin of the person selected:

   Alice Newton – American of German descent

5. The name, national origin and title of the selecting and recommending official(s):

   Dennis Hatcher, Director of the Office of Budget was both the recommending and selecting official. He is American of British descent.

6. The employment applications and/or resumes, of all candidates for the Senior Budget Analyst position including Miguel Santiago.

See attached.

7. A listing of all promotions and hires where Dennis Hatcher was the selecting official from June 1, 2014 to the present identifying:

   a. name, national origin, original job title, promotion job title and date of promotion.

May 19, 2016	Alice Newton (German), Senior Budget Analyst. Hired from another company.
March 22,2016	Maurice Brown (West Indies), Program Manager. Hired from another company.
April 10, 2016	Sara Longfellow (French, Vietnamese), Procurement Specialist, promoted to Senior Procurement Analyst from Procurement Analyst.

8. English-Only Policy attached.

9. Placed in Employee Handbook and posted on Employee Bulletin Boards.

10. English-Only Policy was created because CWS Engineering Inc. is a federal contractor which requires federal government security clearances. The employer believed employees speaking languages other than English while in the workplace may create a safety issue. There have been no reported violations of the policy.

11. None

12. Responding to this request violates Privacy laws and is irrelevant and unduly burdensome. We have provided an organization chart for the Office of Budget, at issue in this case, under the direction of Dennis Hatcher.

13. EEO Policy attached.

14. Training of CWS Engineering employees it not at issue in this case, therefore we believe it is irrelevant and respectfully decline to provide such information at this time. With over 2,600 employees nationwide, it would be unduly burdensome to gather that information.

Please let me know if you have any questions.

Signed: Rosemary Compton, HR Manager
Date: June 25, 2016

Statement

MIGUEL SANTIAGO

1. My name is Miguel Santiago. I am of Puerto Rican national origin.
2. I am employed as a Budget Analyst at CWS Engineering Inc. in the Office of Budget. I have held this position since 2012. From 2010 to 2012, I was a Budget Technician for Triangle Aerospace Company. My current supervisor is Dennis Hatcher, Director of the Office of Budget. I do not know his national origin.
3. I applied for the position of Senior Budget Analyst, which was advertised within the company and open to the public, on May 1, 2016. I submitted my application to Rosemary Compton in CWS Engineering Inc's personnel office.
4. The job qualifications for the Senior Budget Analyst position were ability to develop, implement, and oversee the annual budget for CWS Engineering Inc. Requirements for the position included knowledge of budgeting processes, policies and practices; ability to act as a team leader for the Office of Budget; ability to prepare and analyze budget options given company priorities and mandates; ability to interact with senior management; ability to present budget information in a clear and concise manner to senior personnel via written or oral communications.
5. I have experience in all of the job requirements for the Senior Budget Analyst position. I have worked in the budget process for over seven years. I understand budgeting processes, policies and practices as required by the company. I have sometimes acted as team leader in the Budget Division. This generally occurred when the Director was out of the office for extended periods.

I am responsible for performing a wide variety of budgetary functions related to implementation of the company's annual budget. I review and analyze budget estimates and justifications. I have good working relationships with senior managers and have advised them formally and informally on all aspects of budget planning and implementation. My application package for the job details my qualifications.

6. I received outstanding performance evaluations as a Budget Analyst in 2012, 2013, and 2014. I did not receive an outstanding evaluation in 2015. In 2015, Dennis Hatcher was my supervisor. He told me that he believed that the former Director of the Office of Budget, Melanie Perez, inflated performance ratings. According to Mr. Hatcher, no one in the Office of Budget was performing at the Outstanding level, although there are some very good workers in the office.

7. Mr. Hatcher was the selecting official for the Senior Budget Analyst job. I don't know how many people applied, although people from outside the company were allowed to apply. The person selected, Alice Newton, came from the outside. I don't know anything about her qualifications. Since she arrived here, she has been going to lots of meetings, and I continue to do the same things I have always done.

8. I was told by Mr. Hatcher that I was not the best qualified candidate for the job. He did not tell my any details of how my qualifications fell short.

9. I believe that Mr. Hatcher is prejudiced against Puerto Ricans. He has made ethnic slurs about the previous Director of the Office of Budget, Ms. Perez who is Puerto Rican like I am. He said that she could not manage her way out of a

paper bag. This statement was also heard by Michelle DeWitt, another Budget Analyst. He also criticized performance ratings given by Ms. Perez. Now, he has not selected me for this job for which I am clearly very qualified.

