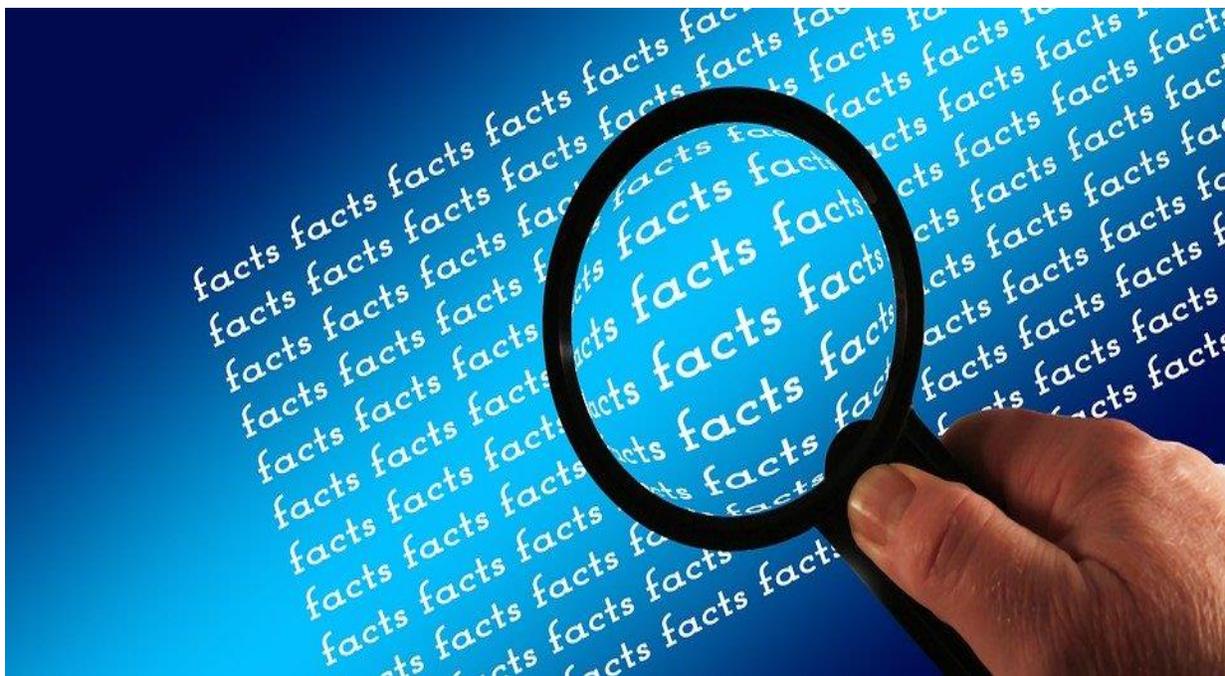




EEOC
Training Institute
...Learn from the Experts

EEO for New Investigators



Participant Training Manual

**Provided by:
the US Equal Employment Opportunity Commission**

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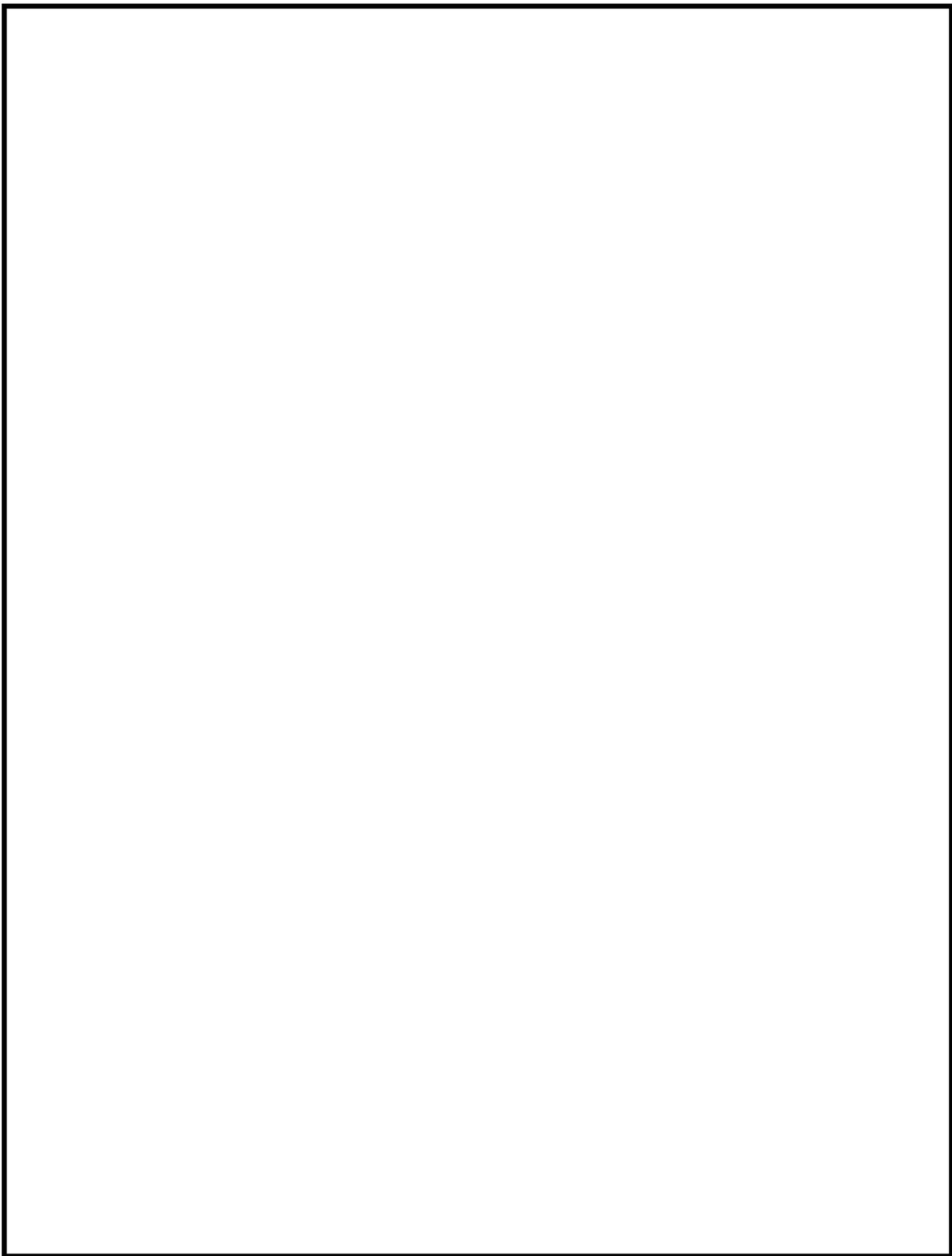
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INTRODUCTION

Welcome to the Equal Employment Opportunity Commission's (EEOC's) EEO Investigator Training Course. As the name states, this course is designed for people who are new to the equal employment opportunity (EEO) investigations field. EEOC is confident that the workshops and opportunity for interaction with your peers and our experienced trainers, together with the course materials and other reference materials available at your agency and on our website at www.eeoc.gov, will provide you with the necessary skills to investigate EEO complaints for federal agencies. As you may know, EEOC regulations require that all new investigators, including contract and collateral-duty investigators, must have completed at least thirty-two (32) hours of investigator training before conducting investigations. In addition, all investigators are required to receive at least eight (8) hours of continuing investigator training every fiscal year. This course is structured to ensure compliance with Title 29 of the Code of Federal Regulations (C.F.R.), Part 1614.108, and the standards laid out in EEOC Management Directive 110 (MD-110), Chapter 6, Section II. It is important that you attend and participate in each module of this 32-hour course in order to receive an EEOC certification of training.

We look forward to a productive and rewarding week.

COURSE OBJECTIVES

The purpose of this training is to introduce you to the investigative tools and techniques you will use as a federal EEO investigator to collect and discover factual information concerning claims of employment discrimination. At the end of the course, you will become a certified EEO investigator and will be able to investigate federal employment discrimination complaints.

This training will provide you with the tools necessary to do the following:

1. Understand the basics of EEO law and theories of discrimination
2. Understand the federal-sector EEO process as set forth in 29 C.F.R. Part 1614
3. Apply models of proof in employment discrimination cases
4. Gather and analyze evidence under the appropriate theory of discrimination
5. Understand the elements of disability discrimination and harassment cases
6. Plan an EEO investigation
7. Interview complainants, management officials, and other witnesses
8. Use different investigative methods, including Requests for Information, to obtain documents and medical information
9. Develop an impartial and appropriate factual investigative record that will enable a reasonable fact finder to draw conclusions as to whether discrimination occurred
10. Draft an investigative summary

We hope that this training will teach you to ask questions. Our expectation is that you will leave after 32 hours with an appreciation for the complexities of the work that you do and an understanding that there are resources available to help you find the answers to your questions.

There also are many ideas and skills we want you to take back with you to your workplace when this training is over. We expect to lay a foundation from which you will continuously build on your ability to do the following:

Get the facts: You will develop the tools necessary to focus on getting the facts during witness interviews, through Requests for Information, and by reviewing documents.

Be inquisitive: You will learn how to ask the right question at the right time and develop the ability to inquire about every aspect of a factual situation that may be relevant.

Plan carefully: You will learn to plan an investigation and to develop well-thought-out plans for conducting interviews and for analyzing evidence.

Be flexible: You will develop your ability to “switch gears” whenever warranted by the situation and be able to recognize when to adjust your approach to conducting an investigation or interview.

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.

Be methodical and organized: You will learn how to keep track of tasks and schedules to ensure timely completion of each investigation in your workload, and you will learn how to keep logical, organized investigative files.

Use common sense: In addition to using your newly acquired investigative skills, we will emphasize the importance of using all the work and life skills you had before embarking on this course; investigations are all about human stories and human experiences, and all of your life experience outside this course will come into play as you make decisions, and gather and organize evidence.

Be confident: We hope that this training will increase the level of confidence you have in yourself as an EEO investigator.

EEO for New Investigators Agenda Day One

Time	Topic/Activity
8:30 am to 9:30 am	Welcome/Introduction/Icebreaker
9:30am to 10:30 am	TAB A: What You Will Be Doing as an Investigator: Challenges and Issues for Investigators What You Will Learn in this Course/ Course Expectations
10:30 am to 10:45 am	BREAK
10:45 am to 12:00 pm	The Federal Sector EEO Process: How Does a Complaint Become a Complaint?
12:00 pm to 1:00 pm	LUNCH
1:00 pm to 2:00 pm	TAB B: Federal Employment Laws and Threshold Issues
2:00 pm to 2:15 pm	BREAK
2:15 pm to 4:30 pm	Theories and Analyses of Discrimination Claims
4:30 pm to 5:00 pm	Wrap-Up

EEO for New Investigators Agenda Day Two

Time	Topic/Activity
8:30 am to 9:30 am	Icebreaker/Recap
9:30am to 10:30 am	Theories and Analyses of Discrimination Claims, cont'd Fragmentation
10:30 am to 10:45 am	BREAK
10:45 am to 12:00 pm	TAB C: Case Management
12:00 pm to 1:00 pm	LUNCH
1:00 pm to 2:00 pm	Developing Investigative Plans TAB F: Models of Proof
2:00 pm to 2:15 pm	BREAK
2:15 pm to 4:30 pm	Requests for Information TAB C: Investigative Interviews
4:30 pm to 5:00 pm	Wrap-Up

EEO for New Investigators

Agenda Day Three

Time	Topic/Activity
8:30 am to 9:30 am	Icebreaker/Recap
9:30am to 10:30 am	TAB D: Introduction to Case Studies
10:30 am to 10:45 am	BREAK
10:45 am to 12:00 pm	Discussion: Investigative Interviewing and Writing Affidavits Interview: Complainant Miguel Santiago Review Affidavit of Miguel Santiago
12:00 pm to 1:00 pm	LUNCH
1:00 pm to 2:00 pm	Discussion (Complainant's Witness): Investigative Interviewing, cont'd Scripted Role Play Interview: Michelle DeWitt, Complainant's Witness /Santiago Case Study
2:00 pm to 2:15 pm	BREAK
2:15 pm to 4:30 pm	Interview: Responsible Management Official (RMO) Dennis Hatcher Discussion (Management Witness): Review Things Learned from RMO Interview
4:30 pm to 5:00 pm	Wrap-Up

EEO for New Investigators Agenda Day Four

Time	Topic/Activity
8:30 am to 9:30 am	Icebreaker/Recap
9:30am to 10:30 am	Santiago Recap and Writing the Santiago Summary
10:30 am to 10:45 am	BREAK
10:45 am to 12:00 pm	TAB E: Interview: Complainant Leslie Reed with her Attorney (CLASS ROLE PLAY)
12:00 pm to 1:00 pm	LUNCH
1:00 pm to 2:00 pm	Reed's Disability Claim
2:00 pm to 2:15 pm	BREAK
2:15 pm to 4:30 pm	Interview: Marvin Winters, RMO (ROLE PLAY) Interview: Leslie Reed (Rebuttal and Remedies) (TABLE ROLE PLAY)
4:30 pm to 5:00 pm	Wrap-Up

EEO for New Investigators Agenda Day Five

Time	Topic/Activity
8:30 am to 9:30 am	Recap
9:30am to 10:00 am	Conducting the Investigation: Assembling the Case File
10:00 am to 10:15 am	BREAK
10:15 am to 11:00 am	Review Course Objectives Complete Evaluations
11:00 am to 12:00 pm	Review of Investigative Summaries Wrap-Up

**Tab A:
EEO Complaint Process**

OVERVIEW OF THE FEDERAL-SECTOR EEO PROCESS

The federal-sector equal employment opportunity (EEO) process is the procedure that federal agencies and individuals must follow when an allegation of employment discrimination is made under the laws enforced by the U.S. Equal Employment Opportunity Commission (EEOC). EEOC is the federal law enforcement agency that enforces laws against workplace discrimination. EEOC has enforcement responsibility for the following federal discrimination laws: Title VII of the Civil Rights Act of 1964 (Title VII); the Pregnancy Discrimination Act of 1978 (an amendment to Title VII); the Age Discrimination in Employment Act of 1967 (ADEA); the Rehabilitation Act of 1973, as amended (Rehab Act); the Americans with Disabilities Act of 1990 (ADA); the Genetic Information Nondiscrimination Act of 2008 (GINA); and the Equal Pay Act of 1963 (EPA).

Under the laws enforced by EEOC, it is illegal to discriminate against an individual (employee or applicant) because of that person's race, color, religion, sex (including pregnancy, gender identity, and sexual orientation), national origin, age (40 or older), disability, or genetic information, and it is illegal to retaliate for reporting, participating in, and/or opposing a discriminatory practice. In addition, there are federal protections from discrimination on other bases not under the laws enforced by EEOC, including status as a parent, marital status, and political affiliation, and conduct that does not adversely affect the performance of an employee. This class will discuss only employment discrimination under the laws enforced by the EEOC.

What Types of Discrimination Are Prohibited?

- **Title VII:** Prohibits employment discrimination on the bases of race, color, religion, sex (including gender identity and sexual orientation), and national origin. In addition, Title VII prohibits retaliation for participating in the EEO process and for opposing employment discrimination.
 - **Pregnancy Discrimination Act:** This law amended Title VII to make it illegal to discriminate against a woman because of pregnancy, childbirth, or a medical condition related to pregnancy or childbirth.
- **ADEA:** Prohibits discrimination on the basis of age against individuals 40 and over.
- **Rehab Act:** Prohibits discrimination on the basis of disability. Federal employees and applicants are covered by the Rehab Act. Private employers, state and local governments, employment agencies, and labor unions are covered by the ADA.
- **GINA:** EEOC enforces Title II of GINA, which prohibits employment discrimination on the basis of genetic information.
- **EPA:** Provides protection against gender-based wage discrimination and requires that men and women be given equal pay for substantially equal jobs

All of the statutes described above prohibit retaliation by an agency because an employee, a former employee, or an applicant for employment engaged in protected activity.

What Is Unlawful Employment Discrimination?

Employment discrimination occurs when an employer takes an adverse action against a person (employee or applicant) because of that person's protected class (e.g., race, color, sex, disability, religion, national origin, age, genetic information, or reprisal). Only those actions that involve the use of a protected class as a basis for discrimination are illegal under federal discrimination laws. In addition, it may constitute employment discrimination when there is an identifiable, neutral policy or practice that is evenly applied but tends to screen out individuals of a particular protected group.

Federal employees, former employees, or job applicants who believe they were discriminated against under the laws enforced by EEOC have a right to file a complaint with the agency's office responsible for its EEO programs. Federal agencies are responsible for ensuring the integrity of the EEO process, and agency programs must comply with the Commission's regulations to ensure that complaints of employment discrimination are resolved fairly and quickly. The federal-sector complaint process is set forth in Title 29 of the Code of Federal Regulations (C.F.R.) at Part 1614. In addition, EEOC has issued interpretive guidance to ensure compliance with the regulations and consistent and uniform complaint processing, government-wide. This interpretive guidance is set forth in EEOC's Management Directive 110 (MD-110). The text of 29 C.F.R. 1614 and MD-110 may be found on EEOC's website at www.eeoc.gov/laws/index.cfm, and the specific links are included in the Additional Resources packet provided with this manual.

Who Are the Parties to an EEO Complaint?

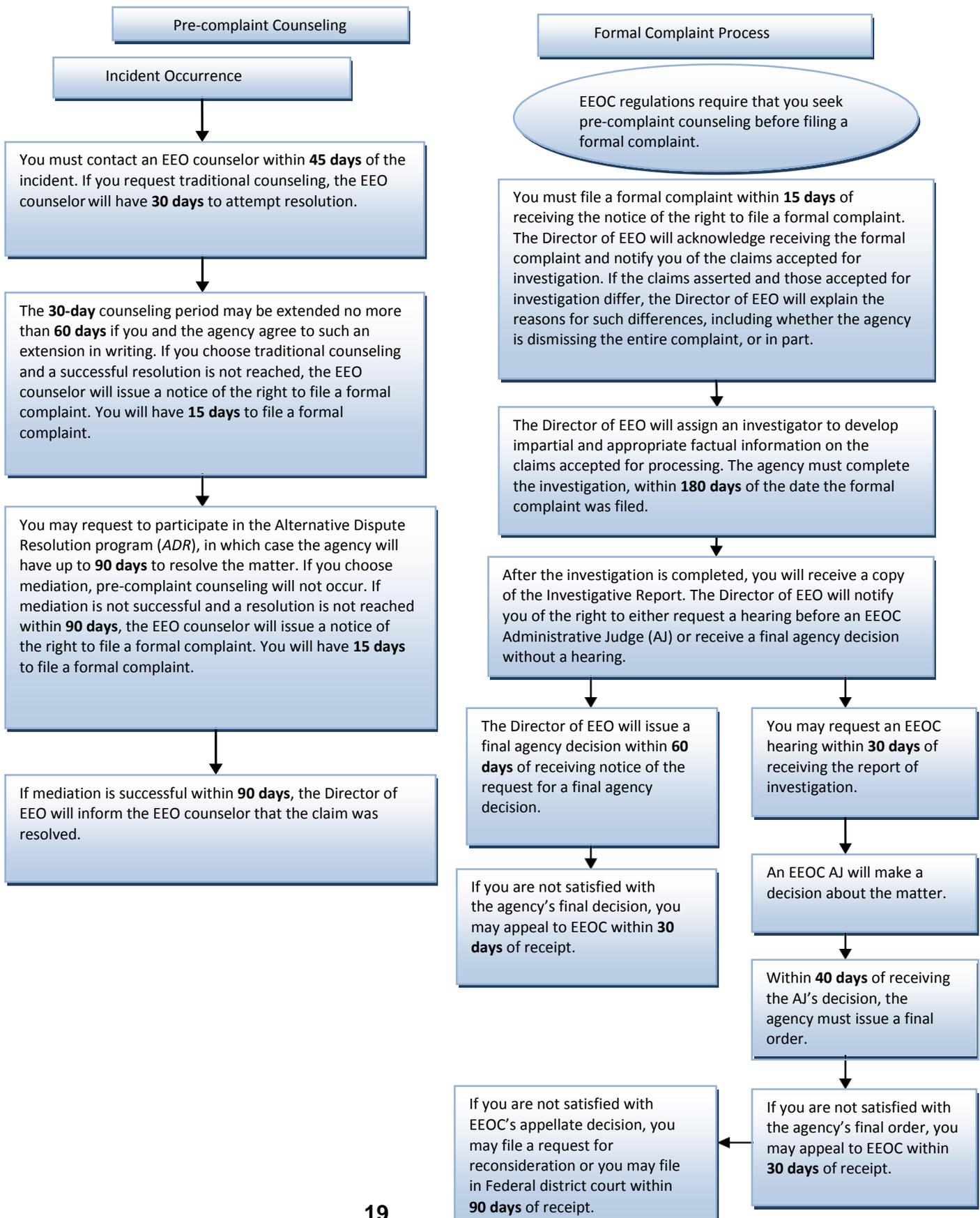
There are at least two parties to any EEO complaint:

- **The employee(s):** This includes former employees and applicants for employment. Sometimes even someone who is a federal contractor can be considered an employee for EEO purposes. This could also include a class of employees who have been subjected to the same or similar discriminatory treatment.
- **The agency:** Generally, the agency acts through a manager or supervisor, but even the actions of a co-worker, contractor, or visitor to the agency can form the basis of an employment discrimination complaint.

What Is the Procedure for Processing Federal-Sector Complaints?

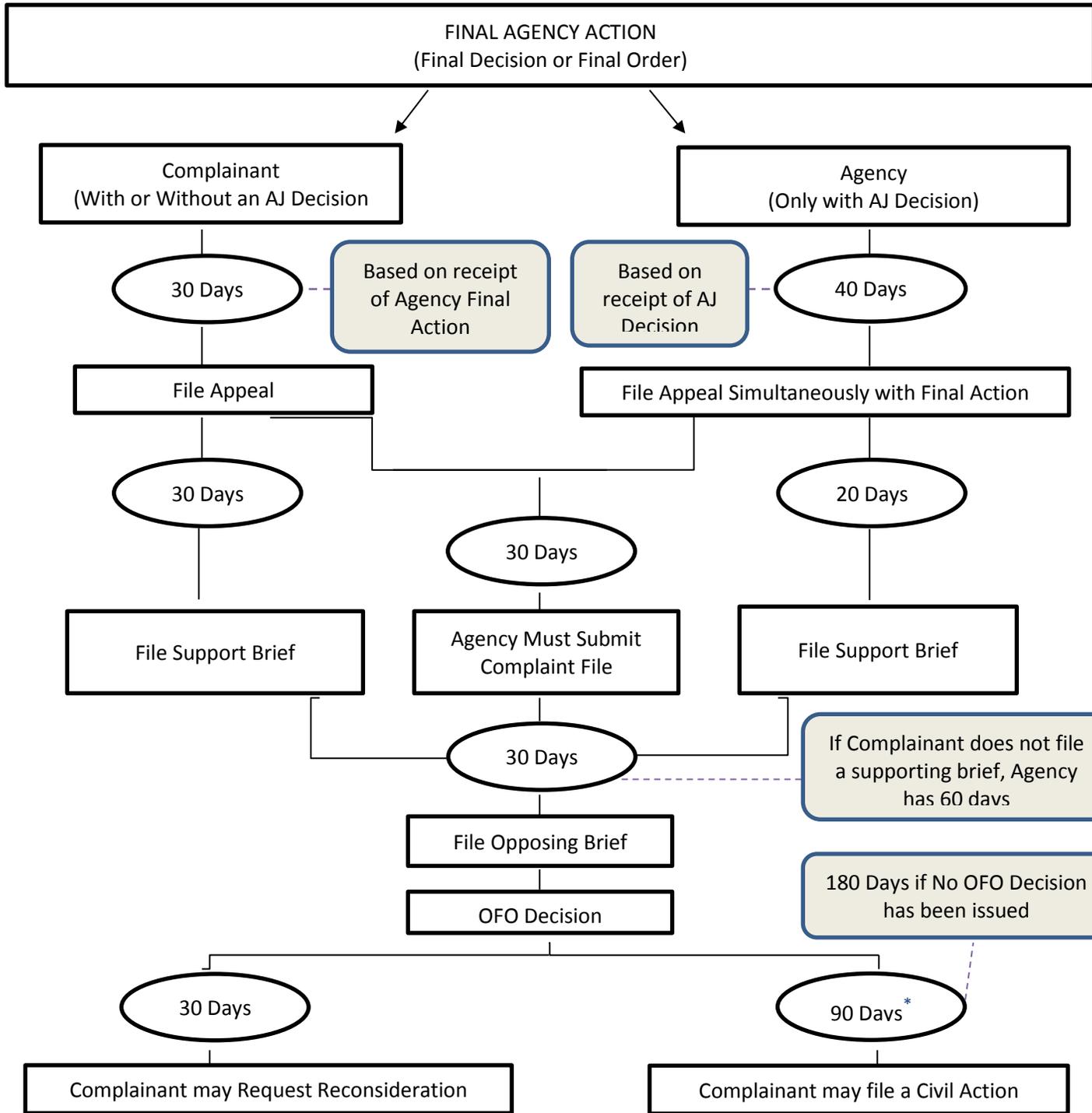
The following flow charts and descriptions show each step of the federal-sector complaint process and where in the process you, as an EEO investigator, will fit in. As you can see, there are two parts to the federal-sector EEO process: a complaints process and an appeals process; the latter, if utilized, picks up after a decision is issued on the complaint. The complaint process is further subdivided into a pre-complaint process and a formal complaint process. In this class, we will focus on the formal complaint process, because it is during that part of the process that the investigation generally takes place.

Flowchart of the Federal EEO Complaint Process



FEDERAL SECTOR APPELLATE REVIEW PROCESS*

29 C.F.R. 1614



*Filing a Civil Action terminates EEOC Processing of an appeal. Complainant May File a Civil Action...

- Within 90 days of receiving a Final Action (Final Decision or Final Order from AJ Decision) if they did not file an appeal to OFO
- After 180 days of filing an individual or class complaint if no appeal has been filed and no final action or final decision has been issued.
- Within 90 Days after receipt of the EEOC decision on appeal
- After 180 days of filing an appeal with OFO, if OFO has not issued a decision in that time.
- For EPA violations, within 2 years of the violation, or within 3 years if the violation is willful.

Counseling / Alternative Dispute Resolution

Generally, when someone believes that an agency has discriminated against him/her, the first step is to initiate EEO counseling at the agency where the alleged discrimination occurred. EEO counseling is an informal process during which the EEO counselor attempts to resolve the complaint. The EEO counselor provides vital information regarding the EEO process and other processes that may be available to the aggrieved individual, gathers basic information regarding the matter(s) from the aggrieved individual, and attempts to informally resolve the matter(s) if the matter does not go to the alternative dispute resolution (ADR) program. The EEO counselor must perform several tasks in all cases, including determining the issue(s) and basis(es) raised by the potential complaint. To determine the issue(s), the EEO counselor must identify what action(s) the agency has taken or is taking that causes the aggrieved person to believe s/he is the victim of discrimination. In other words, the issue is the employment practice that the employee believes is unfair, such as failure to hire, demotion, or discipline.

In addition, the aggrieved person must believe s/he has been discriminated against on the basis of race, color, sex, religion, national origin, age, disability, or genetic information, or in retaliation for prior protected activity. The EEO counselor should determine if the aggrieved person believes that his/her problem is the result of discrimination on one or more of these bases.

It is also important for you, as the investigator, to understand that each claim must have a basis and an issue.

When you put the two together (basis + issue) you create a narrative statement of the claim. So, for example, if the basis was age and the issue was non-selection, you might frame the claim like this:

- Whether the agency discriminated against the complainant by subjecting him to disparate treatment on the basis of **age** when he was **not selected** for the Budget Analyst position.

A good way of remembering the difference between an issue and a basis is that an issue is what the employee alleges happened (e.g., my supervisor did not promote me, I was not hired for a job, etc.) and a basis is why the employee believes it happened (e.g., because I am female, because I have a disability, etc.).

- (1) The **basis**. The *basis* of an employment discrimination claim is the prohibited reason. Only those bases covered by Title VII, ADEA, EPA, the Rehab Act, and/or GINA (i.e., race, color, religion, sex, national origin, age, disability, genetic information, or retaliation) are covered by the federal EEO process.
- (2) The **issue**. The second part of any employment discrimination claim is called the *issue*. The issue is the employment practice that the employee believes is unfair, such as failure to hire, demotion, discipline, job assignment, training, discharge, layoff, denial of benefits, harassment, failure to provide a reasonable accommodation, and so on. Generally, any action, or failure to act, that could occur in the course of an individual's employment may be raised in an EEO claim.

Agencies are also required to have an ADR program in place, and ADR may be offered during the informal EEO process, depending on the parameters of an agency's program. During counseling, the person who is alleging discrimination is called the "aggrieved individual." Because the term "aggrieved individual" may be used to identify the individual at any point in the complaint process, some agencies have coined the term "counselee" to identify the aggrieved individual during the counseling process. The employee has 45 days from the alleged discriminatory event to contact an EEO counselor. The agency generally has 30 days to complete that counseling, although that time can be extended for ADR or at the request of the counselee.

If the EEO counselor does not resolve the claim(s) during counseling, the counselor will inform the aggrieved individual of his/her right to file a formal complaint. The aggrieved individual has 15 days to file the formal complaint with the EEO office at the agency where the alleged discrimination occurred.

Examples of claims of prohibited employment discrimination include the following:

- Whether the agency subjected the complainant to disparate treatment because of race when she was involuntarily reassigned to the agency's Timbuktu Field Office.
- Whether the agency's adherence to its "no beards" policy has a disproportionate impact on the complainant based on his religion, despite the absence of a legitimate business necessity.
- Whether the agency subjected the complainant to harassment based on national origin when ethnic slurs were used in her presence.
- Whether the complainant was discriminated against on the basis of disability when she was denied a reasonable workplace accommodation.
- Whether the agency subjected the complainant to discrimination based on reprisal because of her prior complaints about employment discrimination, when it terminated her employment.

The Formal Complaint

Once the aggrieved individual files a formal complaint, he/she becomes a "complainant." Once it is filed, the agency's EEO office will either accept or dismiss the complaint. If the agency dismisses the complaint, there is no investigation. If the agency acknowledges and accepts the complaint, the agency's EEO office will assign the case to an EEO investigator for investigation. This is where you (the investigator) fit into the federal EEO complaints process set forth in 29 C.F.R. 1614. The agency will issue an acceptance letter defining the claims for investigation. Even if the agency dismisses part of the complaint, the EEO investigator must investigate the accepted claim(s). If the EEO investigator has questions about the scope of the investigation, s/he should consult with the EEO office.

The Investigation

Now that the agency EEO office has assigned the investigation to you, your job is to gather evidence relevant to the complaint. You do this by interviewing witnesses and collecting documents and other data that might be relevant to the claim(s). In this course, we will discuss the elements of a claim, and we will then discuss in more depth the nuts and bolts of investigative techniques, such as interviewing and gathering documents. Basically, after you finish the evidence gathering, you will assemble an Investigative Report and write a summary of the evidence you have found. You then will turn in the Investigative Report to the agency EEO office.

The agency must complete the investigation process within 180 days of the filing of a complaint, or within the time period contained in an order from the EEOC Office of Federal Operations to investigate a complaint following an appeal from a dismissal, unless the EEO Director (or designee) and the complainant agree in writing to an extension of not more than an additional 90 days. If the complainant amends the complaint, the agency will have an additional 180 days after the last amendment to complete the investigation, but no more than 360 days after the filing of the original complaint. If the investigation cannot be completed in 180 days, the agency must inform the complainant, and provide an estimated time for its completion. The agency must also explain the complainant's right to request a hearing or go to federal district court after 180 days, regardless of the investigation's incomplete status.

Chapter 6 of MD-110, which can be found at www.eeoc.gov (with the specific link in the Additional Resources provided with this manual), provides guidance on investigating EEO complaints. Generally, EEO investigations will all proceed in the same manner. Below are the typical steps an EEO investigator will follow in conducting an investigation:

- The investigator will receive and review the complaint file, which contains the initial processing correspondence, the formal complaint, the EEO Counselor's Report, the acceptance letter, and the assignment letter authorizing the investigation of the complaint.
- The investigator prepares an Investigative Plan (IP) and submits the IP to his/her manager for approval.
- Following IP approval, the investigator contacts the complainant and arranges to meet for an interview and affidavit.
- Prior to obtaining the complainant's affidavit or immediately thereafter, the investigator prepares and submits a Request for Information (RFI) to relevant agency offices. Some EEO offices instruct the investigator to obtain the complainant's affidavit before submitting the RFI.
- After the investigator obtains the complainant's affidavit, the investigator arranges interviews with management and with the complainant's witness(es) identified in the complainant's affidavit.
- The investigator provides copies of signed affidavits from management witness(es) to the complainant. The complainant has a limited amount of time to provide a rebuttal affidavit.
- The investigator analyzes documents the agency has submitted in response to the RFI and determines if, in order to ensure a complete and thorough investigation, s/he needs to secure additional documents, interview additional witnesses, and/or follow up with witnesses s/he previously interviewed.

The investigator writes the Investigative Summary and assembles the Investigative Report. Rebuttal evidence submitted by the complainant should be included in the Investigative Report. Investigators should begin drafting the Investigative Summary as evidence is obtained. For example, the section describing the complainant's position can be written

upon completion of complainant's affidavit; the section on management's position can be written after those affidavits are obtained.

The investigator should not proceed to management interviews without having the complainant's signed affidavit unless otherwise instructed by the EEO office. In those instances where the complainant does not cooperate with the investigation, the EEO office may choose to proceed with the investigation without input from the complainant.

What Happens After the Investigation?

After you turn in your investigative file, the agency provides the complainant with a copy of the investigative file and notifies the complainant of the right

- to request a hearing and decision from an EEOC administrative judge (AJ), or
- to request a Final Agency Decision (FAD) from the agency.

The agency issues a FAD if the complainant requested a FAD, or if the complainant failed to request either a hearing or a FAD. The FAD will inform the complainant of the outcome of the claim, the right to appeal the decision to EEOC or file a civil action in federal district court, and the applicable time limits. If the complainant requests a hearing, the complaint file is sent to EEOC, and an AJ is assigned to the case. Once the complainant requests a hearing, the case is no longer under the agency's jurisdiction, and the AJ takes complete control over the case.

The AJ may or may not hold a hearing. Hearings are not held in every case, even if the complainant requests a hearing instead of an agency decision. The AJ will issue a decision and send it back to the agency's EEO office. The EEO office decides whether to implement the AJ's decision. If the EEO office does not want to implement the AJ's decision, it must file an appeal to EEOC's Office of Federal Operations (OFO).

What Happens If the Complainant Disagrees with the Decision?

Whether the agency implements an AJ's decision or issues its own decision in cases where the complainant did not request a hearing, the complainant may file an appeal to OFO if the complainant disagrees with the decision.

There may be situations in which OFO orders the agency to further investigate the complaint. This may occur when

- The investigative file is not thorough or adequate, or
- OFO needs additional information to issue an appellate decision.

OFO's decisions are binding on the agency. However, if the complainant is still dissatisfied with the outcome of his/her case, s/he may file a lawsuit in an appropriate U.S. district court.

THE FEDERAL EEO COMPLAINT PROCESS ... AT A GLANCE

For quick reference, here is an outline of the federal EEO complaint process.

Initiating the EEO Complaint Process

- An individual who believes s/he has been discriminated against must begin the EEO process within **45 days** of the date of the alleged event or incident.
- The complainant begins the process by **contacting an EEO counselor**.
- An agency may offer **alternative dispute resolution (ADR)** to an aggrieved individual during counseling. The aggrieved individual has the right to choose either participation in the ADR program, if it is available, or traditional counseling activities.
- **Traditional counseling** should be completed within 30 days. During counseling, an EEO counselor will
 - explain the rights and responsibilities of the aggrieved and the procedures for filing a complaint,
 - determine the legal claim (bases and issues) being raised in the potential complaint,
 - seek resolution of the matter,
 - document the resolution or advise the complainant of his/her right to file a formal EEO complaint, and
 - prepare a report that summarizes the counseling process.
- At the conclusion of the EEO counseling process, the EEO counselor issues a notice of final interview.
 - The notice advises the complainant that s/he has 15 days from receipt of the notice to file a formal EEO complaint.
 - The notice also advises the complainant as to where to file the complaint.
- **ADR during the counseling process.** If the aggrieved individual accepts the agency's offer to proceed through the ADR program, resolution through traditional counseling will not be attempted.
 - Agencies have **90 days to conduct** ADR during the pre-complaint process.
 - If the ADR attempt succeeds in resolving the claim, the agency must notify the EEO counselor that the claim was resolved.
 - If the ADR process does not result in resolution of the dispute, the EEO counselor will issue a notice of final interview, advising the aggrieved individual of the right to file a formal complaint. The EEO counselor will also write the counseling report, describing the initial counseling session, framing the claim being raised, and reporting only that ADR was unsuccessful.

The Formal Complaint

Filing the Formal Complaint

- **Within 15 days** following receipt of the notice of final interview, the complainant must file a formal EEO complaint.
 - It must be signed by the complainant or his/her attorney.
 - It must be sufficiently precise to identify the aggrieved individual, the agency, the basis (or bases) of discrimination, and the actions or practices deemed discriminatory.
- The agency must acknowledge its receipt of the EEO complaint in writing and further advise the complainant as to what it deems the complaint's official filing date to be.

The agency should inform the complainant that s/he has the right to appeal any agency dismissal or final decision on the merits of the complaint.

Dismissal

- The agency has the right to dismiss a complaint in its entirety for the following reasons:
 - The complaint fails to state a claim,
 - The complaint states the same claim that is pending at or has been decided by the agency, or is the basis for a matter pending in court,
 - The complaint has been raised in an appeal to the Merit Systems Protection Board or has been raised in a grievance proceeding that permits claims of discrimination to be raised,
 - The complaint was not filed before the deadline or the complainant did not begin the EEO process in a timely manner,
 - The complaint is moot,
 - The complaint concerns a preliminary step to the taking of a personnel action,
 - The complainant cannot be located or has not responded to a request for relevant information, provided that the record does not contain sufficient information from which the agency could render a decision,
 - The complaint is part of a clear pattern of misuse of the EEO process, or
 - The complaint alleges dissatisfaction with the processing of a previously filed complaint (i.e., it is a "spin-off complaint").

Note: EEO offices should advise individuals who seek to file a spin-off complaint to bring their concerns to the attention of the individual responsible for the original complaint: the investigator, the agency EEO manager, the EEOC AJ, or the EEOC on appeal, depending on the stage of the process. The claim of unfair processing and any appropriate evidence will then be considered during the processing of the underlying complaint by these individuals in the context of their actions pertaining to that complaint.

- The agency's dismissal must inform the complainant that s/he has the right to appeal the dismissal to the EEOC.
- **Partial dismissals:** Under the Commission's November 1999 revisions to Part 1614, when an agency believes that part of a complaint should be dismissed in accordance with one of the dismissal bases, the agency must notify the complainant in writing of its determination, the rationale for that determination, and that those claims will not be investigated. A copy of this notice must be placed in the investigative file created for the accepted portions of the complaint.

Note: The complainant cannot appeal the partial dismissal until final action is taken on the remainder of the complaint.

Investigation

- When the agency accepts the complaint, it must begin an investigation of the complaint's claims. The purpose of the investigation is to develop an **impartial and appropriate** factual record upon which to make findings on the claims raised by the complaint. An appropriate factual record is one that allows a reasonable fact finder to draw conclusions as to whether or not discrimination occurred.
- Unless the complaint has been amended, the agency has 180 days from the date that the complaint was filed (not accepted) to complete the investigation. The complainant may agree to an extension of time for not more than 90 days.
- If the complainant amends the complaint, the agency will have an additional 180 days after the last amendment to complete the investigation, but no more than 360 days after the filing of the original complaint. If the investigation cannot be completed in 180 days, the agency must inform the complainant, and provide an estimated time for its completion. The agency must also explain the complainant's right to request a hearing or go to federal district court after 180 days, even if the investigation is incomplete.
- The agency unilaterally may extend the time to complete the investigation by 30 days in order to sanitize a file that contains classified information.

Post-investigation

- Once the investigation is completed, the agency must provide the complainant with a copy of the investigative file and notify the complainant that s/he has the right to elect whether to have the agency issue a final decision on the merits of the complaint or to request a hearing before an EEOC AJ.
- The complainant requests a hearing by submitting a written request directly to the EEOC office indicated in the agency's notice and sends a copy to the agency.
 - Even if the investigation has not been completed, the complainant may request a hearing after the expiration of the 180-day period.
 - If the complainant does not request a hearing, the agency must issue a final decision on the merits of the complaint.

Amendment of Complaints

- A complainant may amend a complaint to add issues or claims that are “like or related to” the original complaint at any time prior to the conclusion of the investigation. No new EEO counseling is required on these additional claims.
- When a complaint has been amended, the agency must complete its investigation within the **earlier** of 180 days after the last amendment to the complaint or 360 days after the filing of the original complaint. However, the complainant may request a hearing on the amended complaint any time after 180 days from the date of filing of the original complaint.

After requesting a hearing, a complainant may seek permission from the AJ to amend a complaint to add issues that are “like or related to” the original complaint by filing a motion to amend.

Consolidation of Complaints

- An agency must consolidate for processing all complaints filed by the same complainant which are pending before it.

When a complaint has been consolidated with an earlier filed complaint, the agency must complete its investigation within the **earlier** of 180 days after the filing of the last complaint or 360 days from the filing of the first complaint. However, the complainant may request a hearing on the consolidated complaints any time after 180 days from the date of the first filed complaint.

Hearings and Agency Final Actions

Hearings

- The complainant may request a hearing by submitting a written request directly to the EEOC office indicated in the agency’s notice, with a copy served on the agency.
- An EEOC AJ will preside at the hearing, which is similar to an informal trial.

At the conclusion of the hearing process, the AJ will issue a decision to both parties.

Note: If the AJ determines that there are no issues of material fact in the complaint, and that the complaint can be decided without a hearing, the AJ will issue a decision on summary judgement, without a hearing.

Agency Final Actions

- Upon receipt of an AJ’s decision on a complaint, the agency has 40 days to take final action by issuing a final order on the complaint. The final order will notify the complainant whether or not the agency will fully implement the decision of the AJ and will contain notice of the complainant’s appeal and civil action rights.
- If an agency does not take final action within 40 days of receipt of an AJ’s decision, the decision automatically becomes the final action of the agency.

- When the agency dismisses a complaint in its entirety or receives a request for a final decision without a hearing, or where a complainant fails to elect a hearing, the agency takes final action by issuing a final decision.
 - The final decision consists of findings by the agency on the merits of each issue in the complaint or, as appropriate, the rationale for dismissing any claims in the complaint. Where discrimination is found, the final decision includes appropriate remedies.
 - When issuing a final decision, the agency has
 1. 60 days from the receipt of the complainant's request for an immediate final decision, or
 2. where the complainant has not requested either a hearing or a decision, 60 days from the end of the 30-day period for the complainant to make the election.
 - All final actions of the agency must inform the complainant that s/he has the right to appeal the decision to the EEOC or file a civil action in federal district court. The agency must include a copy of EEOC Form 573, Notice of Appeal/Petition.

Appeals and Civil Actions

Appeals

- If a complainant is not satisfied with the agency's final action, the complainant may file an appeal with EEOC's Office of Federal Operations (OFO). Both parties may submit briefs or statements in support of their positions.
- An agency that does not fully implement an AJ's decision must file an appeal with the OFO, and both parties may submit briefs or statements in support of their positions.
- EEOC may impose sanctions on a party who fails, without good cause shown, to comply with appellate procedures or to respond fully and in a timely manner to a Commission RFI. Sanctions are possible if an agency has failed to fully investigate a complaint within the prescribed time frames. Possible sanctions include the following:
 - Drawing an adverse inference that the requested information would have reflected unfavorably on the party refusing to provide it,
 - Considering the matters to which the requested information or testimony pertains to be established in favor of the opposing party,
 - Issuing a decision fully or partially in favor of the opposing party,
 - Taking other appropriate action.

Note: These same sanctions are available to an AJ during the hearing process.

EEOC will issue decisions on appeals. Either party may request reconsideration of an initial appellate decision. The EEOC will grant reconsideration only in limited circumstances.