10. Michelle DeWitt also told me that a couple of times she overheard Dennis Hatcher making fun of Ms. Perez's accent which I find offensive.

11. The company also has posted a policy that says you can only speak English in the workplace, which I find offensive.

13. I have no further information about this matter.

Statement Taken by:_____ Investigator

Date:_____

CWS Engineering Inc.

Vacancy Announcement

SENIOR BUDGET ANALYST

Deadline: May 4, 2016

Contact: Rosemary Compton
Phone: (703) 366-5115
Office of Human Resources

Duties and Responsibilities:

Incumbent serves as senior budget analyst and is responsible for the development, justification, presentation, execution and financial operations of CWS Engineering Incorporated's program and budgets. Advisor to the Director of the Office of Budget on all aspects of budget formulation, policy, execution and/or forecasting issues. Reviews and evaluates complex budgetary issues to assess the overall impact of the broad issues in terms of short term and long range program direction. Reviews and evaluates significant financial management and budget execution issues affecting overall program operations. Prepares and arranges briefings for the Director of the Office of Budget and the CEO, CWS Engineering Incorporated's, on unresolved/complex policy issues involving budget and other policy-related documents. Prepares forecasts of all expenditures required for quarterly, annual and multi-year budget estimates, especially two-year budget cycle conversion. Represents the Director of the Office of Budget in meetings, conferences and other activities. Supervises junior budget analysts and support staff.

Qualification Requirements:

Specialized experience working with corporate budgeting. A Masters Degree in Finance or Business Administration is not required, but highly desired. Experience with two-year budget cycles is required.

Competitive Salary and Benefits Package

PROMOTION APPLICATION

FOR

MIGUEL SANTIAGO

APPLICATION FOR EMPLOYMENT

==========

VACANT POSITION: Senior Budget Analyst

LAST NAME: Santiago FIRST, MIDDLE: Miguel Alberto

SOCIAL SECURITY NUMBER: 542-99-0913

MAILING ADDRESS: 41009 Winding Way Road

CITY/STATE/ZIP: Running Park, VA 22877

PHONE NUMBERS DAYTIME: (703) 366-5222

EVENING: (703) 899-0103

==========

WORK EXPERIENCE: Describe your paid and nonpaid work experience related to the job for which you are applying. (Do not attach job descriptions)

1) JOB TITLE: Budget Analyst

FROM:02/2012 TO: present

SALARY: $64,949 pa HOURS PER WEEK: 40

EMPLOYER'S NAME: CWS Engineering Inc., Office of Budget
AND ADDRESS: 2518 Grover Cleveland Parkway
Alexandria, VA 22399

SUPERVISOR'S NAME: Dennis Hatcher (703) 366-5200

DUTIES: I perform a variety of budgetary functions related to implementation of the company's budget. I am responsible for reviewing and evaluating complex budgetary issues to assess the overall impact on company programs, policies and procedures. I perform administrative duties in support of these activities as well. I advise managers on all aspects of budget planning and implementation. I review and analyze budget estimates and justifications, requests for allotments, and obligating documents submitted by managers to determine accuracy of technical treatment and format and conformance with budgetary guidelines. I prepare written and oral summaries of budget options and alternatives for managers. I work closely with senior management to ensure that the company's budget programs and policies adhere to standards and guidelines for the company.

2) JOB TITLE Budget Technician

FROM: 7/2010 TO: 1/2012

SALARY: $35,510 pa HOURS PER WEEK: 40

EMPLOYER'S NAME: Triangle Aerospace Company
AND ADDRESS: 5251 McKinley Road
Silver Spring, MD 22119

SUPERVISOR'S NAME: Rebecca Dobson (301) 554-9986

DUTIES: I performed budget analyses and reviews for the Office of Operations and Development at this company. Applying policies and procedures consistent with company guidelines, I determined the feasibility of various budget options and drafted memoranda and reports for the Director of Operations and Development. I assisted in the preparation of annual budgets for submission to senior management, revised budget estimates, and prepared support documentation for the annual budgets. During my employment, I also participated in the conversion of the budget software to FINFUN, a sophisticated budget planning, development and tracking program.

EDUCATION

MARK HIGHEST LEVEL COMPLETED: Some HS [ ] Bachelor [X]
HS/GED [ ] Master [ ]
Associate [ ] Doctoral [ ]

LAST HIGH SCHOOL or GED SCHOOL: Roosevelt High School
CITY/STATE/ZIP (if ZIP known): 4416 Manor Road,
Paradise, FL

YEAR DIPLOMA or GED RECEIVED: 2005

COLLEGES AND UNIVERSITIES ATTENDED (Do not attach a copy of your transcript unless requested.)