Civil Actions

- A complainant has a right under Title VII (Rehab Act, GINA) to file a civil action 180 days after the date the complaint was filed, regardless of the administrative posture of the complaint.
- **Special rules apply under the Equal Pay Act (EPA):** Pursuant to Section 1614.408, a complainant is permitted to file a civil action within two years or, if the violation is willful, three years of the date of the alleged violation of the EPA regardless of whether s/he pursued any administrative complaint processing.
- **Special rules also apply under the Age Discrimination in Employment Act (ADEA):** A complainant alleging age discrimination may elect, as an alternative to filing a formal EEO complaint under 29 C.F.R. Part 1614, to inform the EEOC that s/he intends to file a civil action. The complainant must inform the EEOC of his/her intentions at least 30 days prior to commencing a federal civil action and within 180 days after the date of the alleged discriminatory action.

Miscellaneous Provisions Under Part 1614

Official Time

- The regulations state that an agency must provide a complainant who is an employee of the agency with a reasonable amount of official time to prepare a complaint and to respond to agency and EEOC RFIs.
- The regulations further state that where the complainant's representative is an employee, the agency must allow the representative to take official time to prepare a complaint and to respond to RFIs.

The complainant and an employee representative will be on official time when their presence is required during the investigation of or any hearing on the complaint.

Settlement Agreements and Breach

- Nothing bars the parties from settling their dispute at any stage of the complaint process.
- When the complainant believes that the agency has breached the settlement agreement, s/he must notify the EEO Director within 30 days of when s/he knew or reasonably should have known of the noncompliance.
- The complainant may request specific enforcement of the agreement or a reopening of the EEO complaint from the point at which processing ended with the execution of the settlement agreement.

If the agency fails to respond to the complainant's notice of breach within 35 days of its receipt of the notice, the complainant may file an appeal to the EEOC. If the agency issues a decision on the breach claim with which the complainant disagrees, the complainant must file an appeal within 30 days of his/her receipt of the decision.

Enforcement of Final Decisions and EEOC Orders

- Orders contained in an agency final decision finding discrimination or breach of a settlement agreement or in a decision from the EEOC on an appeal are binding on an agency.
- The EEOC may direct the agency to fully implement an order contained in either an agency decision or a decision from the EEOC. EEOC regulations provide that complainants and agencies may petition the Commission to enforce or clarify a decision.

TIME LIMITATIONS IN THE FEDERAL EEO PROCESS

How to Calculate Deadlines

The flow chart in your manual sets forth time limitations for each step of the EEO process. For example, an individual who believes her employer has discriminated against her must contact an EEO counselor within 45 days of the alleged discriminatory act. If she does not contact a counselor within 45 days, the agency may dismiss her complaint. Generally, this and other filing deadlines are based upon calendar (not business) days, and if the deadline falls on a weekend or holiday, the next business day is the last day for filing.

For example, a formal EEO complaint must be filed within 15 days from receipt of the Notice of Right to File a Formal EEO Complaint. Most agencies require that aggrieved individuals sign the notice so that the 15 days may be easily calculated. If the 15th day falls on a Saturday or Sunday, then the last day to file the formal complaint would be on the following Monday. If that Monday is a federal holiday, the last day to file would be Tuesday.

When to Start Counting Days

A question that sometimes arises is when the clock starts for determining the date of the alleged violation.

The date of violation is generally the first date the employee has notice of the adverse action. If the adverse action is a personnel action, the contact with an EEO counselor must be made within 45 days of the effective date of the personnel action.

For example, if an employee receives notice of demotion three months before his/her actual demotion, the 45 days begins to run from the effective date of the personnel action, not the date the employee received notice. In a non-selection case, the date of the violation may be the date the agency filled the position, or the date the complainant knew that s/he would not be selected.

Continuing Violations

Sometimes, a complainant will allege a series of discriminatory acts that are continuing in nature, a situation known as a "continuing violation." If a continuing violation is found, events occurring outside the 45-day time limit may be considered timely. To be a continuing violation, there must be at least one timely event and an interrelationship between it and the other discriminatory events.

Typically, the theory of continuing violations occurs in the context of harassment claims. Discrete acts of discrimination must be challenged within applicable time frames, but in a typical example of a continuing violation, an aggrieved individual may allege that s/he has continually been harassed over a long period of time by the same harasser(s). Under this scenario, events that happened before the 45-day time limit for contacting a counselor may be considered timely and become part of the complaint. The entire course of conduct creating a hostile environment may be challenged so long as one act of harassment occurs within the applicable time frames.

Tolling Time Frames

“Tolling” refers to suspending the time limit for filing. Tolling rarely occurs.

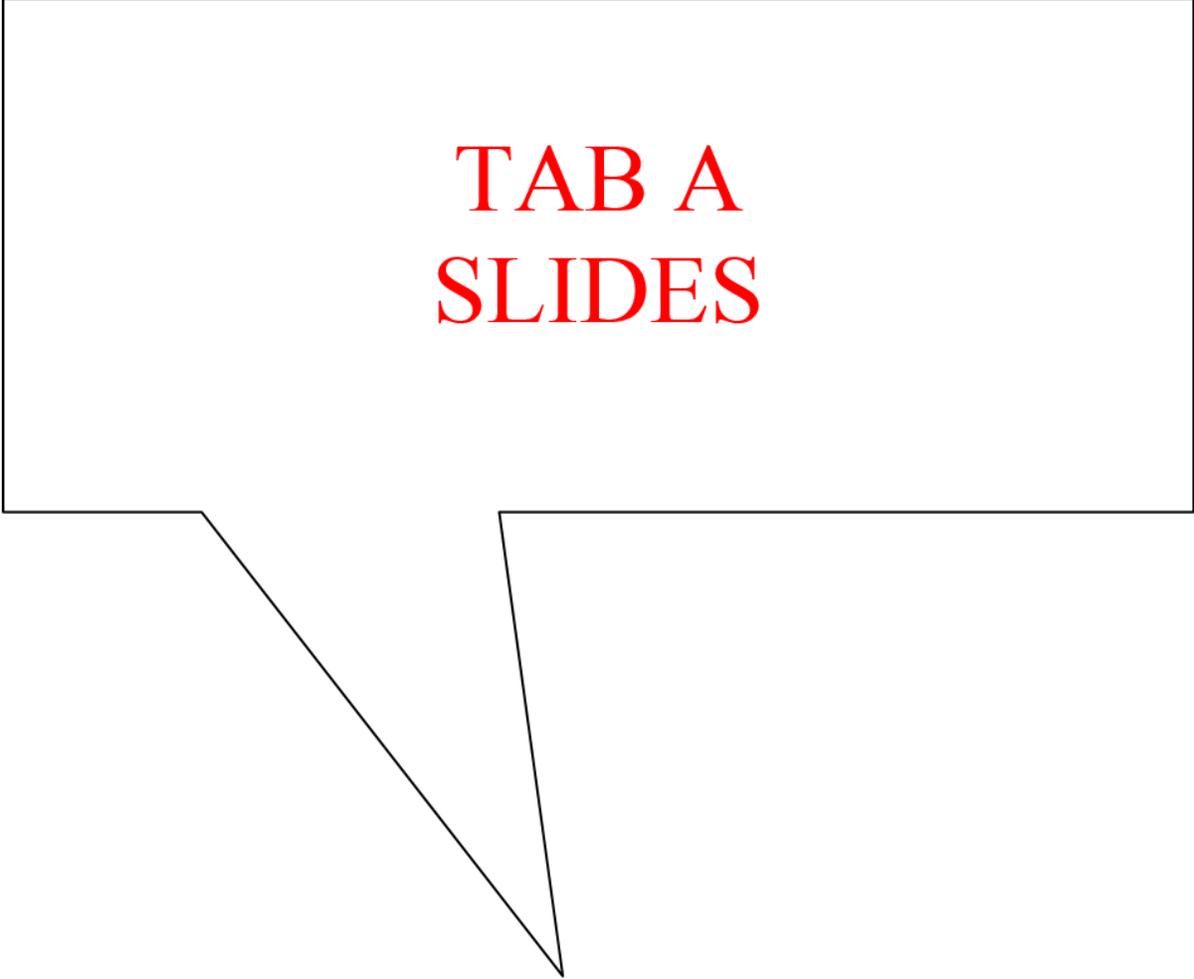
Generally, the time limit for contacting an EEO counselor may be tolled when the complainant was not aware that s/he was subjected to discrimination, thereby delaying his/her contact. Time may also be tolled if the agency actively deceived or misled the potential complainant.

For example, an individual applies for a job and is interviewed, and then continuously telephones the agency to inquire as to the status of the position. The agency tells him that the position is still open and no decision has been made yet. A year goes by and the applicant learns from a friend that the position was filled with an individual of a different protected group many months ago. In this case, the 45-day time period for contacting an EEO counselor may be tolled for the period that the applicant was unaware of the deception.

Conclusion

This is just a brief overview of the EEO process. You will find the federal-sector EEO regulations, 29 C.F.R. Part 1614, at www.eeoc.gov, with the specific link listed in the Additional Resources provided with your materials. It is very important for you to remember that, as an EEO investigator, even after you complete an investigation, you may be asked to investigate further. Therefore, it is important to conduct as thorough an investigation as possible the first time.

We will spend most of this week discussing how to thoroughly investigate a complaint of discrimination. We will also discuss in detail your role and responsibilities, as well as the roles and responsibilities of others during this process.



**TAB A
SLIDES**

EEO Investigators

- Get the facts
- Are inquisitive
- Plan carefully
- Are flexible
- Are objective
- Are methodical and well-organized
- Use common sense
- Are confident

What Is EEO?

- Body of law and procedures
- Provides protection to individuals with protected status under the law
- Protects against unlawful discrimination
- EEOC enforces EEO laws in both private and federal sectors

What is an EEO Complaint?

- Federal sector term for the official document of complaint or the accepted “claim” of discrimination
- Private sector term is “charge”

Federal EEO Investigators DON'T

- Represent or advocate for the Complainant
- Represent or advocate for the Agency
- REACH A CONCLUSION

What Are the Elements of an EEO Claim?

Basis + Issue + Injury = Claim

- A claim is an assertion that an employment practice or policy is unlawful under the Federal equal employment laws
- If the assertion is proven, there is a remedy under the law.
- Each claim must have a basis, an issue and an injury.

Basis + Issue + Injury = Claim

1) The **basis**. The *basis* of an employment discrimination claim is the prohibited reason.

Only those bases covered by Title VII, ADEA, EPA, the Rehab Act and/or GINA are covered by the federal EEO process.

Basis + Issue + Injury = Claim

(2) The **issue**. The second part of any employment discrimination claim is called the *issue*.

The issue is the employment practice that the employee believes is unfair.

Generally, any action, or failure to act, that could occur in the course of an individual's employment may be raised in an EEO claim.

Basis + Issue + Injury = Claim

(3) What is an **Injury**? The third part of the employment claim is called the *injury*.

The injury must be substantial and detrimental.

Does it impair the complainant's job performance or prospects for advancement?

Who Are the Parties to an EEO Complaint?

- (1) The employee(s), former employees and applicants for employment.
- Sometimes even someone who is a federal contractor can be considered an employee for EEO purposes.
 - This could also include a class of employees who have been subjected to the same or similar discriminatory treatment.

Who Are the Parties to an EEO Complaint?

continued....

- (2) The agency.
 - The agency acts through a manager or supervisor.
 - The actions of a co-worker, contractor or visitor to the agency can form the basis of an employment discrimination complaint.

Time Limitations in the Federal EEO Process

- Counseling - Within 45 Calendar Days
- Formal Complaint - Within 15 Calendar Days of the Notice

When Does the Clock Start?

- Generally the first/earliest date the employee had notice
- Timeliness Issues

The Federal Complaint Process
Before an Investigation

- Informal EEO Counseling
- ADR
- Formal Complaint
- Acknowledgment Letter/Acceptance/Dismissal

The Federal Complaint Process
After an Investigation

- Agency Final Decision
- Hearing before EEOC Administrative Judge (AJ)
- Appeal to EEOC Office of Federal Operations (OFO)
- U.S. District Court

OVERVIEW

WHAT IS A STATUTE?
WHAT IS A BASIS?
WHAT IS AN ISSUE?

**Tab B:
EEO Law and Analysis**

FEDERAL EMPLOYMENT DISCRIMINATION LAW FROM THE INVESTIGATOR'S PERSPECTIVE

Title VII of the Civil Rights Act of 1964 (Title VII)

Title VII prohibits discrimination based on race, color, religion, sex, national origin, and retaliation. This means that an agency cannot take an employment action because of an individual's race, color, religion, sex, or national origin, or in retaliation for participating in an EEO process or opposing an employment practice believed to be unlawful under Title VII.

Everyone is protected under Title VII.

- **Race** discrimination involves all races, including, for example, African American, Caucasian, Asian, and Native American. Race discrimination may also include a characteristic associated with race, such as skin color, hair texture, or certain facial features.
- **Color** discrimination involves treating someone unfavorably because of skin color or complexion. Color discrimination may involve individuals of the same race, such as between light-skinned and dark-skinned individuals of the same race.
- **Religious** discrimination involves all aspects of religious observance and practice as well as belief. Title VII covers not only individuals of traditional faiths, but also those of new or uncommon faiths, as well as those who are atheist or agnostic

Religious discrimination may manifest itself as a difference in treatment or as a denial of a reasonable accommodation for a religious practice. For example, an individual who cannot work on the Sabbath may need an accommodation of his work schedule. We will discuss accommodations later in this class.

Sex discrimination refers to biological differences between men and women, pregnancy and related medical conditions, gender and gender identity, and sexual orientation. There is a more detailed discussion of discrimination against lesbian, gay, bisexual, and transgender individuals in the next module.

The prohibition against sex discrimination covers harassment. Although sexual harassment has been the subject of many high-profile cases recently, it is important to note that in addition to prohibiting harassment based on sex or gender, Title VII also prohibits race, color, religious, and national origin harassment in the workplace. The agency has an obligation to provide a work environment that is free of harassment because of an individual's race, color, religion, sex, or national origin.

- **National origin** discrimination covers discrimination against an individual because of his/her place of origin (or that of his/her ancestors) or an individual's national origin group/ethnicity (i.e., a group sharing a common language, culture, ancestry, etc.). It also may include accent or manner of speaking, English fluency, appearance, or imposition of citizenship requirements and English-only rules.

Retaliation is also a basis of discrimination covered by Title VII. It occurs when the agency takes an adverse action because the employee participated in the EEO process or opposed an employment practice which s/he believed was unlawful under Title VII. Title VII does not cover retaliation for other reasons, such as union activity or being outspoken about an agency's practices, that have nothing to do with unlawful discrimination. Any complaint alleging retaliation must specify how the retaliation was manifested by the agency (e.g., harassment, demotion, discipline, discharge).

Retaliation is interpreted very broadly, so that anyone who participates in the process is covered. You do not have to file a formal complaint to be covered. If you were a witness in the agency's internal investigation of a complaint and later suffered an adverse action as a result, you are covered. We will be discussing this in more detail later, in the "Investigator's Analysis of Discrimination Claims" section, where we cover theories of discrimination.

Title VII covers all aspects of employment, from the initial action an agency takes to advertise a position and recruit applicants to its decision to terminate or lay off an employee, and all employment actions in between. Virtually anything that can happen in an employment relationship could become an issue as long as there also is a covered basis.

Title VII, as well as each of the other federal employment discrimination statutes we will be discussing in this class, covers prospective employees (applicants), individuals currently employed, and former employees.

The Age Discrimination in Employment Act of 1967 (ADEA)

The purpose of the ADEA is to promote the employment of older persons based on their ability rather than age, to prohibit arbitrary age discrimination in employment, and to help employers and workers find ways of meeting problems arising from the impact of age on employment. ADEA therefore is unlike Title VII because it does not protect everyone: ADEA protects only individuals who are 40 years of age or older from employment discrimination based on age. There is no upper age limit for ADEA coverage. However, the complainant must have been 40 or over at the time of the adverse employment action. The ADEA permits employers to favor older workers based on age even when doing so adversely affects a younger worker who is 40 or older.

As with Title VII, ADEA covers all terms and conditions of employment, from recruitment to discharge. Also like Title VII, ADEA covers applicants, current employees, and former employees. One of the most common claims raised under the ADEA is non-selection.

The ADEA also prohibits an agency 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, just as it is under Title VII.

The Equal Pay Act of 1963 (EPA)

The Equal Pay Act (EPA) covers only one claim — sex-based wage discrimination. Basically, EPA covers individuals who allege they are being paid less than an individual of

the opposite sex even though they are performing substantially the same job. EPA covers everyone: males and females. EPA requires an analysis of what jobs are substantially equal; we will talk about how to compare jobs in the “Investigator’s Analysis of Discrimination Claims” section, where we cover theories of discrimination. EPA also prohibits retaliation, like Title VII and ADEA.

It is important to remember that Title VII also prohibits discrimination in wages based on sex. Therefore, an EPA case often is filed as a Title VII claim as well.

The Rehabilitation Act of 1973

The Rehabilitation Act of 1973 protects federal government employees from discrimination because of disability. The Rehabilitation Act also requires agencies to reasonably accommodate qualified individuals with disabilities.

The Americans with Disabilities Act (ADA) protects private-sector employees from discrimination on the basis of disability. The statutes provide comparable coverage, and often you will hear a Rehabilitation Act claim referred to as an ADA claim.

An individual’s coverage under the Rehabilitation Act may not be readily apparent. Unlike Title VII, which covers all persons, the Rehabilitation Act and the ADA cover only those persons with disabilities. Until 2008, it was very difficult to prove coverage, that is, that a person had a disability covered by the statutes. In 2008, Congress passed the Americans with Disabilities Act Amendments Act (ADAAA), which amended both the ADA and the Rehabilitation Act to make coverage much broader than it had been prior to the amendments. Prior to 2008, much litigation and investigation under the Rehabilitation Act and ADA focused on coverage rather than on the issues of whether discrimination, in fact, had occurred. Beginning in 2008, the focus shifted away from coverage and toward whether the employer has discriminated against the individual on the basis of his/her disability.

We will have a complete discussion of all these terms during the Rehabilitation Act section of the training. Like the other three statutes, the Rehabilitation Act also prohibits retaliation.

The Genetic Information Nondiscrimination Act of 2008 (GINA)

The Genetic Information Nondiscrimination Act of 2008 (GINA) is the newest statute EEOC enforces. It became effective on November 21, 2009. Title II of GINA prohibits employment discrimination against applicants and employees based on genetic information. Genetic information includes information on an individual’s genetic tests and the genetic tests of an individual’s family members, as well as information about any disease, disorder, or condition of an individual’s family members (i.e., an individual’s family medical history). We will discuss the provisions of GINA after the Rehabilitation Act section of the training. GINA also prohibits discrimination on the basis of retaliation.

Overview

First, let’s go over some scenarios and determine the following for each:

- What is the statute?
- What is the basis?

What is the issue?

Scenario #1: Supervisor Charles allows Adam to use unpaid leave for a court appearance in the criminal prosecution of an assault. Ann also asks to use unpaid leave to testify in the criminal prosecution of domestic violence that she experienced. Charles denies Ann's request, stating, "the assault by a stranger is a real crime, whereas domestic violence is just a marital problem." Ann later overhears Charles telling another supervisor that "women think everything is domestic violence."

What is the statute?

What is the basis?

What is the issue?

Scenario #2: Alexander is a light-complexioned African-American who works in the legal unit. He alleges that Maxwell, the unit supervisor, who is a dark-complexioned African-American, told him, "being a member of the 'Blue Vein Society' is not an asset on this team." Alexander believes Maxwell intentionally assigns him the most complex cases because of his skin color.

What is the statute?

What is the basis?

What is the issue?

Scenario #3: Randy is a member of the team that redesigned the agency's website. All team members received a cash award for this accomplishment. Randy learned that his award was several hundred dollars less than that of the other team members. He believes that this disparity is because he is the only Caucasian on the team.

What is the statute?

What is the basis?

What is the issue?

Scenario #4: David is an accountant with the agency. He is 58 years old. David is upset because this year he received the lowest performance rating he has ever received in his career with the agency. David claims that he did not have any problems with his performance until this year, when he was assigned to Andy's team. David overheard his manager, Andy, who is 38, joke to another manager that he (Andy) "would love to give David a 'golden handshake.'"

What is the statute?

What is the basis?

What is the issue?

Scenario #5: Alphonso has arthritis in his hip. He has pain when walking long distances and takes medication to alleviate inflammation. His manager, Rosa, strongly believes in holistic healing and has frequently commented to him that he should consider freeing his body of the pollution of Western medicine. Alphonso believes Rosa denied him assignments that require overnight travel because of his disability.

What is the statute?

What is the basis?

What is the issue?

Scenario #6: Tyler applied for a position as a mechanic. He was initially pleased to learn that the interviewing official knew his father, who had worked for the agency before dying of heart disease. At the end of the interview, the official stated, "I hope you are doing everything you can to overcome this unfortunate health legacy." Tyler was not selected and believes the agency discriminated against him.

What is the statute?

What is the basis?

What is the issue?

INVESTIGATOR'S ANALYSIS OF DISCRIMINATION CLAIMS

Introduction

An EEO investigator's job is to collect and gather factual information concerning the claim. To do that, the investigator must know the theories of discrimination that the courts and EEOC guidelines have established. In other words, we just discussed the substance of each of the five statutes EEOC enforces to prohibit employment discrimination. In this section, we are going to talk about the theories of discrimination, which are the basic frameworks and models of proof that lawyers and investigators use to put together their cases and investigations. Although lawyers generally use these theories and models to advocate for one side or the other, an investigator does not advocate for either side. You will use these theories and models to organize your investigation and as checklists to ensure that you have gathered enough relevant evidence to develop an impartial, appropriate, and factual investigative record that will enable a reasonable fact finder to draw conclusions as to whether discrimination occurred. The theories most frequently applicable to EEO complaints that we will discuss are the following:

- Disparate treatment
- Disparate impact (or adverse impact)
- Retaliation
- Harassment
- Religious accommodation
- Equal pay
- Age discrimination

Disability

Disparate treatment and disparate impact are theories that apply across almost all statutes. Retaliation as a basis can apply to any of the statutes we have discussed. Harassment is a theory that can apply under any of the statutes as well. The other frameworks/models of proof we will be discussing are statute-specific. All of these theories provide frameworks for investigating complaints of discrimination. You will know which theory or theories to apply in your investigation because, as we will learn later, the agency that assigns you the investigation will have framed the issues before giving you the case file.