NAME: Maryland State University

CITY/STATE/ZIP: Ocean Grove, MD 20556

SEMESTER CREDITS EARNED: 124 MAJOR(S): Accounting/Finance
(or)
QUARTER CREDITS EARNED:

DEGREE (If any): B.S. YEAR RECEIVED: 2010

NAME: Virginia State College

CITY/STATE/ZIP: Alexandria, VA 22395

SEMESTER CREDITS EARNED: 10 MAJOR(S): Business Administration
(or)
QUARTER CREDITS EARNED:

DEGREE (If any): n/a YEAR RECEIVED:

==========

OTHER QUALIFICATIONS

Training Courses
FINFUN - Basic (2010)
FINFUN - Advanced (2010)
Options for a two year budget cycle (2012)
Budget Preparation (2013)
Diversity (2010)
Finance (Virginia State College graduate course), Fall 2014
Public Administration Seminar (Virginia State College graduate course), Spring 2015
Accounting Systems (Virginia State College graduate course), Spring 2014

Computer Skills
Lotus 123
Excel
Word
Quicken
Kiplinger's

Job-related honors, awards, and special accomplishments
Outstanding Performance Ratings in 2012, 2013, 2014
Employee of the Month, December 2013

==========

APPLICANT CERTIFICATION

I certify that, to the best of my knowledge and belief, all of the information on and attached to this application is true, correct, complete and made in good faith. I understand that false information on this application may be grounds for not hiring me or for firing me after I begin work.

SIGNATURE: *Miguel Santiago* DATE SIGNED: May 1, 2016

Job Application

Alice Newton

APPLICATION FOR EMPLOYMENT

==========

Job Title in Announcement: Senior Budget Analyst

Last Name:	First and Middle Names	Social Security Number:
Newton	Alice Grace	144-90-8741

Mailing Address:
6916 16th Street, NW

City/State/Zip:
Washington, DC 20018

Phone Numbers (include area code)
Day: (202) 886-4432

Evening: (202) 986-1744

==========

WORK EXPERIENCE

Describe your paid and nonpaid work experience related to the job for which you are applying. Do not attach job descriptions.

1) **Job title** Budget Analyst

From	**to**	**Salary**	**Hours per week**
11/13	present	$79,148	40

Employer's name and address
Outer Space Propulsion Company
1406 New York Avenue, NW
Washington, DC 20908

Supervisor's name and phone number
Felix Munger
(202) 886-4450

Describe your duties and accomplishments

Responsible for development and implementation of the annual budget. Prepare budget analyses to address funding options for various programs. Review and recommend modifications to policies and procedures regarding budget formulation and implementation. Supervise budget technician. Serve as Team Leader on company Task Force on Viability of Two-Year Budget Cycle, develop strategies and identify issues related to implementation of two-year budget cycle at the company. Provide guidance to program managers on all aspects of budget formulation, policy, implementation, and forecasting. Brief company leadership on potential issues and possible resolutions to budget problems. Monitor policy developments and evaluate short-term and long-term impacts on budget program and policies.

2) **Job title** Budget Analyst

From	**to**	**Salary**	**Hours per week**
11/12	11/13	60,890	40

Employer's name and address
Jennings AeroNautics
413 Illinois Avenue, NW
Washington, DC 20908

Supervisor's name and phone number
Sandra Williams
(202) 456-4337

Describe your duties and accomplishments

Responsible for development and implementation of budget for ($500 million budget in fiscal year

2008). Reviewed, analyzed, and evaluated budget options incorporating funding alternatives. Prepared recommendations on budget issues for consideration by senior management. Kept abreast of developments in company budget policies and practices. Monitored budget implementation and reviewed budget documentation submitted.

3) **Job title** Budget Analyst

From	to	Salary	Hours per week
9/06	10/11	$51,204	40

Employer's name and address
National Finance Company
28000 Technology Way
Rockville, MD 22390

Supervisor's name and phone number
Leon St. Cloud
(301) 891-4469

Describe your duties and accomplishments
Responsible for preparing budget analyses. Evaluated budget plans, monitored budget implementation, and reviewed supporting documentation. Reviewed and critiqued options for multi-period budget cycles; provided input for task force reports.

4) **Job title** Financial Intern

From	to	Salary	Hours per week
8/05	8/06	$20,829	40

Employer's name and address
National Finance Company
28000 Technology Way
Rockville, MD 22390

Supervisor's name and phone number
Leon St. Cloud
(301) 891-4469

Describe your duties and accomplishments
Assisted budget analysts in preparation, review and implementation of annual budget. Performed administrative functions in support of budget preparation and implementation. Drafted memoranda to program managers regarding budget issues and their impact.

5) **Job title** Bookkeeper

From	to	Salary	Hours per week
7/2000	7/05	$7.50/hour	40

Employer's name and address
Scientific Exports, Inc.
1800 N Street, NW
Washington, DC 20036

Supervisor's name and number
Omar Sharif
(202) 466-0999

Describe your duties and accomplishments
Responsible for all bookkeeping duties for small firm specializing in export of scientific instruments and devices. Prepared annual financial statements, tax returns, and operating statements for President of firm.

EDUCATION

Mark Highest Level Completed: Some HS [ ] HS/GED [ ] Associate [ ] Bachelor [ ] Master [X] Doctoral [ ]

Last High School or GED School:	Barrington High School
City/State/ZIP (if ZIP known):	Fair Haven, NY
Year Diploma or GED Received:	1994

Colleges and Universities Attended (Do not attach a copy of your transcript unless requested.)

Name:	**Credits Earned: Semester (or) Quarter**	**Major(s):**
Burnside College	145	Finance/Public Admin.

City/State/ZIP:	**Degree (If any):**	**Year Received:**
Brook Haven, VA	Double B.A.	2000

Name:	**Credits Earned: Semester (or) Quarter**	**Major(s):**
Maryland State University	83	Business Administration

City/State/ZIP:	**Degree (If any):**	**Year Received:**
Ocean Grove, MD 20556	M.B.A.	2010

OTHER QUALIFICATIONS

Job-Related Training.

Management Development, 40 hours, August 2013.
Budget Development for Companies, 27 hours, September 2013.
Budget Cycles, 8 hours, May 2013.
Financial Management Systems, 35 hours, December 2012.
Beyond FINFUN - the Next Generation of Budgeting Software, 21 hours, September 2012.
FINFUN for Companies - 14 hours, July 2011.
FINFUN Basics - 24 Hours, December 2010.

Job-related skills.

Familiar with all computer-based budget software, including FINFUN.
Excel, QuattroPro
Lotus 123
Oracle Database Systems

Job-related Awards, Honors, and special accomplishments.

Recipient of numerous performance awards and bonuses from various employers from 2008-2014

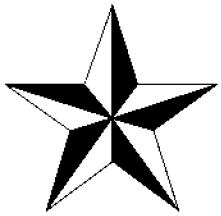
APPLICANT CERTIFICATION

I certify that, to the best of my knowledge and belief, all of the information on and attached to this application is true, correct, complete and made in good faith. I understand that false information on this application may be grounds for not hiring me or for firing me after I begin work.

SIGNATURE: *Alice Newton* **DATE SIGNED** *May 1, 2016*

OFFICE OF BUDGET

ORGANIZATION CHART



CWS ENGINEERING INC.

Office of Budget

Office of the Director
- Director
  - Dennis Hatcher (British) 366-5200
- Assistant Director
  - Maurice Brown (West Indies) 366-5205
- Executive Assistant
  - Thelma Hickey (United States) 366-5200

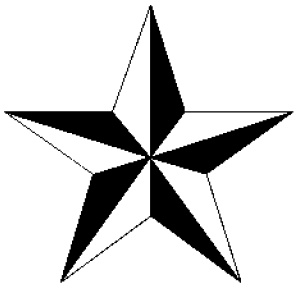
Budget Division
- Senior Budget Analyst
  - Alice Newton (German) 366-5220
- Budget Analyst
  - Miguel Santiago (Hispanic) 366-5222
- Budget Analyst
  - Michelle DeWitt (Guyana, Lithuania) 366-5221
- Budget Technician
  - Harold Sykes (British) 366-5225

Procurement Division
- Senior Procurement Analyst
  - Sara Longfellow (French, Vietnamese) 366-5230
- Procurement Analyst
  - William Rodman (national origin unknown) 366-5233
- Procurement Clerk
  - Evelyn Hargrove (United States) 366-5231

Resource Management Division
- Senior Management Specialist
  - Beverly Spellman (Nigeria) 366-5240
- Management Assistant
  - Thomasina Everett (Haiti, United States) 366-5241

Operational Planning Division
- Senior Analyst
  - (Vacant)
- Operations Analyst
  - Michael Bartok (Hungarian) 366-5210
- Planning Assistant
  - Henrietta Jones (West Africa)

..... 366-521



CWS Engineering Inc.