Disparate Treatment

Disparate treatment is the most easily understood and the most common theory of discrimination.

The claim in a disparate treatment case is that an individual has been treated adversely because the agency decisionmaker was motivated by his/her race, color, sex, national origin, religion, age, or disability—that is, his/her membership in a protected group.

Knowledge and perception are relevant in a discrimination case: in general, what does an agency or supervisor know or think s/he knows about a complainant?

Why is this important? In order to prove discrimination, the complainant must show that the agency knew of and took an adverse action motivated by his/her membership in a protected class.

Scenario #7: John, a 25-year-old office employee, receives a “satisfactory” evaluation from his supervisor, Paul, who is 43. John learns that Sam, who is even older than Paul, received an “outstanding” evaluation. John thinks that Paul doesn’t like him because he is much younger than Sam. John wants to file a complaint alleging age discrimination.

What is John’s claim (what are the statute, issue, and basis)? Let’s assume John was 50 years of age. What information would be needed for the agency to determine whether there was a causal connection between John’s age and the “satisfactory” evaluation that he received?

Scenario #8: John, an office employee, receives a “satisfactory” evaluation from his supervisor, Paul. John’s two previous evaluations from Paul were both “outstanding.” John and Paul are Asian. John’s new wife is black. John thinks that Paul does not like that he (John) is married to someone black. John wants to file a complaint alleging race discrimination.

What is John’s claim (what are the statute, issue, and basis)? How could you show whether Paul was aware of John’s wife’s race? What information would be needed to determine whether there is a causal connection between Paul’s knowledge of the race of John’s wife and the “satisfactory” evaluation that John received?

Scenario #9: The agency advertised for two Administrative Assistant positions. It decided to hire Carter, a black female, and Casey, a white male. Among the applicants not hired is Cameron, a black male. Cameron wants to file a complaint alleging discrimination based on race and gender.

Does it matter that the agency hired a male applicant and a black applicant? Would it make a difference to our analysis if Cameron and the others all applied by resume and never met with the selecting official, who did not know any of the parties?

INVESTIGATING A CLAIM OF DISCRIMINATION: DISPARATE TREATMENT

Under disparate treatment theory, there are two basic types of evidence:

- Direct evidence: Evidence that proves bias and the intent to discriminate

Circumstantial evidence: Evidence that suggests that discrimination motivated the actor

Direct Evidence

Direct evidence of discrimination consists of facts revealing that intentional discrimination caused an adverse action. It is very rare to find direct evidence of discrimination. If a responsible management official tells you that s/he did not select the complainant because s/he was too old and inflexible, you have direct evidence of unlawful age discrimination. The agency has made it clear that the employment action was taken **because of, or was motivated by**, the complainant'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, or other protected basis. An example of such a statement is "I don't hire old goats like him."

To prove discrimination, however, there must be a connection, or link, between the direct evidence and the adverse action. There may be cases in which there is direct evidence of bias but it does **not** constitute proof of discrimination. For example, if an employee who is not connected to the adverse action made a biased verbal statement, that statement will not prove the adverse action was discriminatory. Similarly, if a biased verbal statement was made months or years earlier, it may be direct evidence of past bias, but it may be weaker evidence of current unlawful discrimination.

Scenario #10: Abigail wears a snood (head covering) as part of her Orthodox Jewish religion. She was denied the opportunity to transfer on a detail to the position of Director's Assistant and believes it was because of her religious practice. She alleges the following questions were asked of her by the Director in the interview: "So, what's the deal with the thing on your head? Could you wear something fancier? I just don't get the whole covering your head for modesty thing."

Are the Director's statements direct evidence of discrimination?

Circumstantial Evidence

This is evidence that is suggestive of discrimination. A complainant is not required to provide direct evidence to prove a case of disparate treatment. The vast majority of disparate treatment cases are proven by circumstantial evidence.

Proving discrimination through the use of circumstantial evidence in a disparate treatment case typically involves a three-part analysis (often referred to as the **McDonnell Douglas** analysis, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)).

Complainant must initially establish a **prima facie** case of discrimination by showing

- that s/he belongs to a statutorily protected group,
- that an adverse employment action occurred, and

some connection between the two (i.e., in a selection case, that although the complainant was qualified for the position, an individual not in complainant's protected group was selected).

Establishing these elements, if unrebutted, creates an inference that the agency's actions resulted from discrimination.

The agency may then rebut the initial inference of discrimination by **providing a legitimate, non-discriminatory reason** for its actions. What does this mean? It means that the agency generally responds to the complaint and offers some non-discriminatory reason for the employment action. For example, an agency official may state that s/he did not discipline the complainant because of his/her national origin; rather, the complainant was disciplined because of his/her poor attendance and poor performance.

Once the agency has articulated a non-discriminatory reason, the investigation focuses on whether the articulated reason is a **pretext** to hide discrimination. In other words, is the reason given by the agency or the responsible management official merely a "cover-up" for discrimination?

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." After all the steps are analyzed, the question that still remains is whether the agency took the challenged adverse action against the complainant because of a discriminatory motive.

Establishing Pretext

Pretext can be established in several ways. The most common way involves comparing the agency's treatment of the complainant with its treatment of individuals who are similarly situated to the complainant but who are not in the complainant's protected group.

Individuals who are similarly situated are those who are, or were, in similar circumstances, such that you reasonably would expect them to receive the same treatment as the

complainant. In determining whether others are similarly situated, it is necessary to know the following:

- Are they covered by the same policy? 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 complainant? Is it the same as the 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 would not be similarly situated for comparing time and attendance violations.

Some factors used to determine who is similarly situated include

1. Bargaining unit versus non-bargaining unit
2. Non-supervisory employees versus managers/supervisors
3. Different departments/functions
4. Probationary versus non-probationary employees
5. Employees at different stages of the disciplinary process
6. Rule violations known to the agency versus violations *unknown* to the agency

Note: Complainants frequently allege that “everybody did it” but the agency or responsible management official did not discipline others. The investigator must investigate whether the agency or the responsible management official knew that others were violating the policy.

7. Employees separated by long periods of time or announced policy changes

Note: This factor only applies to legitimate policy changes and not those instituted as a pretext to discriminate against the complainant.

Remember that most complainants 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.

Some agency witnesses or representatives may improperly define the pool of similarly situated comparators, either through lack of technical knowledge or a desire to present the pool that puts their decision in the most favorable light. It is the investigator’s responsibility to seriously examine the comparators suggested by both parties, ask probing questions to uncover any unnamed comparators, and make an independent judgment as to whether the correct individuals are being compared. If the pool of similarly situated individuals is flawed, the entire investigation of the case may be equally flawed.

Scenario #11: Ms. Scott, an African American Program Analyst, was disciplined for taking excessively long lunch hours. She claims that other White employees took the same amount of time for lunch and were not disciplined in any way. The responsible management official states that the other White employees who took long lunch hours were in managerial positions and that their positions did not demand such a rigid schedule.

With whom should we compare Ms. Scott?

Are the best comparators other Program Analysts? What if there are no other Program Analysts in the office?

Generally, once comparative evidence is used to create an initial inference of disparate treatment, comparative evidence it is not helpful to establish pretext unless the comparative evidence addresses and accounts for the non-discriminatory reason. For example, if a female complainant creates an initial inference of discrimination by showing that she was disciplined, but a male comparator working for the same supervisor was not, the comparator evidence would only help establish pretext if the male comparator had engaged in misconduct of comparable or greater seriousness.. While **comparative evidence** is the most commonly used method for investigating for pretext, there are additional ways to investigate for pretext when comparators are not available. These may also be used to buttress comparative evidence.

Statistical Evidence

Statistical evidence can also be used to uncover pretext. For example, in a case in which a female complainant alleges she was fired from her warehouse job because of her sex, if there is evidence that an agency hires disproportionately fewer women for warehouse jobs and fires a disproportionately larger number of women from such jobs, this may be probative evidence of pretext that an investigator should collect for the decision maker to consider in evaluating the credibility of the employer's reason for the decision.

Other Evidence

Pretext may also be established by other evidence, for example, suspicious timing, statements by the agency that lack credibility, or behavior or comments directed at the complainant or other employees in the protected group.

Sometimes, the timing of the adverse action is suspicious enough to raise an inference of discrimination. For example, if an agency takes an adverse action right after it receives a copy of a complaint, then that raises an inference of retaliation.

In retaliation cases in particular, sometimes simply proving that the responsible management official is untruthful or has provided false information may be sufficient evidence to establish pretext to hide discrimination. While an agency's failure to give a

credible reason for its action does not compel a finding of discrimination, the agency's false explanation, coupled with the prima facie case, may be enough to conclude that discrimination was the true reason for the adverse action.

Sometimes, a responsible management official may lie about the reasons for an action even when the true reason is not unlawful. For example, the agency's decisions may have been based upon political motives, nepotism, personal dislike, or favoritism. The evidence must show that an agency employee **lied to cover discrimination**.

Scenario #12: Anne, age 59, was terminated from a position as a Senior Editor for the agency's Office of Congressional and Legislative Affairs. The Office Director advised the EEO investigator that Anne was terminated because of performance deficiencies and notes that Anne's position was eliminated in a recent reorganization. Anne alleges that her former duties were initially transferred to a 31-year-old co-worker and then given to a newly hired 29-year-old editor. The investigator discovered an email from the Director, dated 15 months prior to Anne's termination, instructing supervisors to "re-read" Anne's work products to look for performance deficiencies. She also found email exchanges with Human Resources discussing possible rationales for discharging Anne. One of these noted, "this is a performance issue and must be presented as such."

What are the elements of Anne's prima facie case?

What evidence would be relevant to an inquiry concerning pretext?

Mixed-Motive Cases

In some cases, you'll discover evidence that suggests that the responsible management official's actions **at the time s/he made the decision** were based on both discriminatory and non-discriminatory reasons. These are known as mixed-motive cases.

For example, suppose that a responsible management official admits that he considered the fact that the complainant had filed a sexual harassment complaint when he made a decision to discipline her. This would constitute direct evidence of unlawful retaliation. However, the official also states that the complainant left her dispatcher's position during an emergency, and this was also a reason for her discipline. In such a case, the investigator would need to thoroughly investigate whether the agency would have disciplined the complainant because of her misconduct even absent the discriminatory motive. If a true mixed-motive case is shown, there is a violation of the law, but the remedy may be different.

After-Acquired Evidence Cases

Sometimes the investigator will find evidence that the agency acted for discriminatory reasons, but the evidence also shows that, after the agency took the adverse action, it

discovered a lawful reason for taking the same action. For example, suppose that in a selection case, your investigation discloses that the complainant was better qualified than the selectee and you have evidence to indicate the selection was discriminatory. In preparing for his interview with the EEO investigator, the responsible management official discovers that the complainant lied when she stated on the application that she was unrelated to any current employees, when in fact her sister also worked for the agency. This deception on her application could have been a legitimate non-discriminatory reason for non-selection due to the agency's anti-nepotism policy. But, inasmuch as the official was not aware of the deception at the time s/he made the selection, it was not a factor in his decision. In such a case, there is still a violation of the law, but the remedy is affected by the after-acquired evidence.

The Bona Fide Occupational Qualification Defense

Title VII and the ADEA allow an agency, in very limited circumstances, to discriminate on the bases of sex, religion, national origin, and age when sex, religion, national origin, or age 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 agency can prove that the employee's sex, religion, national origin, or age is necessary to perform the essential functions of the job.

An example may be a situation where an agency needs a guard in a women's prison facility. Gender could be a BFOQ for the job.

INVESTIGATING A CLAIM OF DISCRIMINATION: DISPARATE IMPACT

Most cases involve the use of disparate treatment analysis for proving discrimination. However, there is another theory of discrimination that sometimes arises. “Disparate impact,” “adverse impact,” and simply “impact” are terms that are used interchangeably to describe this theory of discrimination.

Investigating Disparate Impact

In a disparate impact case, the complainant **does not have to show intent** to discriminate. Instead, the claim is that a policy or practice that is neutral on its face (so everyone is treated the same) has a significantly negative impact on members of a protected group.

- For example, the requirement that individuals seeking work as attorneys have law degrees is a neutral policy that on its face applies to everyone equally. The requirement that all clerical employees be able to type 40 words per minute is also a neutral policy that applies to everyone equally.

However, if a facially neutral policy disproportionately excludes members of a protected class, that policy may be discriminatory. For example, an agency required that all employees for a position have a degree in an agriculture-related field. Female employees of the agency noted that 80% of the graduates from agriculture-related degree programs were male. So, this neutral policy had barred more women than men from this job.

Once a complainant shows this disproportionate impact on a protected group, the burden shifts to the agency to justify the policy or practice. Here, the agency would have to show that its policy/requirement met a legitimate business need — that is, met the operational needs of the agency and the position in question. The agency has the opportunity to raise the “business necessity defense.” That is, the agency has the opportunity to show that even though the policy has a disparate impact, it is job related and necessary to the safe and efficient operation of the business. In the case of the agriculture-related degree requirement, the agency would have to show that knowledge of agriculture, and the learning that occurs while seeking an agriculture degree, are related to the performance of the job.

Rebuttal to Agency’s Defense

If the agency can prove its business need for the policy, then the complainant may be out of luck, unless she can show that there is an alternative with less disparate impact that would still meet the agency’s business needs. For example, the complainant in the agriculture case might show that growing up on a working farm and active involvement in 4-H clubs would provide the experience and knowledge needed to do the job. Where the complainant shows that there are less discriminatory means to achieve the same end, the agency’s defense would be defeated.

Another example: Suppose an agency requires all bookkeepers to have graduated from a four-year business college. This requirement is shown to have a disparate impact on

Hispanic applicants. The agency proves that this requirement is job related and consistent with business necessity by proving that bookkeepers with college degrees perform better than those without. Nevertheless, the complainant may show that there is an alternative with less disparate impact that would still meet the agency's business needs. For instance, requiring a certain amount of course work in accounting may be as effective a selection device, while resulting in less disparate impact.

These are some examples of policies/practices that should signal the need for a disparate impact analysis:

- Minimum height/weight requirements
- Certain educational requirements
- Physical agility tests
- "No beards" policy
- Criminal record screens

In such cases, the investigator is not looking for evidence of the agency official's intent to discriminate. Rather, statistical evidence of the impact of the agency's policy on the complainant's protected class becomes relevant. Equally relevant is evidence establishing a connection between the policy and the operations and mission of the agency.

Discrimination Based on Sex: Pregnancy Discrimination

Sex discrimination involves treating someone unfavorably because of that person's sex, which includes gender. Title VII protects both women and men from discrimination.

Title VII, as amended by the Pregnancy Discrimination Act (PDA) of 1978, clarifies that discrimination based on pregnancy, childbirth, or related medical conditions is a prohibited form of sex discrimination. It requires that employers treat women affected by pregnancy or related medical conditions the same way they treat non-pregnant applicants or employees who are similar in their ability or inability to work.

Adverse decisions relating to hiring, assignments, or promotion that are based on an employer's assumptions or stereotypes about pregnant workers' attendance, schedules, physical ability to work, or commitment to their jobs are unlawful. Even when an employer believes it is acting in an employee's best interest, adverse actions based on assumptions or stereotypes are prohibited. For instance, it is unlawful for an employer to involuntarily reassign a pregnant employee to a lower-paying job involving fewer deadlines based on an assumption that the stress and fast-paced work required in her current job would increase risks associated with her pregnancy.

As a general rule, the PDA prohibits sex-specific policies that restrict women from certain jobs based on childbearing capacity, such as those banning fertile women from jobs with exposure to harmful chemicals. An employer's concern about risks to a pregnant employee or her fetus will rarely, **if ever**, justify such restrictions. Sex-specific job restrictions can only be justified if the employer can show that lack of childbearing capacity is a BFOQ, that is,

reasonably necessary to the normal operation of the business. An employer is also prohibited from discriminating against an employee because she has stated that she intends to become pregnant.

Blanket policies dictating when a woman must take maternity leave are unlawful. Further, Title VII prohibits an agency from asking women questions that it does not ask men, such as whether they would quit or seek extended time off following pregnancy (or even whether they intend to become pregnant), or what kind of childcare arrangements the applicant/employee has made or would make if they were offered a particular position.

Who would be similarly situated in a pregnancy discrimination case?

The comparator group, the group of similarly situated employees, for a pregnancy claim includes non-pregnant male and female employees who are similar in their ability or inability to work. Guidance on the PDA can be found at www.eeoc.gov, with the specific link listed in the Additional Resources provided with your materials.

Discrimination Based on Sex: Gender Identity and Sexual Orientation

Discrimination against an individual because that person is transgender (gender identity discrimination) is, by definition, discrimination based on sex, and violates Title VII. See *Macy v. Department of Justice*, EEOC Appeal No. 0120120821 (April 20, 2012).

Applying *Macy*, the Commission has also held that an employer's restrictions on a transgender woman's ability to use a common female restroom facility constituted disparate treatment ([Lusardi v. Dep't of the Army, EEOC Appeal No. 0120133395, 2015 WL 1607756 \(Mar. 27, 2015\)](#)), that intentional misuse of a transgender employee's new name and pronoun may constitute sex-based discrimination and/or harassment ([Jameson v. U.S. Postal Service, EEOC Appeal No. 0120130992, 2013 WL 2368729 \(May 21, 2013\)](#)), and that an employer's failure to revise its records pursuant to changes in gender identity constituted a valid Title VII sex discrimination claim ([Complainant v. Dep't of Veterans Affairs, EEOC Appeal No. 0120133123, 2014 WL 1653484 \(Apr. 16, 2014\)](#)).

In [Baldwin v. Dep't of Transportation, EEOC Appeal No. 0120133080 \(July 15, 2015\)](#), the Commission held that a claim of discrimination on the basis of sexual orientation necessarily states a claim of discrimination on the basis of sex under Title VII.

The *Baldwin* decision explains that allegations of sexual orientation discrimination necessarily involve sex-based considerations. First, discrimination on the basis of sexual orientation necessarily involves treating an employee differently because of his/her sex. Sexual orientation discrimination is also sex discrimination because it is associational discrimination on the basis of sex. That is, an employee alleging discrimination on the basis of sexual orientation is alleging that the employer took the employee's sex into account by treating him/her differently for associating with a person of the same sex. Finally, discrimination on the basis of sexual orientation is sex discrimination because it necessarily involves discrimination based on gender stereotypes, including employer beliefs about the person to whom the employee should be attracted.

More information on gender identity and sexual orientation discrimination can be found at www.eeoc.gov, with specific links listed in the Additional Resources provided with your materials.

Scenario #13: Bob interviewed Patricia, a recent law school graduate, for a position as an agency attorney. Bob noticed Patricia's wedding band and asked, "How many children do you have?" Patricia responded that she had no children but hoped to once she and her husband had their careers underway. Bob explained that this was a demanding position and, rather than discussing Patricia's qualifications, asked how she planned to balance work and childcare responsibilities once the need arose. He added, "You are like the women I already have who think they can come and go as they please to take care of their families." Patricia advised him that she planned to share childcare responsibilities with her husband, but Bob quickly interjected, "men are not reliable caregivers." Bob selects another female applicant, who is not married.

Is there direct evidence of discrimination?

What are the elements of Patricia's prima facie case?

What additional evidence is needed to establish a connection between her protected status and the non-selection?

Would it matter whether the successful applicant was male? More qualified than Patricia?

What if the agency did not select and decided to re-advertise? Could Patricia assert gender discrimination even in the absence of a comparator? Would she have to wait until after the agency re-advertised?

Discrimination Based on National Origin

As discussed, national origin discrimination covers discrimination against an individual because of someone's place of origin (or that of his ancestors) or his national origin group/ethnicity (i.e., a group sharing a common language, culture, ancestry, etc.). It also may include accent or manner of speaking, English fluency, appearance, and the imposition of citizenship requirements and English-only rules.

For instance, because accent is closely linked to national origin, adverse employment decisions based on accent may be unlawful discrimination based on national origin. Under Title VII, distinctions based on accent are permissible only when an accent "interferes materially with job performance." Employers must provide actual evidence, and not just unsupported assertions, to justify adverse actions based on an employee's or applicant's accent.

Whenever an "accent" claim arises, the investigator must gather evidence to establish

- whether the ability to communicate is materially related to the ability to perform the job, and

whether the individual's accent in fact interferes with that necessary ability to communicate.

Guidance on national origin discrimination can be found at www.eeoc.gov, with the specific link listed in the Additional Resources provided with your materials.

Scenario #14: Randy, a native of Grenada, works as a computer specialist with the agency's Help Desk. He was reprimanded after his Director received a complaint from another agency Director regarding Randy's poor customer service. She accused Randy of being "rude and insensitive" about her inability to understand him due to his thick accent.

What evidence is relevant to Randy's claim of national origin discrimination?

What questions should the investigator ask Randy's Director? The complaining Director?

Should the investigator determine whether s/he can understand Randy? Is this relevant evidence?

RETALIATION

Reprisal

All five statutes enforced by EEOC prohibit retaliation against an individual because s/he has either

- Opposed an unlawful employment practice, or filed a complaint, or testified, assisted, or participated in an investigation, proceeding, or hearing concerning prohibited discrimination.

When an individual alleges retaliation in a complaint, they do not need to show an adverse employment action; they only need to prove that the agency's adverse action is likely to deter the complainant or others from engaging in protected activity.

The retaliation provisions provide exceptionally broad protection to individuals who file complaints or otherwise aid the EEO enforcement function.

- Any individual who has engaged in opposition or participation, or is closely related to someone who engaged in such activity, is protected against retaliation.

It is important to note that the **individual does not have to be a member of the protected group in question to be protected**. For example, a male who testifies during an investigation that he saw the female complainant being sexually harassed by her supervisor and is later disciplined because of his participation has grounds for a retaliation complaint. Individuals protected from retaliatory conduct are not limited to those who protest discrimination against themselves.

Elements of a Retaliation Claim

There are three essential elements that must be established in any retaliation claim:

1. Complainant **opposition** to discrimination or **participation** in covered proceedings,
2. Action by the agency that is reasonably likely to deter protected activity, and
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 complainant clearly stated to his/her manager that s/he believed s/he was the victim of some type of unlawful employment discrimination. But sometimes the complainant's form of opposition is ambiguous.

For example, what if the complainant said to her manager, “I think I should get paid more.” If she later claims that this statement was a complaint of sex-based wage discrimination, and that she was subjected to retaliation for making that complaint, would she have a valid

complaint? Probably not. Her statement was too ambiguous. There are too many possible reasons an individual might believe that his/her wage is unfair.

Suppose, however, that the complainant's workplace is filled with graffiti on the walls with sexually offensive words and pictures. Suppose also that the complainant said to her supervisor, "I want the graffiti removed." Like the other example, the complainant did not *explicitly* say, "I believe I am being subjected to sexual harassment." Would her statement be too ambiguous to qualify as opposition? No. In this situation, it seems clear that her supervisor reasonably would have interpreted her statement as opposition to sexual harassment.

In addition, the **manner of opposition must be reasonable**. The right to oppose discrimination must be balanced against the agency's need for a stable and productive work environment. Thus, violent or unlawful forms of opposition would not be reasonable.

The complainant 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 individual is protected against retaliation, even if it is ultimately determined that the opposed practice was lawful and not discriminatory.

Participation

Any form of participation in the statutory complaint process qualifies as participation — not just filing a complaint, but also giving information regarding someone else's complaint.

- Under the "participation" clause of the Title VII prohibition on retaliation, an individual is protected from retaliation when s/he files a complaint, seeks EEO counseling, testifies at a hearing on behalf of a complainant or the agency, or assists the complainant or the agency in the matter.

The merit of the original protest, or complaint, has no relevance to the individual's retaliation complaint. For example, an employee whose original claims are very weak is sometimes a target for retaliation because the manager is upset that the employee has filed a "frivolous complaint."

Scenario #15: Forrest works as a prison guard. He was demoted after refusing to comply with the practice of only allowing the white (but not non-white) inmates to shower after a work shift.

Analyze Forrest's allegation of opposition retaliation. Does it matter that the inmates are not employees?

What evidence should the investigator gather? Interviews?

Actions Likely to Deter

Did the agency subject the complainant to any kind of adverse action?

- Although trivial annoyances are not actionable, retaliatory treatment that is reasonably likely to deter protected activity is unlawful. There is no requirement that the action materially affect the terms, conditions, or privileges of employment.

Retaliatory actions undertaken after the complainant's employment relationship with the agency has ended, such as negative job references, can be challenged.

Examples of adverse actions include these:

- Harassment and intimidation
- Denial of employment benefits
- Discharge, discipline, demotion, reassignment
- Unjustified evaluations and reports

Acceleration of disciplinary action

Causal Connection

A violation would not necessarily be found simply because the complainant engaged in protected activity and was subsequently subjected to an adverse action. There must be **proof** that a **reason** for the adverse action was that the individual engaged in protected activity.

In rare cases, 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? First, you would look for evidence of **whether the treatment of the complainant changed** after she made the protest. Second, you would look at a **time line** — that is, how long after the protest did the adverse action occur?

For example, if the adverse action occurred shortly after the protected activity, and the manager who undertook the adverse action was aware of the protected activity, then the inference of retaliatory motive for the adverse action becomes stronger. 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. For example, in one case where the complainant was disciplined 18 months after she filed an EEO complaint, there was evidence that her manager mentioned the complaint at least twice a week during the interim, and her discipline occurred just 2 months after the EEO office dismissed her original complaint.

Retaliation claims based on circumstantial evidence usually boil down to the question of whether the agency's explanation for the adverse action is pretext. Like the investigation of other disparate treatment claims, comparator evidence is not required in retaliation cases,

but you may examine how the agency treated the complainant in comparison with how it treated **similarly situated employees** who did not engage in protected activity if such evidence is available.

Who is similarly situated in a retaliation claim?

The definition for the comparator group for a retaliation claim is everyone of any race, sex, or other protected basis 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 engages in poor performance or misconduct the fact that s/he engaged in protected activity does not protect him/her against any legitimate adverse action.

Guidance on retaliation can be found at www.eeoc.gov, with the specific link listed in the Additional Resources provided with your materials.

Scenario #16: Darryl is alleging discrimination on the basis of retaliation. He believes that his supervisor denied his training request because he testified in an EEO hearing filed by a co-worker.

Is this allegation opposition or participation retaliation?

Is the alleged harm “likely to deter”?

What questions should the investigator ask Darryl regarding his testimony?

What questions should the investigator ask to establish a causal connection?

RELIGIOUS ACCOMMODATION

Discrimination Based on Religion

Religious accommodation cases are a subset of religious discrimination cases. However, religious accommodation cases **do not involve a comparison** between the complainant and similarly situated individuals. They involve a conflict between religious practices or beliefs and work schedules or job requirements. For example, a dress code may conflict with wearing religious clothing, such as a head covering. Like all other claims under Title VII, both applicants and current employees are covered.

Under Title VII, agencies 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 agency’s business.

Many requests for reasonable accommodation involve employees’ seeking time off to celebrate the Sabbath or other religious holidays. Other areas that may involve the need for accommodation include conflicts with work schedules, dress or grooming practices that conflict with uniform or dress codes, and requests for prayer breaks during work.

Religious accommodation cases must be analyzed on a case-by-case basis. Investigations must be based on an individualized assessment of the agency’s operations to analyze its “undue hardship.”

There are four elements in a religious accommodation case:

1. The complainant has a sincerely held religious belief.

A reasonable accommodation may be required even if the complainant does not belong to an established or a specific religious group.

2. The complainant must inform the agency of the need for religious accommodation **unless the agency otherwise knows.**

For example, a complainant requested Saturdays off, but he did not tell the agency he needed them off to observe a religious practice. The agency denied the request. Has the agency discriminated against the complainant? No. However, even if an applicant has not requested accommodation, an agency may violate the law by refusing to hire him because the agency knows or suspects he would need accommodation.

3. The agency has the duty to reasonably accommodate the complainant.

- Unlike the other bases of discrimination under Title VII, agencies have an **affirmative duty** beyond not discriminating: there is a duty of reasonable accommodation.
- The agency does not have to provide the exact accommodation requested, as long as the religious accommodation provided reasonably meets the complainant’s needs. Generally, agreeing on a reasonable accommodation is an interactive process between the employee and the agency.

4. If the agency refuses to accommodate, can it prove the accommodation would create an undue hardship on the conduct of its business?
- The investigation of a religious accommodation claim will basically center on the efforts that the agency made, or could have made, to accommodate the complainant's request.
 - The EEOC Guidelines on Discrimination Because of Religion, 29 C.F.R. Part 1605, suggests that agencies consider accommodations such as voluntary substitutes and "swaps," flexible scheduling, and lateral transfer and change of job assignment when an employee cannot be accommodated as to either his entire job or an assignment within the job.

The agency can raise the undue hardship defense and attempt to show that none of these alternatives would work.

- In 1977, the United States Supreme Court defined "undue hardship" in *Trans World Airlines v. Hardison*, 432 U.S. 63 (1977), as any hardship that is "more than a de minimis cost." EEOC subsequently issued its Guidelines on Discrimination Because of Religion, which provides the standards to be used in interpreting "reasonable accommodation," "undue hardship," and "de minimis cost."
- To analyze an agency's cost-based **undue hardship** defense, you must examine the identifiable cost of the accommodation in relation to the size and operating costs of the agency, and the number of employees who have requested accommodation.

Costs to be considered include not only direct monetary costs but also the burden on the conduct of the agency's business. For example, courts have found undue hardship where the accommodation 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. Guidelines on Discrimination Because of Religion, 29 C.F.R. Part 1605, can be found at www.eeoc.gov, with the specific link listed in the Additional Resources provided with your materials.

Religious Expression

Generally, employees may engage in private religious expression in their personal work areas not regularly open to the public, subject to the agency's reasonable, content-neutral standards. Guidelines on Religious Exercise and Religious Expression in the Federal Workplace, which can be found at www.eeoc.gov (with the specific link listed in the Additional Resources provided with your materials), explicitly provides that federal agencies must allow their employees to wear religiously prescribed clothing.

- Employees are permitted to engage in religious expression with or directed at fellow employees to the same extent they are permitted to engage in comparable speech not involving religion.
- An employee may be restricted from engaging in religious expression where it creates or may create the impression that the government is sponsoring, endorsing, or inhibiting religion generally, or favoring or disfavoring a particular religion, or

where the religious expression is harassing, interferes with work, or is otherwise disruptive.

Scenario #17: Laura, who is Jewish, was terminated from her position as an analyst during her 90-day probationary period. She refused to attend a mandatory training session scheduled on a Saturday because of religious reasons. She advised her manager that she cannot work from sundown on Friday until sundown on Saturday. When questioned, the manager noted, "This training was a one-time offering and was conducted outside our agency, so we had no control over the day it was held."

Analyze Laura's allegation of discrimination. What questions should the investigator ask?

How does the fact that the agency could not control the day of the session affect your analysis?

Scenario #18: Kamilah is a supervisor and a devout Methodist. She interviewed Sasha for a position in her division. She was impressed with Sasha and was prepared to select her until she saw a local newspaper article that identified Sasha as a gay marriage activist. When Derek questioned Kamilah about her non-selection of Sasha, she replied, "I think it is important that we protect the institution of marriage between a man and a woman. I could not work with someone who believes in 'opposite marriage.'" Derek disciplines Kamilah for allowing her religious beliefs to factor into her employment decision. Kamilah files an EEO complaint alleging denial of religious accommodation.

Analyze the elements of Kamilah's complaint. What is the agency's duty regarding Kamilah's sincerely held religious belief?

WAGE DISCRIMINATION UNDER THE EQUAL PAY ACT AND TITLE VII

The Equal Pay Act of 1963

The Equal Pay Act (EPA) 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:

- **Skill:** 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 of equal skill 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:** For example, suppose that men and women work side by side on a mail sorting line. The man at the end of the line must also lift the boxes of mail and place them on a table. That man's job may **not** be considered to involve equal effort as the other sorting jobs **if** the extra effort of lifting the boxes is substantial and it is a regular part of the job.

Responsibility: Responsibility may be measured in a variety of ways, including, for example, financial accountability, management duties, regular interaction with senior officials, or the ability to work independently and exercise initiative. For example, a manager who negotiates and oversees an agency's high dollar contracts has more responsibility than a manager who oversees smaller contracts negotiated by others. On the other hand, a minor difference in responsibility, such as 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.

The EPA does not allow an agency to reduce the wages of any employee to correct an unlawful wage differential. So, if you discover evidence that an agency is paying lower wages to women who are performing substantially equal jobs under similar working conditions as higher-paid men, the agency must raise the women's wages, not lower the men's.

Defenses Under the Equal Pay Act of 1963

The EPA allows an agency to pay different wages if the difference is based on one of the four defenses set forth in the statute:

1. **Seniority:** The wage differential can be based on a bona fide seniority system. To be bona fide, it must be an established seniority system with predetermined criteria, must be communicated to employees, and consistently applied, and it must not have been adopted with a discriminatory purpose.

2. **Merit:** A wage differential can be based on a merit system that has predetermined criteria, is communicated to employees, and is consistently applied. The merit system may be based on objective or subjective criteria. Agencies with merit systems that include subjective criteria should ensure that the criteria are, among other things, legitimate, accurate, and consistently applied. For example, in one case an agency was unable to rely on its purported merit system to justify different pay for male and female cashiers where the primary consideration in pay decisions was a high official's "gut feeling" about each employee.
3. **Quantity or Quality of Production:** For example, in a division where lawyers are awarded administrative leave based on the number and quality of their briefs, and some of the female lawyers have repeatedly completed more briefs that were consistently praised as superior, the agency would not be in violation of the Equal Pay Act if those attorneys were given more administrative leave as a result.
4. **A Factor Other Than Sex:** This is a broad defense that encompasses a wide array of factors. An employee's job-related education, experience, or training may justify a wage differential; for example, a male physics professor with a Ph.D. in physics could be paid more than a female physics professor with just a master's degree.

Title VII of the Civil Rights Act of 1964

Title VII prohibits wage discrimination on the basis of race, color, religion, sex, or national origin. The basic theories of disparate treatment and disparate impact apply to wage discrimination claims under Title VII.

THE AGE DISCRIMINATION IN EMPLOYMENT ACT (ADEA)

The Age Discrimination in Employment Act

- prohibits discrimination on the basis of age against individuals 40 or over,
- prohibits retaliation for participating in the EEO process and for opposing employment discrimination, and

uses the *McDonnell Douglas* disparate treatment analysis.

HARASSMENT

Introduction

Harassment in the workplace is a particularly notorious form of discrimination. While much publicity and attention are directed toward sexual harassment claims, the general principles of hostile work environment harassment apply to all bases of harassment, that is, harassment based on race, color, religion, national origin, age over 40, disability, or genetic information, and for retaliation. Furthermore, it is important to remember that gender-based harassment — that is, conduct that is **not** of a sexual nature, but is based on the gender of the complainant — is also unlawful. For example, a complainant who alleges that her manager calls her a “stupid broad” and makes other disparaging comments about women that are not sexual in nature may also file a harassment claim based on sex.

Elements of a Harassment Claim

Typically, there are four elements of a harassment claim:

1. The challenged conduct must be **unwelcome**.
 - If the employee did not solicit or invite the conduct and regards it as undesirable, it would be considered unwelcome.
 - The critical inquiry is whether it was explicitly or implicitly communicated to the alleged harasser that the conduct was unwelcome.
2. The complainant must have been subjected to the conduct because of his/her sex, race, color, religion, national origin, age, disability, or **genetic information**.
3. The challenged conduct must have resulted in a tangible employment action or a hostile work environment.
 - Tangible employment action
 - An agency is **always** liable for unlawful harassment by a supervisor that resulted in a tangible employment action. The agency has **no defense** for such harassment.
 - A tangible employment action is “a significant change in employment status.” Examples are hiring, firing, promotion, failure to promote, demotion, undesirable reassignment, a decision causing a significant change in benefits, a compensation decision, and work assignment.
 - **Only** a supervisor can undertake a tangible employment action — a non-supervisor does not have that power.
 - Hostile work environment
 - Unlawful harassment can be established if unwelcome conduct based on race, color, sex, religion, national origin, age, or disability creates an intimidating, hostile, or offensive work environment. Neither tangible job harm nor psychological harm need be shown. Psychological harm is a factor, but it is not required.

- **Anyone** in the workplace — a supervisor, co-worker, or even a non-employee — might create a hostile work environment.
 - The governing standard is whether the conduct was severe or pervasive enough to create an environment that a **reasonable person** would find hostile or abusive, and that the **employee** 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 of the circumstances should be considered; no single factor is determinative. Conduct outside the workplace that has an impact on the workplace can contribute to a hostile work environment.
 - 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. One incident of harassment violates federal law only if it is extremely serious.
4. There must be a legal basis for holding the agency liable for the harassment.
- An agency is **always** liable for an actual change in employment that is linked to harassment.
 - An agency is also **always** liable for a hostile work environment resulting from harassment by a supervisor that includes a tangible employment action. The agency has **no defense** for such harassment.
- Note:** A supervisor is an individual with the authority to take or recommend a tangible employment action.
- An employer (agency) can be liable for hostile work environment harassment by a supervisor, even if it does **not** result in a tangible employment action, unless the employer (agency) can prove the following affirmative defense:
 - that it exercised reasonable care to prevent and promptly correct the harassing behavior; and
 - that the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer (agency) or to avoid harm otherwise.

An agency is directly liable with no recourse to an affirmative defense if a “high-ranking” official engages in hostile work environment harassment. An agency is liable for harassment of its employee by a co-worker or a non-employee if it knew or should have known of the harassment and failed to take immediate and appropriate corrective action within its control.

More information on unlawful harassment can be found at www.eeoc.gov, with the specific link found in Additional Resources, provided with your materials.

Harassment Fact Scenarios

Scenario #19: On Lola's first day in the unit, Oliver asked her where she attended church. She advised him that she was an agnostic and unchurched. For weeks afterward, Oliver repeatedly talked with her about her "soul." He told her she was "headed for eternal damnation" and encouraged her to visit his church. For months, she did not object and tried to steer the discussions with him toward religious tolerance. One afternoon, Lola told Oliver, "If Jerry Falwell had been born in Saudi Arabia of Muslim parents, I am sure he would be promoting Islam today." Oliver stomped into his supervisor's office and demanded that Lola be reprimanded for religious harassment.

What evidence is relevant to Oliver's claim of harassment, particularly as to unwelcomeness?

Scenario #20: Ronnie contacted an EEO counselor to discuss his complaint of discrimination. He advised the counselor that he is a wolf hunter. He complained that after a picture of him with his first wolf kill of the year appeared on the Internet, his co-workers and supervisors refer to him as a "fat redneck" and compare him to Michael Vick. The counselor advised Ronnie of the EEO laws and asked whether he felt this conduct was based on any of the protected bases. Ronnie responded that he believes he is being discriminated against because he is "American."

Can Ronnie establish workplace harassment? Is "American" a protected basis?

Scenario #21: Nic's parents were born in Romania and he excitedly sent postcards back to his unit at work when he visited Romania for the first time. One morning, Stacy, his supervisor, asked if he saw the Gypsy couple on television the previous night talking about scams they had pulled on unsuspecting people. Stacy remarked that she was appalled that people who scammed others would flaunt it on television and asked Nic if "Dracula and Gypsies were all Romania contributed to the world." Stacy began referring to him as "Nic's Tricks." Nic eventually told her he was offended. He added that his father's given name was "Gypsy" and that he was proud of his heritage.

The Office Director sent an email encouraging employees to apply for a management opening. Because a recommendation for the position was required, Nic asked Stacy to recommend him for this opportunity. Stacy told Nic he needed to work on developing his character before applying for leadership roles. Nic filed a complaint of harassment and disparate treatment based on national origin because he was denied the promotion.

How should the investigator approach Nic's harassment claim?

Scenario #22: Harold, an African American, claimed that his supervisor, Dimitrie, sent a text message that “Black people exist because they were left in the oven too long.” He alleged that two months later, Dimitrie sent a second text that included a joke comparing black babies to bats and a third regarding blacks and AIDS. Harold told another manager and an investigation was launched. Harold’s request for transfer away from Dimitrie was granted. After its investigation, the agency reprimanded Dimitrie and conducted diversity training for all staff at that location.

Discuss the elements of Harold’s claim.

Scenario #23: During a service celebrating Native American Heritage Month, Kimi revealed to her co-workers that “Kimi” is an Algonquin name meaning “secret.” Kimi also discussed the attempt to Americanize Native Americans and noted that many Native Americans referred to that as “making apples.” Later that afternoon, Kimi overheard her co-worker Kendra jokingly say to another co-worker, “I’ve got a secret for you, Kimi. I wish they’d been successful in making all you natives into ‘apples’ so that I wouldn’t be asked to waste my time going to some stupid service about your heritage.”

Kimi was very offended and upset by Kendra’s remark. She found a large red apple on her desk when she arrived at work the following day. Kimi advised their supervisor, Robert, and he suspended Kendra for harassing Kimi.

Analyze Kimi’s claim of harassment based on national origin and Robert’s response to her complaint.

Scenario #24: Jaden works in a building where a number of federal agencies are located. She has frequent conversations with several federal employees from other agencies during shared smoke breaks outside the building. During one of those conversations, Jaden disclosed that she had recently ended a romantic relationship and joked, “I’m just not gonna get laid anymore.” Afterwards, she shared the elevator ride with Hayden and the walk down the corridor toward both their offices. Hayden grabbed her around the waist and tried to kiss her and touch her breasts. When Jaden protested, Hayden laughed and released her.

The next day, Jaden was outraged when Hayden approached the group of smokers she was talking with, pointed at himself and stated, “You know, I would have satisfied you right

there. I'm still willing to ease your need." Jaden advised her manager about the incidents and was told that she should complain to Hayden's agency.

Analyze Jaden's claim of harassment, **particularly** as to unwelcomeness and severity.

May Jaden file an EEO complaint against Hayden's agency?

May Jaden's agency be held liable for the actions of Hayden, who does not work for Jaden's agency?

Analyze Jaden's manager's response to her complaint.

The models of proof at the end of this participant's manual set out the analytical framework for different types of claims under the different theories of discrimination. Executive Order 11478, "Equal Employment Opportunity in the Federal Government," can be found at www.eeoc.gov, with the specific link listed in the Additional Resources provided with your materials.

FRAGMENTATION, AMENDMENT, AND CONSOLIDATION

What is fragmentation? Fragmentation is the breaking up of a complainant's legal claim into separate factual claims or incidents. When fragmentation occurs, a complainant's ability to present an integrated and coherent claim of employment discrimination can be compromised.

Why else is fragmentation bad? Because it substantially increases case inventories and workloads and because it does not allow the legal claim to be processed properly.

What is an agency's responsibility regarding fragmentation? Agencies must prevent fragmentation at all stages of complaint processing.

How can an agency prevent fragmentation? There are three ways an agency can prevent fragmentation:

1. An agency must *identify and define the claim* in an EEO complaint.
2. An agency may allow the complainant to *amend* a complaint.
3. An agency may *consolidate* two or more pending complaints.

We are going to talk about all of these concepts so that you will know how to recognize fragmentation issues when they arise during your investigations. But it is not the investigator's job to rectify issues of fragmentation. Always report them back to your supervisor or the agency EEO office.

Identifying and Defining the Claim

A **claim** is an assertion that an employment practice or policy is unlawful under the federal equal employment laws, and for which, if the assertion is proven, there is a remedy under the law. Often, a claim is fragmented when the factual incidents that make up the legal claim are identified as individual claims. For example, if an agency treats each and every incident in a harassment case as an individual claim, that would be improper fragmentation of a claim of harassment.

When an agency defines a claim, it must identify two components:

1. The factual statement of the employment practice or policy being challenged, and
2. The basis (race, color, national origin, sex, religion, age, disability, or retaliation) for a violation of an equal employment statute.

In short, what happened and why the complainant believes it happened.

What about incidents that occurred outside the 45-day time period for counselor contact?

Sometimes, a complainant will describe events that happened outside the 45-day time period for counselor contact (which often determines the scope of an EEO investigation). It is important to distinguish whether these incidents should be treated as independently

actionable legal claims or supporting evidence for a claim that has already been timely raised. How should those events be treated?