2518 Grover Cleveland Parkway
Alexandria, Virginia 22399

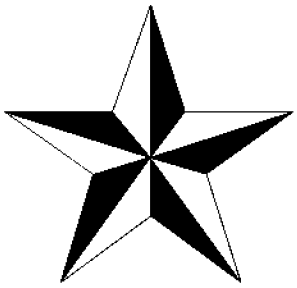
EEO Policy

Our policy at CWS Engineering Inc.is to provide an equal employment opportunity to all applicants and employees without regard to race, color, religion, sex, sexual orientation, national origin, age, disability, veteran status or any other legally protected status.

Similarly, all personnel policy, actions, and programs are administered without regard to race, color, religion, sex, sexual orientation, national origin, age, disability, or any other legally protected status. Discrimination in employment is strictly prohibited and will not be tolerated. Any employee who feels that he/she has been subjected to discrimination of any kind by another employee, management, officer, agent of the company, customer, other federal contractor, vendor, or other non-employee, is requested to immediately report the incident directly to his/her supervisor or manager or to Rosemary Compton in Human Resources.

Knowledge of such incidents is very important to us and, consequently, we maintain a strict open door policy with regard to these matters. You can be assured that a thorough investigation will be conducted in an effort to resolve the situation in an equitable and timely fashion.

Associates with questions regarding this policy may contact Rosemary Compton in Human Resources. The utmost discretion will be used in handling such matters.



CWS Engineering Inc.
2518 Grover Cleveland Parkway
Alexandria, Virginia 22399

English-Only Policy

TO: All Employees

CWS is committed to providing an environment that is inclusive of all peoples. While we respect all cultures and languages we recognize that being able to communicate in one language is critical to maintaining an office and/or manufacturing environment that is safe for all involved. For this reason, CWS Engineering has adopted a policy which requires its employees to speak only English while performing their job duties. Employees may speak any language before and after work and when on break/lunch. We appreciate and expect your cooperation. We thank you in advance. Management.

Statement
Michelle DeWitt

1. My name is Michelle DeWitt. My mother is from Guyana and my father is from Lithuania.
2. I am a Budget Analyst in the Office of Budget at CWS Engineering Inc. I have held this position for about 5 years. My current supervisor is Dennis Hatcher. He is the head of the Office of Budget. He's been in that job almost two years now.
3. My previous supervisor was Melanie Perez. She left a couple of years ago.
4. Dennis Hatcher holds meetings with the Budget Division staff usually once or twice a month. We have more meetings if the budget cycle is coming to a close. Sometimes we meet with him individually, too.
5. At one of the Budget Division meetings, Dennis Hatcher stated something along the lines that Melanie Perez couldn't manage her way out of a paper bag. I do not recall when this statement was made. This statement was made in front of the entire Budget Division staff.
6. I have not heard Mr. Hatcher specifically make any derogatory comment or connotation about Ms. Perez related to her ethnicity or about any ethnic groups.
7. A couple of times I did hear Mr. Hatcher pronounce certain words the way Ms. Perez does with a Spanish accent.
8. I know that Miguel Santiago was convinced that the paper bag comment was a slur against Melanie and all Hispanics, but I do not agree. There is a difference between being disrespectful of someone's ancestors and being critical of someone's management style.

9. I do not think it was right for him to make fun of her accent, however, it is not her fault she speaks that way.

10. In 2015, Mr. Hatcher refused to give anyone an outstanding performance evaluation because he thought that Melanie Perez inflated the performance ratings.

11. I have seen an English-Only Policy posted on the employee bulletin board.

12. I do not know anything more than that about the policy.

13. I have no further information about this matter.

Statement Taken by: _____ Investigator

Date: _____

SANTIAGO CASE STUDY

PROFILE OF DENNIS HATCHER

(***Role Player's Note:*** *Dennis Hatcher role players will have most of the information they need from the witness PROFILE. Hatcher role players should be natural: they should not take on the role of a totally hostile witness. They should not deviate too far from the basic factual scenario provided. The purpose of these exercises is NOT to demonstrate how good the role players are at stonewalling.)*

Dennis Hatcher is the Director of the Office of Budget at CWS Engineering, Inc. His national origin is British. He was placed in this position almost two years ago after serving as the Executive Assistant to Valerie Simon, CEO of CWS Engineering, Incorporated. During his tenure with CWS Engineering, Inc., the company has seen dramatic downsizing and cuts in its budget. The result has been a severe shortage in qualified senior managers within the company.