- If these incidents involve a discrete act, such as failure to hire or promote, termination, or denial of a transfer, they will generally not be independently actionable unless they were timely raised with an EEO counselor. See *National Rail Road v. Morgan*, 536 U.S. 101 (2002). Nonetheless, untimely discrete discriminatory acts should be considered as background evidence if they are relevant to the determination of whether acts which were timely raised were discriminatory. This is true of supporting evidence offered by the complainant during counseling as well as later in the investigative stage. The investigator should gather some information about the prior incidents which fell outside the time period.
- However, if the complainant is making a claim of hostile work environment, it does not matter if some of the acts which are alleged to be part of the claim fell outside the 45-day time period as long as at least one act contributing to the claim occurred within the time period. Because all the incidents, whether timely raised or not, which make up a hostile work environment claim “collectively constitute one ‘unlawful employment practice,’” they will all be considered for the purpose of determining liability. See *National Rail Road v. Morgan*, 536 U.S. 101 (2002) at 117. This is because hostile work environment claims are based on the cumulative effect of individual acts over a period of time. Therefore, these incidents, timely or not, must be investigated as part of the claim.

What is the EEO investigator’s responsibility in these circumstances if the evidence is not relevant?

The EEO investigator may conclude the factual incidents outside the 45-day time limitation are not relevant to the legal claim. If so, the EEO investigator must document in the complaint file any such incident and the reasons why the EEO investigator concluded that the incident did not warrant more than minimal investigation.

New Incidents May Arise after Counseling

If a complainant raises new incidents of alleged discrimination after counseling, the EEO Director or Complaints Manager must determine

- whether the new incident provides additional evidence to support the existing claim, but does not raise a new claim in and of itself;
- whether the new incident raises a new claim that is like or related to the claim(s) raised in the pending complaint; or

whether the new incident raises a new claim that is *not* like or related to the pending claim(s).

If the complainant raises new claims during the investigation, the EEO investigator **MUST** do the following:

- Instruct the complainant to submit a letter to the agency's EEO Director or Complaints Manager describing the new incident(s) and stating that s/he wishes to amend the pending complaint to include the new incidents.
- Inform the complainant that the EEO Director or Complaints Manager will determine how to handle the complainant's request in an expeditious manner.

Inform the complainant that although the EEO investigator CANNOT investigate the new claims without authorization from the EEO Director or Complaints Manager, the investigator will include a brief and concise statement from the complainant about the new claims in the complainant's affidavit.

In some instances, the new incident may simply provide additional evidence to support the existing claim. If so, the EEO Director or Complaints Manager should instruct the investigator in writing to include the new incident in the investigation. A copy of this letter should also be sent to the complainant.

There is no effect on the time period for completing an investigation in this scenario.

Amending a Pending Complaint

If a complainant raises a new incident or claim of alleged discrimination that is like or related to the claims raised in the pending complaint, the complainant may amend the pending complaint. A new incident or claim is "like or related" if it clarifies or adds to the original claim and/or it could have been reasonably expected to grow out of the investigation of the original claim. For example, discipline of the complainant by the responsible management official right after the management official was interviewed by the EEO investigator would be a retaliation claim that is like and related to the original claim.

What are the effects of amending a complaint?

- Additional incidents are included in the original complaint.
- No additional EEO counseling is required.
- The agency must acknowledge the receipt of an amendment to a complaint in writing and inform the complainant of the date on which the amendment was filed.
- The EEO investigator should receive a copy of the letter sent to the complainant along with instructions to include the new incident(s) in the investigation.
- The EEO investigator will generally take supplemental affidavits that will be included in the Investigative Report.
- The EEO investigator must complete the investigation of an amended complaint within the earlier of
 - 180 days after the last amendment, or
 - 360 days after the filing of the original complaint.
- Regardless of amendment or consolidation of complaints, the investigation must be completed in not more than 360 days.

- The complainant may still request a hearing 180 days after the filing of the original complaint even if the investigation is not completed.

If the complainant requests a hearing before the investigation is completed, the EEO investigator should stop the investigation and turn in the Investigative Report to the agency EEO office.

Consolidating EEO Complaints

Suppose the EEO Director concludes that the new incident or claim raised by the complainant is NOT like or related to the pending complaint. In this circumstance, the new incident or claim should be the subject of a separate EEO complaint and processed accordingly. If the new complaint is not resolved at the informal stage, and the complainant files a new formal complaint, the agency must consolidate the pending complaints.

What are the effects of consolidating complaints?

- The complainant must seek EEO counseling on the new claim.
- The 45-day time period for contacting a counselor is calculated by using the date on which the complainant's written request to amend was postmarked or received. If the complainant visited the EEO office to request an amendment, the date of that visit would be used.
- The agency must consolidate two or more complaints filed by the same complainant into one investigation.
- The agency must notify the parties in writing that the complaints have been consolidated, and this notice must be included in the Investigative Reports of the consolidated complaints.
- The EEO investigator must complete the investigation of the consolidated complaints within the earlier of
 - 180 days after the filing of the last consolidated complaint, or
 - 360 days after the filing of the original complaint.
- Regardless of amendment or consolidation of complaints, the investigation must be completed in not more than 360 days.
- The complainant may still request a hearing 180 days after the filing of the original complaint even if the investigation is not completed.
- If the complainant requests a hearing before the investigation is completed, the EEO investigator should stop the investigation and turn in the Investigative Report to the agency EEO office.

Additional information about preventing fragmentation may be found in EEOC's Management Directive 110 (MD-110), Chapter 5, Section III. This resource may be found at www.eeoc.gov, with the specific link listed in the Additional Resources provided with your materials. MD-110 also includes examples that illustrate the problems of fragmentation and how agencies should handle those problems.

ANALYZING A DISABILITY CLAIM: THE REHABILITATION ACT OF 1973

Sections 501 and 505 of the Rehabilitation Act of 1973 prohibit employment discrimination in the federal government against a qualified person with a disability. The general prohibition reads as follows:

A federal agency cannot discriminate against a qualified individual with a disability in any aspects of employment, including recruitment, hiring, assignments, discipline, promotion, and benefits.

The law also requires that employers reasonably accommodate a qualified individual with a disability, unless doing so would impose an undue hardship on the agency. The Rehabilitation Act also prohibits discrimination against an individual because of that individual's relationship or association with someone with a disability (for example, an agency could not discriminate against an employee because her spouse has a disability).

Like the other anti-discrimination statutes, the Rehabilitation Act also prohibits harassment and retaliation. The legal standards that are used to analyze Rehabilitation Act claims are those that are applied under the Americans with Disabilities Act (ADA), as amended by the ADA Amendments Act of 2008 (ADAAA). Therefore, the terms Rehabilitation Act, ADA, and ADAAA are used interchangeably in this manual.

Definition of Disability

The first step in investigating a disability claim (under disparate treatment, harassment, and/or failure to provide reasonable accommodation) is to gather evidence showing whether the complainant is an individual with a disability. What does this mean?

Under the Rehabilitation Act, an individual with a **disability** is someone who

- has a physical or mental **impairment** that **substantially limits** one or more of that individual's **major life activities**,
 - has a **record** of such an impairment, or
- is **regarded as** having such an impairment.

These terms, and others, have special meanings under the Rehabilitation Act:

Impairment: An impairment is

- a **physiological disorder or condition**, cosmetic disfigurement, or anatomical loss affecting a body system, or
- a **mental or psychological disorder**, such as an intellectual disability, organic brain syndrome, emotional or mental illness, or specific learning disability.

Character traits or physical characteristics, such as being left-handed or red-headed, are **not** impairments.

Major Life Activity:

- A major life activity is a **basic activity** that the average individual in the general population can **perform with little or no difficulty**.
- **Major life activities include** 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, **and** the operation of a **major bodily function** including functions of the immune system, special sense organs, and skin, normal cell growth, and digestive, genitourinary, bowel, bladder, neurological, brain, respiratory, circulatory, cardiovascular, endocrine, hemic, lymphatic, musculoskeletal, and reproductive functions. The operation of a major bodily function includes the operation of an individual organ within a body system.

The list is not exhaustive. Other major life activities have been defined in the regulation and by the courts. For example, as a result of a Supreme Court decision, reproduction is considered a major life activity. In determining other examples of major life activities, the term “major” may not be interpreted strictly to create a demanding standard for disability. Whether an activity is a “major life activity” is not determined by reference to whether it is of “central importance to daily life.”

Substantially Limits: The ADA and ADAAA adopted rules of construction for determining whether an individual’s impairment substantially limits performance of a major life activity, and EEOC’s regulation follow this approach.

The ADA and ADAAA requires a lower degree of functional limitation than the standard previously applied by courts for the term “substantially limits.” Under the ADA and ADAAA, an impairment does not need to prevent or severely or significantly restrict a major life activity to be considered “substantially limiting,” but not every impairment will constitute a disability. The determination of whether an impairment substantially limits a major life activity requires an individualized assessment.

The ADA and ADAAA requires that substantial limitation be determined by comparing the impact of an individual’s impairment on performing a specific major life activity with how that activity is performed by “most people in the general population.” For example, do most people in the general population have to read slowly to understand written material in the way a person with dyslexia might need to read? Do most people struggle to use buttons or hooks, or require assistance in performing these types of manual tasks like a person with Parkinson’s disease because his/her hands shake so much?

Mitigating Measures

- The determination of whether an impairment substantially limits a major life activity must be made without regard to ameliorative effects of a **mitigating measure**, such as medication, a prosthetic limb, or a hearing aid.
- A mitigating measure is a **medicine, device, or treatment** that helps an individual cope with his/her impairment.

Example:

- Q: An individual takes an antidepressant for severe depression. As a result, the individual is no longer impaired with regard to the major life activities of working, interacting with others, and caring for oneself. Additionally, one of the side effects of the antidepressant is significant interference with the individual's ability to sleep. Is the individual substantially limited?

A: Maybe. The individual is not impaired while using the mitigating measure, but the ADAAA requires that the assessment of whether an individual is substantially limited must be made **without** regard to the effect of the mitigation measure; therefore, if the individual's depression substantially limits a major life activity (including major bodily functions), then s/he may be substantially limited. Additionally, sleeping is a major life activity, and if the medication substantially limits the individual's ability to sleep, the individual could be substantially limited with regard to his ability to sleep. The side effects of many medications can cause limitations in major life activities. Investigators should gather evidence of the severity and duration of limitations caused by mitigating measures just as they should for physical or mental impairments.

The following are questions to help identify the severity of the limitation in performing a major life activity:

- How does the complainant describe concrete examples of how the impairment affects his/her daily life at home and at work?
- Are there daily activities that the complainant cannot do because of the impairment? Are there things that are very difficult to do because of the impairment?
- Has the complainant sought treatment for the condition? What is the effect of that treatment?
- Do the complainant's difficulties in performing a major life activity constitute a pattern or an isolated incident?
- Do the complainant's difficulties in performing a major life activity seem similar to problems experienced by everyone from time to time, or do they seem much more serious, either qualitatively or quantitatively?

The EEO investigator should document carefully whether the complainant provides specific information as opposed to vague generalities, and whether his/her statements are largely consistent with other evidence.

Episodic Impairments

Impairments that are episodic or in remission can be disabilities, if they would substantially limit a major life activity when active. The ADAAA does not exempt occurrences or reoccurrences that are limited in duration from its definition of a disability. Therefore, even brief episodes of substantial limitation will suffice.

Eyeglasses Exception

The ameliorative effects of ordinary eyeglasses or contact lenses are considered in determining whether an impairment substantially limits a major life activity. However, a covered entity cannot have a qualification standard based on an individual's uncorrected vision unless that standard is job related for the position in question and is consistent with business necessity.

Record of a Disability

The Rehabilitation Act also protects an individual with a record of a disability from discrimination. This provision protects from discrimination 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. An agency may not shy away, for example, from hiring an individual with a record of a mental disability regardless of the individual's current status.

Individuals who successfully control their symptoms with mitigating measures may meet the "record of" definition if they were substantially limited in performing a major life activity prior to using those measures.

Regarded as Disabled

This provision **provides protection** from discrimination to individuals who are **not disabled but may be perceived or regarded as** disabled.

Example: An individual who walks with a slight limp may be regarded as physically unable to walk but actually not be substantially limited, either in that major life activity or in the major life activity of working. An individual may have no impairment at all but would be deemed protected by the Rehabilitation Act if an agency wrongly perceives him/her as having a substantially limiting impairment.

Sources of evidence include

- interviews of agency officials (e.g., complainant's supervisor, agency's physician) and written documents (e.g., memos or letters discussing the complainant's alleged impairment and how it allegedly limits the complainant).

Under the "regarded as" standard, whether the employer believed a particular major life activity was substantially limited is not relevant. An employer will regard someone as having a disability if it takes a prohibited action based on an actual or perceived impairment that is not transitory and minor. Individuals covered only under the "regarded as" definition of disability are not entitled to a reasonable accommodation.

The regulations provide the agency a defense against a "regarded as" claim when the impairment at issue is objectively **both** transitory (lasting or expected to last six months or less) **and** minor.

An employer also cannot use its subjective beliefs about the duration and severity of the impairment to support an argument that the impairment in question is transitory and minor when objectively it is not. For example, an employer cannot claim that it believed bipolar disorder to be transitory and minor. Sincerity of these beliefs is not relevant; objectively, this impairment is never going to last less than six months or be minor in its effects. A defense of “transitory and minor” must be based on objective medical evidence.

Gathering Evidence to Determine Whether a Complainant Has a Physical or Mental Impairment

1. Begin with the **complainant’s statements**.

What physical or mental impairment does the complainant claim to have?

Some complainants 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 in handling stress or lifting objects.

If the complainant uses “plain English” or is vague on a diagnosis, the investigator will need to collect all relevant medical information concerning the complainant’s impairment, so that the decision maker can determine whether the complainant is an individual with a disability under the Rehabilitation Act.

To obtain additional medical information, the investigator may use the following questions:

- Did the complainant have a professional medical diagnosis? According to the medical diagnosis, what caused the condition and how long is it expected to last? Are there any medical recommendations?
- What are the symptoms suffered by the complainant? Did the condition affect the complainant’s major life activities? Which major life activity or activities?
- Is the complainant currently under the care of a physician or other healthcare professional for the condition or symptoms s/he is describing? What type of treatment did the complainant receive (or is s/he still receiving)? When did the treatment start? How long did it last?
- Is the complainant taking prescription medication for the condition/symptoms? If yes, what is the medication? How long has s/he been taking the medication?
- If the complainant is describing an episodic condition (i.e., the symptoms are not present all the time but flare up periodically), how many times, and for how long, does/did the complainant experience each of these periodic episodes?

2. Obtain **medical documentation**.

If the complainant has an obvious disability, then medical documentation is not required. If, however, a complainant alleges that s/he has a **hidden medical condition**, an investigator must ask the complainant to provide documentation from

an appropriate healthcare professional that verifies that the complainant has the medical condition alleged. Although the investigator should obtain appropriate documentation of medical conditions, the primary purpose of the ADAAA is to make it easier for people with disabilities to obtain protection under the ADA. The definition of “disability” is to be construed broadly in favor of expansive coverage to the maximum extent permitted by the terms of the ADA. The primary object of attention in cases brought under the ADA should be whether covered entities have complied with their obligations and whether discrimination has occurred, not whether the individual meets the definition of disability. The question of whether an individual meets the definition of disability under this part **should not demand extensive analysis.**

The following types of documentation would be relevant:

- A note from the complainant’s treating physician or other healthcare professional (e.g., psychiatrist, psychologist, licensed clinical social worker) that clearly states a diagnosis. The investigator should also attempt to determine
 - the professional’s familiarity with the complainant (how long and how frequently s/he has treated the complainant),
 - whether the professional is a general practitioner or a specialist, and
 - the healthcare provider’s knowledge about the specific condition.
- A diagnosis or similar statement found on a medical bill or in health insurance documents.

3. Conduct an **interview with an appropriate doctor or other healthcare professional.**

If the complainant cannot provide written documentation or if the documentation does not confirm a diagnosed impairment, the investigator should ask the complainant if s/he will permit the healthcare professional to confirm the complainant’s information about the impairment in a telephone call with you. (Since the complainant’s medical files are confidential, the complainant will have to provide the healthcare provider with written authorization to share medical information with an EEO investigator.)

Any information obtained regarding the complainant’s medical condition must be kept confidential by the EEO investigator.

Steps to Use in Gathering Evidence to Determine Whether the Agency Regarded the Complainant as Having an Impairment

1. **Identify the impairment** that the agency knows or believes the complainant to have.
2. **Identify the reason** that the agency disqualified the complainant from an employment opportunity (e.g., hiring, promotion). For example, did the agency take action against

the complainant based on an actual or perceived impairment that is not transitory and minor?

3. **Identify** what **evidence**, if any, shows that the agency believed that the complainant's impairment, rather than something else, was the reason that the complainant was ineligible for the employment opportunity.

The investigation is not over when an investigator completes the collection of evidence used to determine that a complainant has a substantially limiting impairment or a record of one, or that an agency regarded a complainant as having a disability. Remember, all that the evidence will establish at this point is that a complainant meets one of the definitions of "disability."

Next, the investigator must gather evidence used to determine whether the complainant is a qualified individual with a disability.

Qualified Individual with a Disability

A qualified individual with a disability is a person 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.

Essential Functions

Essential functions are the fundamental job duties that the incumbent of a position must be able to perform. A determination as to whether the function is an essential function (as opposed to a marginal function) can be made by collecting the following information:

- Does the position exist to perform that function?
Example: Reading text directly may be an essential function for a proofreader position, but not for an attorney position.
- Are there a limited number of other employees available to whom the performance of the job function can be distributed?
- Does the function require a particular skill or expertise, and is the individual who will fill the slot being sought for special expertise or the ability to perform this function?
Example: 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 in the accounts payable database (60% of his time), and 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.

Determining the essential functions of a job requires a **case-by-case** analysis. Positions bearing the same job title may still have different essential functions because the positions serve different purposes within the organization.

Steps to Use When Gathering Evidence of Which Functions Are Essential

To determine whether a function is essential, you may obtain the following evidence:

- The agency's judgment (e.g., through interviews with the supervisor or other members of management). This factor does not mean that an agency can simply state that a function is essential. Rather, the agency 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 the complainant, the supervisor, or co-workers; a written job analysis provided by the agency; a collective bargaining agreement; or on-site observation).
- The consequences of not requiring an individual in this position to perform the function.
- The terms of the collective bargaining agreement (e.g., does it specify the duties or tasks of the complainant's position?).

Work experience of others who have performed the job in the past and work experience of people who currently perform similar jobs (through, e.g., interviews 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.

In identifying an essential function to determine if an individual with a disability is qualified, the employer should focus on the purpose of the function and the result to be accomplished, rather than the manner in which the function presently is performed. An individual with a disability may be qualified to perform the function if an accommodation would enable this person to perform the job in a different way, and the accommodation does not impose an undue hardship. Although it may be essential that a function be performed, it is not essential that it be performed in a particular way.

Exemptions and Limitations of Coverage

- The Rehabilitation Act exempts from coverage "individuals engaged in current illegal drug use."
- 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 Rehabilitation Act does 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 Act excludes from coverage transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders, compulsive gambling, kleptomania, or pyromania, and psychoactive substance use disorders resulting from current illegal use of drugs.

Reasonable Accommodation

An agency is **required to make reasonable accommodation** for the known physical and mental limitations of an otherwise qualified individual with a disability **unless** the agency can show that accommodation **would cause an undue hardship**.

What Is an Accommodation?

An accommodation is any **change in the work environment or in the way things are customarily done** that enables an individual with a disability to enjoy equal employment opportunities.

Reasonable accommodations must remove **workplace or employment barriers** that stand in the way of providing qualified individuals with a disability with an equal employment opportunity (not barriers that may exist outside the workplace).

Example: Unless provided to non-disabled employees, agencies generally are not required to provide transportation, as a reasonable accommodation, to enable an individual to commute to work.

Employment barriers may include

- **physical obstacles**, such as architectural or structural barriers that prevent or inhibit access to work facilities or equipment (e.g., stairs), and
- procedures or rules**, such as rules concerning when work is performed, when breaks are taken, or how essential or marginal functions are performed.

An agency's reasonable accommodation duty encompasses three aspects of the employment relationship:

1. **The application process:** An agency has to make the application process accessible to individuals with a disability.
2. **Job performance:** An agency must provide an accommodation that enables the individual to perform the essential functions of the position.
3. **Benefits and privileges:** Agencies are required to provide reasonable accommodation so that employees with disabilities can enjoy benefits and privileges of employment equal to those enjoyed by similarly situated employees without disabilities.

There are a number of possible reasonable accommodations that an employer may have to provide in connection with modifications to the work environment or adjustments in how and when a job is performed. These include

- making existing facilities accessible to employees with disabilities,
- part-time or modified work schedules,
- job restructuring (through the elimination of nonessential functions),
- modification of exams or training materials or policies (including providing alternative formats),
- acquiring assistive devices or modifying existing equipment,
- telework,
- providing readers or interpreters,
- permitting use of accrued leave or unpaid leave for treatment, therapy, or training related to disability, and

reassignment to another vacant position (the accommodation of last resort).

The Reasonable Accommodation Process

Generally, **the employee or job applicant is responsible for initiating a request for reasonable accommodation.** The individual does not have to use particular words, mention the Rehabilitation Act, or use the phrase “reasonable accommodation.” The individual only has to inform the agency that s/he needs an adjustment or a change at work or in the application process for a reason related to a medical condition.

The reasonable accommodation process should be “**an interactive process**” between the individual and the agency. An accommodation is reasonable if it appears to be “feasible” or “plausible.” The burden is not on the individual to identify potential accommodations.

The accommodation selected need not be the most expensive or the “best” accommodation, or the complainant’s choice. However, it must be “effective” in the sense that it will enable the individual to perform the essential functions of the job, or to gain equal access to the application process or a benefit/privilege of employment.

Undue Hardship: An Affirmative Defense

Agencies do not have to provide reasonable accommodations that would impose an undue hardship on the operation of the agency. “Undue hardship” refers not only to financial difficulty or expense, but to reasonable accommodations that are unduly extensive, substantial, or disruptive, or those that would significantly alter the nature or operation of the business. The agency has the burden of proving that a suggested accommodation would impose an undue hardship.

Factors used in evaluating a claim of undue hardship:

- the nature of the accommodation,
 - the net cost of the accommodation,
 - the overall financial and other resources of the agency, and
- the impact of the accommodation on the operation of the agency.

Comparison of the cost of an accommodation with the employee's salary is **not** a factor in determining undue hardship.

An agency's proof that one specific accommodation would cause it undue hardship does not absolve it from considering other proposed or potential reasonable accommodations.

Direct Threat: Another Affirmative Defense

Direct threat means a significant risk of substantial harm to the health and safety of the individual or others that cannot be eliminated or reduced by a reasonable accommodation. A determination that an individual poses a "direct threat" must be based on an individualized assessment of the individual's present ability to safely perform the essential functions of the position. The assessment must be based on the most current medical knowledge and/or best available objective evidence.

The agency may raise a "direct threat" defense only when it is claiming that its standards and criteria for selection are not discriminatory.

What factors are considered in evaluating a claim of "direct threat"?

- Duration of the risk
- Nature and severity of the potential harm
- Likelihood that the potential harm will occur

Imminence of the potential harm

Medical Examinations and Disability-Related Questions

The Rehabilitation Act limits an agency's ability to make disability-related inquiries and/or require medical examinations. In particular, if a complainant alleges that the agency illegally made disability-related inquiries or required an illegal medical examination, you need to understand what a "disability-related inquiry" is, as well as what a "medical examination" is, and under which circumstances they are permissible.

Disability-Related Questions

A **disability-related inquiry** is a question (or series of questions) likely to disclose *whether or not* an individual has a disability. Disability-related inquiries may include the following:

- Asking an employee whether s/he has or ever had a disability or how the individual became disabled, or inquiring about the nature or severity of an employee's disability,

- Asking an employee to provide medical documentation,
- Asking an employee's co-worker, family member, doctor, or another person about an employee's disability,
- Asking about an employee's genetic information,
- Asking about an employee's prior workers' compensation history,
- Asking an employee whether s/he is currently taking any prescription drugs or medications, or has taken any such drugs or medications in the past, and
- Asking an employee about his/her impairments or medical conditions.

Questions that are not likely to elicit information about a disability are *not* disability-related inquiries, and therefore, agencies may ask them at any time.

Questions that are not disability-related include the following:

- Asking generally about an 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, or asking how an employee is doing following the death of a loved one or the end of a marriage/relationship,
- Asking an employee about non-disability-related impairments (e.g., "How did you break your leg?"),
- Asking an employee whether s/he can perform job functions,
- Asking an employee whether s/he has been drinking,
- Asking an employee about **current illegal use of drugs**,
- Asking a pregnant woman how she is feeling or when her baby is due, and
- Asking an employee to provide the name and telephone number of an individual to contact in case of a medical emergency.

What Is a Medical Examination?

A **medical examination** is a procedure or test that seeks information about an individual's physical or mental impairments or health.

The following factors are used to make a determination of whether a test (or procedure) is a medical examination:

- whether the test is administered by a healthcare professional,
- whether the test is interpreted by a healthcare professional,
- whether the test is designed to reveal an impairment or physical or mental health issue,
- 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 typically 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 that seek information about an individual's physical or mental impairment or condition 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 agencies may require that generally are not considered medical examinations, including the following:

- Tests to detect the current use of illegal drugs (e.g., urine analysis),
- 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.

When is an agency able to make disability-related inquiries or medical examinations?

An agency's ability to make disability-related inquiries or require medical examinations is analyzed in three stages: pre-offer, post-offer, and current employment.

- **Pre-offer.** All disability-related questions and medical examinations, even if they are job related, are prohibited, with the following **exceptions**: when an applicant has an obvious disability, and the agency has a reasonable belief that the applicant will need a reasonable accommodation to perform specific job functions, or when an applicant voluntarily discloses an invisible disability, the agency may ask whether the applicant needs a reasonable accommodation and, if so, what type.
- **Post-offer. After an applicant is given a conditional job offer, but before work begins,** an agency may make disability-related inquiries and conduct medical examinations, regardless of whether they are job related, as long as it does so for all entering employees in the same job category. However, if an individual is screened out because of a disability, the employer must show that the exclusionary criterion is job related and consistent with business necessity, and performance of the essential job functions cannot be accomplished with reasonable accommodation.
- **Current employment.** An agency may make disability-related inquiries and require medical examinations only if they are "job related and consistent with business necessity." This means the agency has a reasonable belief, based on objective evidence, that
 - (1) an employee's ability to perform essential job functions will be impaired by a medical condition or
 - (2) an employee will pose a direct threat to himself or others due to a medical condition.

In addition, an agency can make disability-related inquiries and require medical examinations when the employee requests reasonable accommodation and the disability or need for accommodation is not known or obvious.

GENETIC INFORMATION DISCRIMINATION

Title II of the Genetic Information Nondiscrimination Act of 2008 (GINA), which prohibits genetic information discrimination in employment, took effect on November 21, 2009. Under Title II of GINA, it is illegal to discriminate against employees or applicants because of genetic information. It prohibits the use of genetic information in making employment decisions, restricts employers and other entities covered by Title II from requesting, requiring, or purchasing genetic information, and strictly limits the disclosure of genetic information (employment agencies, labor organizations, and joint labor-management training and apprenticeship programs are referred to as “covered entities”).

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.

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 manifestation 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 participation in clinical research that includes genetic services by the individual or a family member of the individual, as well as the genetic information of a fetus carried by 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.

Discrimination Because of Genetic Information

Title II of GINA prohibits the use of genetic information in making decisions related to any terms, conditions, or privileges of employment (including hiring, firing, pay, job assignments, promotions, layoffs, training, and fringe benefits). *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.* Therefore, its use is always unlawful. There are limited exceptions to acquisition and disclosure of genetic information, which are discussed below.

Harassment Because of Genetic Information

Under GINA, it is also illegal to harass a person because of his/her genetic information. Harassment can include, for example, making offensive or derogatory remarks about an applicant’s or employee’s genetic information, or about the genetic information of a relative of the applicant or employee. Although the law doesn’t prohibit simple teasing, offhand comments, or isolated incidents that are not very serious, harassment is illegal when it is so

severe or pervasive that it creates a hostile or offensive work environment or when it results in an adverse employment decision (such as the victim's being fired or demoted). The harasser can be the victim's supervisor, a supervisor in another area of the workplace, a co-worker, or someone who is not an employee, such as a client or customer.

Retaliation

Under GINA, it is illegal to fire, demote, harass, or otherwise "retaliate against" an applicant or employee for filing a discrimination complaint, participating in a discrimination proceeding (such as a discrimination investigation or hearing), or otherwise opposing discrimination.

Rules Against Acquiring Genetic Information

It is usually unlawful for a covered entity to acquire genetic information. There are six narrow exceptions to this prohibition:

1. Inadvertent acquisitions of genetic information do not violate GINA, such as in situations when a manager or supervisor overhears someone talking about a family member's illness.
2. 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.
3. Family medical history may be acquired as part of the certification process for Family and Medical Leave Act leave (or leave under similar state or local laws or pursuant to an employer policy) when an employee is asking for leave to care for a family member with a serious health condition.
4. 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 it is likely to acquire genetic information (such as websites and online discussion groups that focus on issues such as genetic testing of individuals and genetic discrimination).
5. 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.
6. Acquisition of genetic information of employees by employers who engage in DNA testing for law enforcement purposes, such as forensic labs, 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 or employees. Covered entities must keep genetic information confidential and in a separate

medical file. (Genetic information may be kept in the same file as other medical information in compliance with the Americans with Disabilities Act.) There are limited exceptions to this nondisclosure rule, such as exceptions that provide for the disclosure of relevant genetic information to government officials investigating compliance with Title II of GINA and for disclosures made pursuant to a court order.

REMEDIES

Types of Relief

Providing relief for the victims of discrimination and eliminating the practices that were the source of that discrimination is the ultimate goal of anti-discrimination legislation. Victims of discrimination are entitled to recovery of whatever losses resulted from the unlawful employment practice. These losses may be **monetary or non-monetary**.

Monetary Relief

Back Pay

Back pay is the amount of money the complainant would have earned if there had been no discrimination. It reflects total earnings, including the value of fringe benefits, overtime pay, bonuses, shift differentials, and premium pay, for example. Pay increases during the back pay period are also included.

Back pay is generally calculated from the date of the discriminatory act until the date of the rightful placement, or the date the complainant's interim earnings exceed the lost pay. A good basis for computation of the amount the complainant would have earned is the earned income of the individual who got the job instead of the complainant.

Under Title VII, back pay is limited to two years prior to the filing date of the complaint.

Under the EPA, you may go back for two years from the date of filing of the complaint to correct the underpayment, or three years if the violation is willful.

The statutes require that a complainant attempt to mitigate the damages to which s/he might be entitled, that is, actively seek other comparable employment. Mitigating damages are amounts that the complainant earned or **could have** earned with reasonable diligence. Agencies have the right to raise the issue of mitigation and require complainants to provide evidence of their efforts to seek other employment. The amount that can be established as what a complainant could have earned with reasonable diligence is subtracted from the amount of back pay owed. EEOC's position is that unemployment compensation should not be regarded as interim earnings under Title VII or the Rehabilitation Act.

Front Pay

Front pay is compensation provided when the position to which the complainant is entitled, or a comparable position, is not available. The complainant should be paid as if s/he had the job until placed into the job or for some other negotiated period of time.

Compensatory Damages (Title VII, Rehab Act and GINA)

The Civil Rights Act of 1991 broadened the monetary damages obtainable under Title VII and the Rehabilitation Act; however, it did not broaden remedies for the EPA or ADEA.

Compensatory damages include damages for past pecuniary loss (out-of-pocket loss),

future pecuniary loss (projected future out-of-pocket loss), and nonpecuniary harm (emotional distress). GINA follows Title VII.

- **Past pecuniary losses** — these 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.
- **Future pecuniary losses** — these include the same expenses listed above, if these losses are likely to continue after settlement, conciliation, or the conclusion of litigation.
- **Nonpecuniary harm** — damages are available for the intangible injuries of emotional distress, such as emotional pain, suffering, inconvenience, mental anguish, and loss of enjoyment of life. The EEOC does not assume emotional distress. The existence, nature, and severity of emotional distress must be established by the complainant. However, it is not necessary to have medical evidence in order to establish emotional distress. It can be shown through the testimony of others who corroborate the complainant's claim. Other nonpecuniary harm could include injury to professional standing, injury to character and reputation, injury to credit standing, and loss of health, for example, which 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 complainant has suffered from the harm.

Compensatory damages are available for discrimination found under the disparate treatment theory. They are not available in claims that challenge neutral employment practices having a disparate impact or in mixed-motive cases. Nor are they available in Rehabilitation Act reasonable accommodation cases where the agency has shown good faith.

There are **monetary caps** on damages for nonpecuniary harm and future pecuniary losses, which are based on agency size:

- 15–100 employees: \$50,000
- 101–200 employees: \$100,000
- 201–500 employees: \$200,000
- Over 500 employees: \$300,000

The caps **do not** apply to past pecuniary losses.

Most federal agencies employ more than 500 employees, so the typical cap in a federal EEO case is \$300,000. However, if you are investigating a smaller agency, you may need to establish the number of employees for the purpose of determining the appropriate cap amount.

Liquidated Damages (EPA and ADEA)

This is an amount equal to the back pay due the complainant.

Liquidated damages are **mandatory for a violation of the EPA**, unless the agency can prove that it acted in “good faith” and reasonably believed that its actions did not violate the EPA.

Note that because an EPA claim may also be brought as a sex-based wage discrimination claim under Title VII, compensatory damages may be available if the claim is brought under both statutes. Liquidated damages are also available for willful violations of the ADEA.

Attorney’s Fees

With two exceptions, a successful complainant who is represented by an attorney in the administrative process is entitled to reasonable attorney’s fees for the time and expenses of the attorney after notice of representation has been made to the agency, administrative judge, or Commission (fees would be allowable for a reasonable period of time prior to notification of representation for any services performed in reaching a determination to represent the complainant). The exceptions are as follows:

- Attorney’s fees and expenses incurred during the pre-complaint process are generally not recoverable.

Attorney’s fees and expenses incurred at the administrative level for claims brought under the ADEA are generally not recoverable.

Costs

Costs include such expenses as postage, mileage, telephone calls, photocopying, witness fees, and transcript costs.

Benefits (e.g., insurance)

Specific Injunctive Relief (e.g., promotion or reinstatement)

Non-monetary Relief

Seniority Adjustments

In situations where seniority is used in making employment decisions, the complainant should be given seniority from the date when the complainant would have received the position, but for the discrimination.

Training

If the complainant is disadvantaged by not obtaining his/her rightful place, special training should be included so that the complainant can hold the job under fair and equal conditions.

Expungement of Records

Any references related to the discriminatory incident(s), including the filing of a discrimination complaint, should be stricken from the agency's record(s) so as not to prejudice the complainant's employment opportunity.

Letters of Recommendation / References

If the complainant is not going back to a job with the agency, a letter of reference, or the content of any oral or written reference, may be part of the relief. Revealing that the complainant brought a discrimination claim is prohibited.

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.

Obtaining Evidence on Remedies

EEO investigators should gather evidence on remedies before the conclusion of the investigation. Gathering this evidence requires knowing what types of relief may be available in the case being investigated and asking for the appropriate evidence. EEO investigators are not responsible for determining the amounts of monetary relief, such as back pay and damages. However, EEO investigators should obtain evidence about a complainant's entitlement to these types of relief and evidence of the causal connection to the alleged discrimination.

What remedies would be appropriate for an investigator to obtain evidence on during an EEO investigation?

- Compensatory damages
- Entitlement to back pay or front pay
- Entitlement to training or other injunctive relief
- Entitlement to attorney's fees and costs

Entitlement to benefits, seniority adjustments, correction of records

Who would have information about remedies in a particular case?

- The complainant
- Agency records (e.g., payroll, training, personnel actions)
- Other witnesses (family/friends of complainant, agency witnesses)

Medical professionals

What investigative techniques would you use to obtain evidence about remedies in a particular case?

- Interviews
- Requests for Information

Interrogatories

What obstacles might an investigator face in trying to gather evidence about remedies?

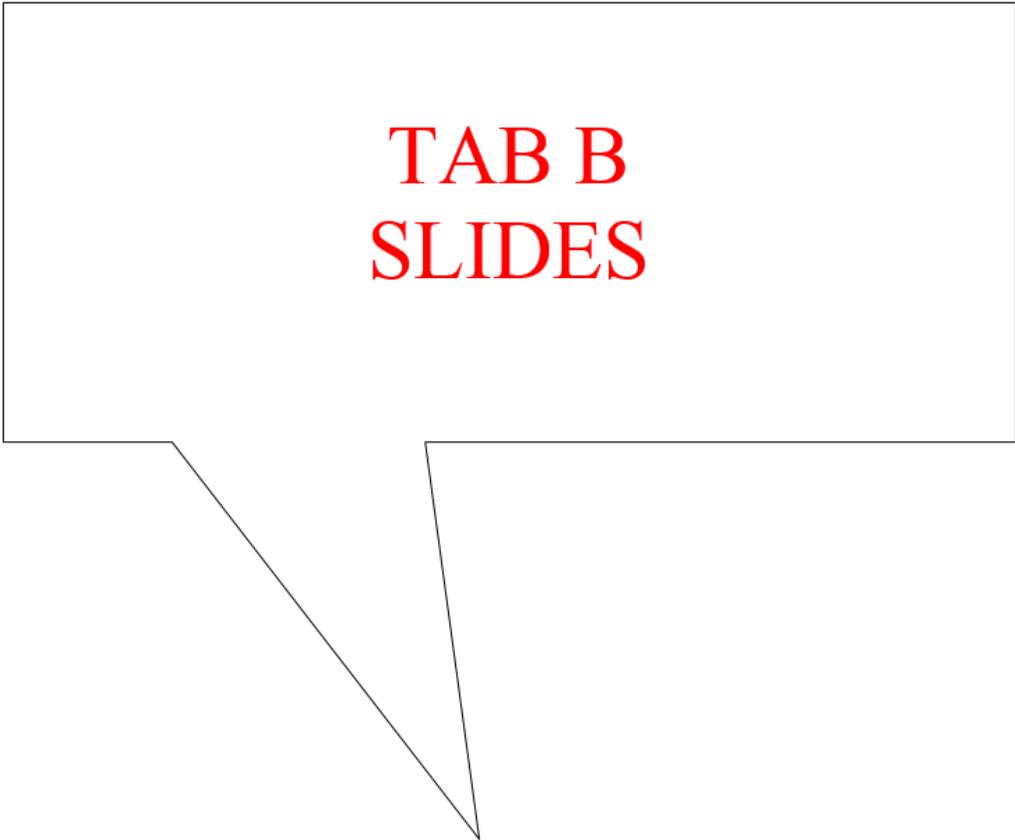
- Complainant who doesn't know what s/he may be entitled to receive
- Complainant who refuses to say because of fear of retaliation
- Complainant who wants more relief than s/he may be entitled to receive

Uncooperative witnesses (e.g., healthcare provider)

How could an investigator overcome these obstacles?

- Take all information offered by the complainant.
- Be persistent with uncooperative witnesses; remember potential sanctions that may be imposed if witness does not respond to inquiries by the investigator.

Seek guidance from the EEO office.



**TAB B
SLIDES**

FEDERAL EMPLOYMENT
DISCRIMINATION LAWS

Title VII of the Civil Rights Act of 1964

- Prohibits discrimination based on race, color, sex (including pregnancy, sexual orientation and gender identity), religion, national origin
- Also prohibits retaliation
- All aspects of employment covered

Gender Identity and Sexual Orientation

- Discrimination against an individual because that person is transgender (gender identity discrimination) is, by definition, discrimination based on sex, and violates Title VII. [See *Macy v. Department of Justice*, EEOC Appeal No. 0120120821 \(April 20, 2012\).](#)
- A claim of discrimination on the basis of sexual orientation necessarily states a claim of discrimination on the basis of sex under Title VII. [See *Baldwin v. Dep't of Transportation*, EEOC Appeal No. 0120133080 \(July 15, 2015\)](#)

Age Discrimination in Employment Act of 1967

- Covers individuals age 40 and over
- No upper age limit
- All aspects of employment covered
- Also prohibits retaliation

Equal Pay Act of 1963

- Focuses on sex discrimination in wages
- Violation established if it is shown that unequal wages are paid to individuals of different genders doing substantially equal work under similar conditions in the same agency

Rehabilitation Act of 1973

- Prohibits discrimination because of an individual's disability
- The ADA standards are applied
- Requires an agency to provide a reasonable accommodation
- Also prohibits retaliation

Theories and Analyses
of Discrimination

Theories and Analyses of Discrimination

- Disparate Treatment
- Disparate Impact
- Retaliation
- Religious Accommodation
- Equal Pay
- Age Discrimination
- Harassment
- Disability

Disparate Treatment
Prima Facie Case

- Member of a protected group
- Subjected to an adverse employment action
- Connection between the two

Who is Similarly Situated?

- Subject to the same policy or practice
- Engaged in similar conduct or conduct of comparable seriousness
- Under same decision-maker

Factors Used in Determination of “Similarly Situated”

- Bargaining unit vs. non-bargaining unit
- Non-supervisory employees vs. managers/supervisors
- Different department/functions

Similarly Situated

- Probationary vs. non-probationary
- Different stages of disciplinary process
- Violation known to the agency vs. violations unknown
- Separated by time or announced policy change

Disparate Treatment
Elements of Proof
After *Prima Facie* Case

- Agency articulates legitimate, non-discriminatory reason for employment action
- Are the reasons advanced by the agency a pretext to hide discrimination?

Investigating for Pretext

- Comparative Evidence: Similarly situated individuals of a different class are treated differently than complainant
- Reliance on policies or reasons rarely used or applied, or applied unevenly
- Statistical Evidence
- Other Evidence
 - Suspicious Timing
 - False Information
 - Behavior/Comments that Show Bias



Disparate Impact Examples

- Minimum height/weight requirements
- Certain educational requirements
- Physical agility tests
- “No beards” policies

Pregnancy Discrimination Act

Requires that agencies treat women affected by pregnancy or related medical conditions the same way they treat any non-pregnant employee who has similar temporary limitations.

Retaliation

All five statutes prohibit retaliation against an individual because s/he has either:

- * Opposed an unlawful employment practice, or
- * Made a complaint, testified, assisted or participated in an investigation, proceeding or hearing

Retaliation Models of Proof

- OPPOSITION to discrimination or PARTICIPATION in covered proceedings
- ACTION reasonably likely TO DETER
- CAUSAL CONNECTION between the protected activity and the action to deter

Opposition Retaliation

- Explicit or implicit communication
- Manner of the opposition must be reasonable
- Complainant must have reasonable and good-faith belief that discrimination occurred

Participation Retaliation

Participation, in any manner, in an investigation, proceeding, hearing or litigation concerning prohibited EEO discrimination.

Actions Reasonably Likely to Deter

- Harassment and Intimidation
- Denial of Employment Benefits
- Discharge, Discipline, Demotion, Reassignment
- Unjustified Evaluations and Reports
- Acceleration of Disciplinary Action

Causal Connection

- Proof that the reason for the action was that complainant engaged in protected activity
- Is there direct evidence?
- Did treatment of complainant change?
- Time line?
- Treatment of similarly situated?

Religious Accommodation

- Does not involve a comparison of complainant's treatment to treatment of similarly situated employees
- Under Title VII, an agency has a **duty to reasonably accommodate** unless to do so would cause an **undue hardship** on the conduct of its business

Religious Accommodation Models of Proof

- Religious belief that needs accommodation
- Complainant informed agency of the need
- Agency failed to accommodate
- Agency can/can not prove undue hardship

Undue Hardship Alternatives to Consider

- Voluntary swaps
- Flexible scheduling
- Lateral transfer or change of assignment

Undue Hardship “De Minimis Cost”

- Identifiable cost in relation to size and operating cost of agency
- Number of individuals who need accommodation

Investigating a Claim under the Equal Pay Act

Are the jobs substantially equal?

- Skill
- Effort
- Responsibility
- Working Conditions

EPA Defenses

- A Seniority System
- A Merit System
- A System Measuring Quantity or Quality of Production
- Any Factor Other than Sex

ADEA

- Prohibits discrimination on the basis of age against individuals 40 and over
- Prohibits retaliation for opposing employment discrimination and for participating in the EEO process

What is Workplace Harassment?

Harassment is any unwelcome verbal or physical conduct based on one of the protected bases that is so objectively offensive as to alter the conditions of the victim's employment.