When Mr. Hatcher became Director of the Office of Budget, he replaced Melanie Perez, Puerto Rican, who had left the Office of Budget in disarray. His first priority was to realign staff and fill critical positions to ensure that the budgetary operations of CWS Engineering, Inc. were not at risk.

Mr. Hatcher received authority from Valerie Simon to fill three critical senior positions in the Office of Budget: Assistant Director, Senior Procurement Analyst, and Senior Budget Analyst. He selected Maurice Brown as Assistant Director and Sara Longfellow as the Senior Procurement Analyst. Both were outside hires. Mr. Hatcher believes Maurice Brown is from the West Indies. He does not know Sara Longfellow's national origin.

(***Role Player's Note:*** *You may refer to the Organization Chart for the Office of Budget for the names and national origins of employees in the Office of Budget.)*

Mr. Hatcher's second priority in the Office of Budget was to build a staff with sufficient budget experience and expertise to participate in the pilot project in which CWS Engineering, Inc. could operate under a two-year budget cycle. He is anxious to show that the company can operate under such a system and that the benefits of the two-year budget cycle are tremendous in terms of ability to plan and implement programs within the company.

Because of Mr. Hatcher's priorities, he wanted a Senior Budget Analyst who was familiar with the operational requirements of a two-year budget cycle. He met Alice Newton while attending a workshop and was impressed with her quick mind and knowledge of the budget cycles. She also seemed to grasp the finer points of the two-year budget cycle. During the workshop several months ago, he told her that he would be filling a Senior Budget Analyst position and that he would really like her to apply for the position. He did not tell her that he would hire her.

After the vacancy announcement for the Senior Budget Analyst position was posted and applications submitted, Mr. Hatcher received word from Rosemary Compton in the human resources office that two applicants were minimally qualified, Mr. Santiago and Ms. Newton. Ms. Compton included a transmittal memorandum that explained that Mr. Hatcher should review and evaluate the applications. Mr. Hatcher could base his selection on the applications or he could conduct interviews. However, Mr. Hatcher already knew Mr. Santiago's background and his application did not reveal any additional information. He called Ms. Compton and told her that he had made his selection of Ms. Newton and to please notify her. He also informed Mr. Santiago that he had not been selected. He does not recall the exact date but refers Investigator to human resources.

Mr. Hatcher was not aware that Mr. Santiago had alleged that the selection was discriminatory until he was notified of his interview by the human resources office. Mr. Hatcher was outraged that anyone would challenge his selection of Ms. Newton given her outstanding qualifications. He also believes that Mr. Santiago is just trying to get a promotion that he is not entitled to because of the lack of promotional opportunities that has persisted because of the downsizing. Mr. Hatcher told the human resources office this and also denied being motivated by a bias against Puerto Ricans.

Since he was made aware of the charge, Mr. Hatcher has been trying to treat Mr. Santiago exactly the same because he does not want anyone to believe that he is retaliating against Mr. Santiago.

(***Role Player's Note:*** *Hatcher tells the Investigator that he followed the selection procedures as directed and based his selection on the applications. He admits that he knew Newton and encouraged her to apply, but that he did carefully consider both candidates.* ***He tells the Investigator that Newton was the best qualified candidate because she met the qualifications for the job and she had knowledge of the two-year budget cycle. According to Hatcher, Santiago did not have experience with the two-year budget cycle.)***

If asked, Mr. Hatcher confirms that he has been critical of the former Director, Ms. Perez, and her management style. Mr. Hatcher feels that he has spent the last two years cleaning up the mess in the Office of Budget that she created. He did not give any outstanding ratings in performance evaluations in 2015 because he thought Ms. Perez inflated prior performance ratings based on what he has seen of his employees' work.

Mr. Hatcher denies making any ethnic statements or slurs about any protected group. When pressed he admits mispronouncing a few rods like Ms. Perez but claims it was because he was "punchy" one day and upset with the mess she left in the department. He quickly adds that it was not meant to be mean-spirited or racist.

He is aware of the English-Only Policy because it is posted on the employee bulletin board but he has never enforced it. He was never given any training by human resources on how to enforce it and has never heard of anyone enforcing it. He is not aware of any violations of that policy because, frankly, the few employees in the Budget Office are not very social people so he has not had the opportunity to really see them interact very much.

Statement
DENNIS HATCHER

1. My name is Dennis Hatcher. My national origin is British.
2. I am the Director of the Office of Budget for CWS Engineering Inc. I was placed in this position almost two years ago after serving as the Executive Assistant to Valerie Simon, CEO of CWS Engineering Inc.
3. During my tenure with CWS Engineering Inc., the company has seen dramatic downsizing and cuts in its budget. The result has been a severe shortage in qualified senior managers within the company.
4. When I became Director of the Office of Budget, I replaced Melanie Perez. My first priority was to realign staff and fill critical positions to ensure that the budgetary operations of the company were not at risk. A few months ago, I received authority from Valerie Simon to fill three critical senior positions in the Office of Budget: Assistant Director, Senior Procurement Analyst, and Senior Budget Analyst. I filled these positions with selectees from outside of the company. I hired Maurice Brown to be my Assistant Director. I believe that Maurice is from the West Indies. I hired Sara Longfellow to be the Senior Procurement Analyst. I do not know Sara's national origin.
5. My second priority in the Office of Budget was to build a staff with sufficient budget experience and expertise to allow the company to run a pilot project that would test a two-year budget cycle for the company instead of the usual one-year cycle. I participated in a company initiative to explore the viability of moving from the one-year to a two-year budget cycle. I fully support the implementation of a

two-year budget cycle. I believe that CWS Engineering can operate under such a system and that it would reap tremendous benefits in terms of our ability to plan and implement other programs within the company.

6. For the position of Senior Budget Analyst, I wanted a person who was familiar with the operational requirements of a two-year budget cycle. I met Alice Newton while at a workshop and was impressed with her quick mind and knowledge of the budget cycles. She also seemed to grasp the finer points of the two-year budget cycle. While attending the workshop, I told her that I would be filling a Senior Budget Analyst position and suggested that she apply for the position. I made no promises that I would hire her.

7. Personnel prepared and posted the notice for the Senior Budget Analyst position. They reviewed and ranked the applications. I received a list of the qualified candidates and their applications from Rosemary Compton in the company's human resources office. It was Santiago and Newton. I was instructed to review and evaluate the applications. I was also told that I did not have to conduct interviews to make a selection. I selected Alice Newton for the position and notified human resources of my choice.

8. After carefully considering the applications, I selected Alice Newton because she was the best qualified candidate for the job. She met the qualifications and she had knowledge of the two-year budget cycle. Santiago did not.

9. I have criticized the former Director, Melanie Perez because of her lack of management skills. She left the Office of Budget in a state of disarray and I have spent the last two years trying to remedy that situation.

10. I did not give anyone outstanding ratings in performance evaluations in 2015. I believe that in the past, the former Director inflated performance ratings. In my opinion, no employee in the Office of Budget has demonstrated outstanding work performance.

11. I have never made any ethnic statements or slurs about any group.

12. I admit that I may have mimicked how Melanie Perez pronounced certain words once or twice but I deny that it was mean-spirited or racist.

12. I never enforced the English-Only Policy and was never trained on it.

13. I have no further information about this matter.

Interview by: _____ Investigator

Date:_____

Observer Instruction Sheet

As the observer, you should note the techniques used by the Investigator to conduct the interview with Dennis Hatcher and also how Hatcher responded to the Investigator:

-Did the Investigator start the interview with an introductory statement?
-Did the Investigator swear the witness in?
-Did the Investigator try to put the witness at ease? How?
-What types of questions did the Investigator use to elicit information from Hatcher? Did the Investigator adjust his/her methods during the interview? Describe?
-Observations about Hatcher's credibility?

National Origin Discrimination

Diversity of the American Workforce

- In 2015, 26.1 million foreign born persons were in U.S. Labor Force, compromising 16.7% of the total
- Hispanics accounted for 48.8% of the foreign-born labor force in 2015, and Asians accounted for 24.1%
- U.S. Bureau of Labor Statistics

What is "National Origin"?

- Place of origin
  - Country or former country
  - Geographic region closely associated with a national origin group
- Ethnic or national origin group
  - Group members share a common language, culture, ancestry, race, and/or other social characteristics

What is "National Origin" Discrimination?

- Title VII of the Civil Rights Act of 1964 prohibits employer actions that have the purpose or effect of discriminating against persons because of their national origin
  - Perception
  - Association
- National origin discrimination may accompany discrimination on other protected bases, for example:
  - Religion, when a particular religion is strongly associated with a specific national origin
  - Race, when adverse treatment is based on physical traits
  - Sex, when women of only one national origin are sexually harassed
  - "Intersectional" discrimination

Employment Decisions

- Title VII prohibits employers from basing **employment decisions** on an individual's national origin
- Employment decisions include:
  - Recruitment
  - Hiring and promotion
  - Transfer
  - Wages/Benefits
  - Segregation and classification
  - Work Assignments
  - Leave
  - Training and apprenticeship programs
  - Discipline
  - Layoff and Termination
  - Other terms and conditions of employment

Employment Decisions: Recruitment

- An employer may not engage in recruitment practices that discriminate on the basis of national origin, including:
  - Deliberately refusing to recruit employees based on national origin
  - Adopting practices, such as word-of-mouth recruitment, that have the purpose or effect of discriminating based on national origin
- Employment agencies
  - Recruitment
  - Referral

Employment Decisions: Hiring, Promotion, and Assignment

- No co-worker or customer preference
- No job segregation or segregation in assignments
- Security requirements

Employment Decisions: Discipline, Demotion, and Discharge

- Discipline, demotion, and discharge decisions must be made without regard to national origin
- Workplace rules and policies must be enforced even-handedly for similar employees, and must otherwise be nondiscriminatory in design and intent

Harassment

- Harassment because of national origin is unlawful when the conduct is:
  - Unwelcome; and
  - Sufficiently severe or pervasive to objectively alter work conditions by creating a hostile or abusive work environment, and is subjectively perceived that way.
- Harassment may include:
  - Ethnic slurs
  - Workplace graffiti
  - Offensive conduct based on foreign culture, foreign accent, etc.
- Employer liability
  - Owner vs. supervisor vs. coworker or outsider

Example: National Origin Harassment

Muhammad, an Arab-American, works for XYZ Motors, a large automobile dealership. His coworkers regularly call him names like "camel jockey," "the local terrorist," and "the ayatollah," and intentionally embarrass him in front of customers by claiming that he is incompetent. Muhammad reports this conduct to higher management, but XYZ does not respond. The constant ridicule has made it difficult for Muhammad to do his job.

Language Issues: Accent

- Language is closely associated with national origin and ethnicity
- An employer may not base an employment decision on an individual's foreign accent unless:
  - The ability to speak in English is required to perform job duties effectively; *and*
  - The individual's accent **materially interferes** with job performance

Language Issues: Fluency

- English Fluency Requirement
  - Lawful only *if* fluency is demonstrated to be required for the effective performance of the job for which it is imposed
- Foreign Language Fluency
  - As with English fluency, foreign language fluency must be necessary for the position for which it is imposed
  - Employer may assign work based on foreign language ability

Language Issues: Language-Restrictive Policies

- A language-restrictive policy limits the language workers may speak
- A language-restrictive policy must be adopted for nondiscriminatory reasons
- Policies that apply at all times, including personal time, are presumed to violate Title VII
- Policies that apply in limited circumstances are lawful only if needed to promote safe/efficient job performance or safe/efficient business operations
  - Employers must provide adequate notice to workers of policy
- A language-restrictive policy may contribute to a hostile work environment

Citizenship-Related Issues

- Foreign nationals employed in the U.S. protected by Title VII
- Title VII prohibits national origin discrimination but not discrimination only due to citizenship or lack thereof
- Title VII is violated if citizenship discrimination has the "purpose or effect" of also discriminating on the basis of national origin
- Non-citizens may have claims under other federal statutes:
  - Anti-Discrimination Provision of the Immigration and Nationality Act
  - Fair Labor Standards Act
  - Special visa provisions (e.g. H-1B, H-2A visas)

Related Issues: Retaliation

- Title VII prohibits retaliation against an applicant or employee because he participated in a protected activity
- Protected activity:
  - Opposing a practice reasonably believed to be employment discrimination
  - Filing a charge, testifying, assisting, or participating in an investigation, proceeding, or hearing under the statute

Related Issues: Foreign Employers in the U.S and American Employers Overseas

- Foreign employers in the U.S. are covered by Title VII and other EEO laws for all applicants or employees, including foreign nationals
  - Only when permitted by treaty may foreign employers *favor* their own nationals in the U.S.
- Foreign employers overseas are not covered by Title VII even when they employ U.S. citizens
- U.S. employers of U.S. citizens oversees are subject to Title VII