This standard is met when:

- √ the conduct culminates in a tangible employment action, or
- √ the conduct was sufficiently severe or pervasive to create a hostile work environment.

Elements of a Harassment Claim

- Conduct is unwelcome
- Conduct is based on complainant's protected EEO status
- Conduct results in a tangible employment action or creates a hostile work environment
- Basis exists for holding the agency liable for the conduct

Unwelcome Conduct

- “Unwelcome conduct” is conduct that the employee did not solicit or invite and regards as undesirable
- Critical Inquiry: Did the employee explicitly or implicitly communicate that the conduct was unwelcome?

Hostile Work Environment Harassment

- Unwelcome comments or conduct based on a protected basis which unreasonably interferes with an employee's work performance or creates an intimidating, hostile or offensive work environment is unlawful.
- Anyone can commit this type of harassment, a management official, a co-worker or a non-employee.

Agency Liability Co-
worker or Non-employee
Harassment

- Agency is liable if it **knew or should have known** of the harassment and failed to take corrective action.
- Agency knowledge is assumed if:
 - Victim complains about harassment, or
 - Conduct occurred in the presence of a supervisor, or
 - Conduct is widespread.

*Processing Harassment Complaints:
What Is Fragmentation?*

Fragmentation is the breaking up of a complainant's legal claim into **separate factual claims or incidents**. A complainant's ability to present an integrated and coherent claim of employment discrimination can thus be compromised.

How Can an Agency Prevent Fragmentation?

- An agency must identify and define the claim in an EEO complaint.
- An agency may allow the complainant to amend the complaint.
- An agency must consolidate two or more pending complaints by the same complainant.
- Where the allegations are related or substantially similar, an agency may consolidate two or more pending complaints by different complainants.

**THE REHABILITATION ACT
OF 1973**

Definition of Disability

- **Physical or Mental Impairment** that **Substantially Limits** one of more **Major Life Activities**
- A **Record of** Such an Impairment
- **Regarded as** (Subjected to an action because of an actual or perceived impairment that is not both transitory AND minor)

Impairment

- A physiological disorder or condition
- A mental or psychological disorder

Major Life Activities

- ▶ Physical or mental impairment that substantially limits one or more **major life activities**
 - What is a major life activity?
 - ◆ Examples include sleeping, eating, walking, talking
 - ◆ Others?
 - What about major bodily functions?

Substantially Limits

- Condition, manner or duration
- Consideration of the difficulty, effort or time required to perform an MLA
- Pain experienced when performing MLA
- Length of time an MLA can be performed
- The way an impairment affects the operation of a major bodily function

Episodic Impairments

- Impairments that are episodic or in remission can be disabilities, if they would substantially limit a major life activity when active.

Mitigating Measures

- Medicine, Device or Treatment that helps an individual cope with impairment
- Not to be considered, except for ordinary eyeglasses or contact lenses

Record of Disability

- Individual no longer has physical or mental impairment and so is not currently substantially limited
- Individual still has the impairment, but is no longer substantially limited in a major life activity

Regarded as individual with a disability

- Subjected to an action because of an actual or perceived physical or mental impairment
- Does not always mean agency engaged in unlawful discrimination
- Perceptions, Myths, Stereotypes, Fears and Assumptions

“Qualified”

- Individual **Has Requisite** Skill, Education, Experience and/or other Job-related Requirements
- Individual **CAN Perform** the **Essential Functions** of the job **With or Without Reasonable Accommodation**

Essential vs. Marginal Functions

- Purpose and result vs. how functions are performed
- Is Complainant actually required to perform function?
- What are the consequences of removing the function?

Exemption and Limitations of Coverage

- Individual engaged in current illegal drug use
- Gender identity disorders, certain behavioral disorders, compulsive gambling, kleptomania, pyromania or others

MEDICAL CONFIDENTIALITY

- Medical information about ALL employees must be kept confidential and housed separately.
- Co-workers do not have a right to know medical information or about the disability of another employee.

Reasonable Accommodation

Reasonable Accommodation to the **known** physical and mental limitations of an otherwise **qualified individual with a disability** is **required** unless the agency can show **undue hardship**.

Reasonable Accommodation

- Modification or adjustments to a job employment practice or work environment
- Address employment barriers:
 - Physical – Rigid Work Schedules
 - Policies or Procedures – Interpersonal Communications

Direct Threat

- 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 that seeks information about an individual's physical or mental impairments or health is considered a medical examination.

Disability-related questions and medical examinations

- Pre-Offer  Agency Cannot Ask
- Post-Offer  Agency May Ask
- Current Employees  Agency May Ask, If Job-Related and Consistent with Business Necessity

**Genetic Information Nondiscrimination
Act of 2008 and EEOC's Final Regulation**

GINA and 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.

Basic Rules Related to Employment

- Prohibits use of genetic information to discriminate in employment (including 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

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
 - The Executive Office of the President
 - The U.S. House and Senate

What is Genetic Information? Part 2

- Genetic information includes:
 4. Request for or receipt of genetic services by an individual or family member
 - Meaning: genetic test, counseling, education
 5. Genetic information of a fetus carried by an individual or family member or of an embryo legally held by the individual or family member using an assisted reproductive technology.

Genetic Information Does NOT Include

- Information about an individual's or family member's race, sex, ethnicity, or age
- The fact that an individual currently has a disease or disorder (manifested condition) – this individual would be protected by the ADA if the disease rises to the level of a disability.

Acquisition of Genetic Information Prohibited

- **General Rule** - 1635.8(a)

- Covered entities *shall not request, require, or purchase* genetic information of an applicant or employee

- There are **six** *narrow exceptions* to this general prohibition.

- Specific intent* to acquire genetic information *not necessary to violate this provision.*

Exceptions to Prohibition on Acquisition of Genetic Information

- No Liability for Inadvertent Acquisition
- Employer-Sponsored Health or Genetic Services
- Acquisition of Family Medical History under FMLA
- Acquisition Through Commercially & Publicly Available Documents
- Genetic Monitoring
- DNA Testing

Confidentiality /Disclosure - 1635.9

- Beginning Nov. 21, 2009, and thereafter, genetic information that an employer has must be kept confidential and placed in a separate medical file (ADA file is OK)
- Limited disclosure rules, some similar to ADA's rules, others unique to GINA

REMEDIES
Available in Federal Sector EEO Actions

Monetary Relief

1. Back Pay (subject to mitigation requirement)
2. Front Pay
3. Compensatory Damages (Title VII, Rehab Act, GINA)
4. Liquidated Damages (EPA and AOEPA only)
5. Attorneys' Fees (pre-complaint and OEA exceptions)
6. Costs
7. Benefits (e.g., insurance)
8. **Specific Injunctive Relief (41.g., promotion)**
9. Punitive Damages NOT available to federal employees

Compensatory Damages :
Pecuniary Losses

- Quantifiable expenses incurred as a result of the discriminatory conduct
- Past losses (medical expenses, moving expenses, etc.) not subject to a cap
- Future losses (likely to continue after resolution) subject to compensatory damages cap...

Compensatory Damages:

Nonpecuniary Harm

- Available for intangible injuries
 - Emotional distress
 - Damage to professional standing
 - Reputational injury
- Not easily quantifiable
- Determined by the **severity** of the harm and the **length of time** suffered
- Often established through testimony

Compensatory Damages:

Monetary Cap

- Applies to future pecuniary losses and nonpecuniary damages.
- Limits recovery of compensatory damages to \$300,000 from agencies with 500+ employees. (Lower caps apply to smaller agencies.)

Nonmonetary Relief

- Seniority adjustments
- Expungement of records
- Recommendation /reference letters
- Training
- Posting a notice
- Policy corrections

Remedies: The Role of the Investigator

Although initial EEO investigations tend to be merit-based, when a finding of discrimination has been made, a supplemental investigation to determine the appropriate remedies – typically, compensatory damages and/or back pay – may be required.

**EEO TRAINING
for NEW EEO INVESTIGATORS**

*Presented by the Training & Outreach Division
of the
Office of Federal Operations*



**Tab C:
EEO Case Management**

CASE MANAGEMENT

Role and Responsibilities of the EEO Investigator: Frequently Asked Questions

What is the role of an EEO investigator?

The **role** of an EEO investigator is to collect and to discover factual information concerning the claim(s) in the complaint under investigation and to prepare an investigative file.

How do EEO investigators investigate complaints of discrimination?

- Interview witnesses for both sides and prepare affidavits.
- Prepare interrogatories and Requests for Information.
- Collect and review documents that are relevant to the claims in the complaint.
- Organize and tab file the results according to agency requirements, and write an Investigative Summary supported by evidence in the file.

Does an EEO investigator have the authority to administer an oath to witnesses?

Yes.

Does an EEO investigator have the authority to require witnesses to give sworn testimony?

Yes.

Does the EEO investigator represent either party?

No. The EEO investigator is a neutral, objective fact finder. The investigator's role is to collect evidence regardless of the parties' positions.

Should an EEO investigator investigate a complaint that was filed against someone in the investigator's line of authority?

No. That would be a conflict of interest.

Should a contract EEO investigator investigate a complaint filed against someone with whom the investigator had a prior contractual or other arrangement?

No. That would be a conflict of interest, and the investigator's job is to be a neutral, objective fact finder.

How does an EEO investigator know when the investigation is appropriate and sufficient?

An **appropriate** investigation is one that allows a reasonable fact finder to determine whether discrimination occurred. There is no cookie-cutter approach to investigating EEO complaints. The facts of each case will determine the scope of the investigation.

It is important to remember that there is **no quantitative measure** of an adequate or thorough investigation. Also, an EEO investigator should not worry about balancing the amount of evidence supporting each side. The job of the EEO investigator is to exhaust those sources on both sides that have evidence relevant to the claims raised by the complainant.

Does the EEO investigator decide whether discrimination occurred?

No. Ultimately, the EEO office of the agency, an EEOC administrative judge, or the Office of Federal Operations on appeal concludes whether discrimination occurred. That decision is beyond the authority of the EEO investigator.

Steps in an Investigation

Generally, most EEO investigations will proceed in the same manner. Below are the typical steps an EEO investigator will follow in conducting an investigation.

- The investigator will receive and review the complaint file, which contains the initial processing correspondence, the EEO Counselor's Report, and the assignment letter authorizing the investigation of the complaint.
- The investigator identifies the involved personnel, prepares an Investigative Plan (IP), and submits the IP to his/her manager for approval.
- Following approval of the IP, the investigator contacts the complainant and arranges to meet for an interview and affidavit.
- Prior to obtaining the complainant's affidavit or immediately thereafter, the investigator prepares and submits a Request for Information (RFI) to relevant agency offices. Some EEO offices instruct the investigator to obtain the complainant's affidavit before submitting the RFI. However, sometimes the investigator may need to briefly talk with the complainant to get more information before requesting documents. Generally, the EEO office can assist the investigator in identifying witness(es) and/or the custodians of documents who need to be contacted for the investigation.
- After the investigator obtains the complainant's affidavit, the investigator arranges management interviews and interviews the complainant's witness(es) identified in the complainant's affidavit.
- The investigator provides copies of signed affidavits from management witness(es) to the complainant. The complainant is then given a limited amount of time to provide a rebuttal affidavit.
- The investigator analyzes documents submitted by the agency in response to the RFI and determines if additional documents or witnesses are needed.
- The investigator writes the Investigative Summary and assembles the Investigative Report. Rebuttal evidence submitted by the complainant should be included in the Investigative Report. Investigators should begin drafting the Investigative Summary as evidence is obtained. For example, the section describing the complainant's position

can be written upon completion of the complainant's affidavit; the section on management's position can be written after those affidavits are obtained.

The investigator should not proceed to management interviews without having the complainant's signed affidavit unless otherwise instructed by the EEO office. In those instances where the complainant does not cooperate with the investigation, the investigator should notify the complainant in writing that failure to cooperate may be grounds for the agency to dismiss the complaint, and give the complainant 15 days to respond. The EEO office may choose to dismiss the complaint for failure to cooperate, or it may proceed with the investigation without input from the complainant.

Investigative Tools and Techniques

EEO investigators utilize a variety of tools and techniques to investigate complaints of discrimination. Most effective are interviews with witnesses, captured in affidavits, and Requests for Information. An investigator may use a combination of techniques depending on the scope of the investigation and the claims raised by the complainant. In addition, factors such as location, availability of witnesses, and budgetary constraints may influence the choice of investigative tools used in any one investigation.

Investigative tools and techniques used by EEO investigators include

- Interviews and affidavits,
- Requests for Information,
- Interrogatories,
- Fact-finding conferences, and
- On-site investigations.

Other methods of investigation may include position statements and the exchange of letters or memoranda.

Interviews and Affidavits

Investigators conduct interviews and take affidavits to obtain testimony regarding the complainant's claim of discrimination. An interview allows full exploration of the claims and underlying facts of a complaint. This testimony is documented in an affidavit. Interviews may be conducted in person or on the telephone.

Other objectives of an interview and affidavit may include the following:

- To gain an understanding of employment records,
- To test the accuracy and validity of those employment records,
- To obtain information from witnesses regarding alleged discriminatory statements, events, policies, or practices,

- To obtain information on the qualifications and job performance of employees and job applicants,
- To test various theories of discrimination and agency defenses,
- To resolve job equality issues in sex/wage investigations, and
- To follow up more easily than with written questions or documents.

During and EEO investigation, an investigator might interview and take an affidavit from:

- The complainant — to clarify the claims and obtain specifics about the alleged discrimination, explore possible agency defenses, and determine other sources of evidence (e.g., witnesses or documents),
- The complainant's witness(es) — to obtain corroboration of the complainant's evidence and to test the theory of discrimination applicable to the case,
- The responsible management official(s) — to determine the specific facts pertaining to the defenses raised by the agency,
- The agency's witness(es) — to determine the overall employment process or practice being challenged and aspects of the employment process affecting individual employees, and
- Other witnesses — to obtain evidence pertaining to the claims and to test the theory of the case.

The process of conducting interviews and preparing affidavits is discussed in depth later in this section.

Request for Information

A **Request for Information** (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. The RFI should seek all information relevant to the case, including the following:

- Evidence of intentional discrimination,
- The agency's asserted reasons for any difference in treatment,
- Factual, documentary, and statistical evidence indicating how the complainant and members of the complainant's allegedly aggrieved class are treated under or affected by the policy or practice being reviewed as compared with non-aggrieved class members, and
- Policies, procedures, and regulations that govern the process that is the subject of the complaint.

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 witnesses are needed.

The process of preparing an RFI is discussed in depth later in this section.

Interrogatories

Interrogatories are written requests for testimonial evidence that are directed to witnesses. Interrogatories should rarely be used, except in the circumstance where a witness has retired and left the area or when the witness has avoided the investigator or was very evasive in an interview and affidavit. Responses to interrogatories should be sworn to or affirmed.

EEO investigators should be aware that responses to interrogatories may be vague, general, or non-responsive, requiring additional investigation. In addition, responses prepared by an attorney may not provide an “unfiltered” answer, in contrast to a face-to-face interview.

Interrogatories Model Checklist

Purpose: To obtain written testimony, usually in lieu of conducting an interview. Allows corroboration of claims and other evidence, and clarification of issues.

Process:

- Identify witness(es) to whom interrogatories will be addressed:
 - Complainant,
 - Complainant witness(es),
 - Responsible management official,
 - Other management witness(es), and/or
 - Custodian(s) of documents.
- Contact the witness to inform him/her that interrogatories will be sent and to ascertain mailing address.
- Prepare an outline or list of questions and topics to be covered with the witness.
- Draft interrogatories.
 - Tailor to the scope and time period of the investigation.
 - Be clear and succinct about information sought.
 - Request information in an organized manner related to the claim.
 - Set a time period for responses.
 - Request that an explanation be provided if responses are not available.
 - Explain possible sanctions for not responding:
 - adverse inference,
 - matters established in favor of opposing party,
 - decision in favor of opposing party,

- exclusion of favorable evidence, and/or
 - other actions as appropriate.
- Ask the witness to swear or affirm under penalty of perjury that the responses are true. If the witness refuses to sign the responses, ask the witness to state if the responses are true. If the witness says the responses are true, add the following at the end of the responses: “The witness declined to sign the above responses but read them and stated that they were true.”
 - Inform the witness that additional information may be sought. Remind the witness that the EEO process is confidential and that the witness should not discuss the interrogatories or any part of the investigation which involves the witness.
 - Explain to the witness what additional actions may be taken to complete the investigation. Explain also that the interrogatories and responses, and any documents provided in response to the interrogatories, will be included in the Investigative Report.
 - Review evidence obtained; determine if follow-up interrogatories or other means of investigation are necessary.

Fact-Finding Conferences

A **fact-finding conference** is an informal investigative forum. It is not an adversarial proceeding. A fact-finding conference is a very useful mechanism to further define the claim, determine what facts are undisputed, clarify and resolve disputed issues, and determine what other evidence is needed. Both parties and other relevant witnesses attend a fact-finding conference. Frequently, fact-finding conferences are recorded and transcribed. The transcript becomes part of the Investigative Report.

EEO investigators are encouraged to use fact-finding conferences. They allow the parties to hear both sides in a non-adversarial setting. Frequently, a fact-finding conference may encourage settlement of the complaint. Investigators should encourage witnesses to participate in and ensure that participants remain civil during a fact-finding conference.

Fact-Finding Conferences Model Checklist

Purpose: An informal investigative forum, not an adversarial proceeding, intended to further define the issue, determine what is undisputed, clarify disputed issues, and determine what other evidence is needed.

Process:

- Determine who should attend:
 - Complainant,
 - Complainant witness(es),
 - Responsible management official,
 - Other management witness(es).

- Conduct any pre-conference interviews necessary to clarify evidence or reassure any witnesses who may be appearing.
- Prepare a list of the unresolved issues to be covered and the questions, in logical sequence, to be posed to each attendee.
- At the conference:
 - Introduce yourself and the attendees.
 - 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.
 - Explain that notes will be taken or that the conference will be recorded.
 - Inform the participants that attorneys for either party are limited to an advisory role and may not cross-examine witnesses or speak for their clients.
 - Allow ample time for the complainant to explain and support each claim and for the responsible management official to present and defend his/her actions.
 - Allow the complainant time to rebut the responsible management official's (or the agency's) statements.
 - Resolve any factual disputes as they become apparent. Attempt to resolve factual disputes or identify any relevant additional evidence that may be needed.
- Close the conference. Explain what additional actions may be taken to complete the investigation. Explain also that the notes (or transcript) of the fact-finding conference will be included in the Investigative Report.

On-Site Investigations

An **on-site investigation** is an examination of the physical environment where the complaint arose. An on-site allows an EEO investigator to obtain a general understanding of the agency's operations at that location. Frequently, EEO investigators are already located in the agency facility where the complaint arose. The investigators will know the physical layout, know where records are maintained, and have access to a location to conduct interviews. EEO investigators should always include an on-site review as part of their investigations, whether the investigator is located at the facility or not.

There may be some circumstances that restrict the ability of the EEO investigator to perform an on-site investigation, such as budget constraints. However, those cases should be the exception and not the rule.

Refer to the case management checklists at the appropriate section for guidelines on using each of these investigative tools.

On-Site Investigations Model Checklist

Purpose: To obtain evidence regarding a claim of discrimination, observe the environment where the claim arose, interview witnesses, and review records in their original state.

Process:

- Review the case file.
- Know the theory of the case you are pursuing; determine what evidence is needed to prove or disprove the theory.
- Determine what the purpose of the on-site is:
 - To review records,
 - To interview non-management witnesses,
 - To interview managerial and supervisory witnesses,
 - To observe physical environment, and
 - To tour the facility
- Arrange the on-site:
 - Identify a point of contact for arranging on-site.
 - Schedule on-site to result in minimal disruption to agency operations at that location.
 - Identify any contacts who may facilitate the on-site (e.g., personnel official for review of personnel documents).
 - Notify any witnesses to schedule interviews.
- Conduct the on-site:
 - Review records; copy any that are relevant to the investigation.
 - Interview witnesses: request that a private room be provided to conduct interviews and prepare affidavits if possible.
- Conclude the on-site:
 - Summarize any commitments made by agency officials (e.g., to provide copies of documents) and explain what next steps will be.
 - Explain that notes and documents will be included in the Investigative Report.

DEVELOPING THE INVESTIGATIVE PLAN

Learning Objectives:

At the conclusion of this session, participants will have

- Developed an Investigative Plan and
- Discussed drafting a Request for Information.

What is the purpose of an Investigative Plan?

The **Investigative Plan** (IP) is a working document intended to refine the claims and lay out the plan for completing the investigation. Many agencies require investigators to submit IPs before commencing an investigation. Even if not required, EEO investigators are urged to always prepare an IP. An IP will help guide the investigator through the investigation and help the investigator keep track of the various steps in the investigative process.

The investigator should draft the initial IP after reviewing the complaint file and update it as evidence is received and analyzed. For example, after the initial interview with the complainant, the investigator may need to amend the IP to indicate how the information obtained relates to each claim and to determine whether additional evidence and/or investigative steps need to be taken. In order to identify the information that must be obtained for each claim, the investigator should refer to the appropriate models of proof, copies of which may be found in Tab F of this Manual.

What should you include in an Investigative Plan?

The IP should include the following:

- Identifying information about the complainant and his/her representative, if s/he has one,
- Description of the complaint,
- Identification of the bases and claims,
- Identification of the appropriate theory of discrimination,
- Investigative methods to be used (e.g., on-site interviews and affidavits, and Request for Information to the agency),
- Sources and description of the observable, documentary, testimonial, and statistical evidence required, and
- Anticipated time line for completion of the investigation

Investigative Plan Model

I. COMPLAINANT AND REPRESENTATIVE INFORMATION

A. Name of Complainant

- B. Name and Address of Office, Department, Facility Where Alleged Discrimination Occurred
- C. Name and Address of Office, Department, Facility Where Complainant Is Employed
- D. Name and Address of Complainant's Designated Representative

II. DESCRIPTION OF COMPLAINT

- A. Agency Docket No.
- B. Dates of
 - 1. Alleged Discrimination
 - 2. Contact with EEO Counselor
 - 3. Notice of Right to File a Formal Complaint
- C. Statement of the Accepted Issues and Bases
- D. Complainant's Claim
- E. Has Complainant Specified Compensatory Damages?

III. DESCRIPTION OF PROPOSED INVESTIGATION

- A. Investigator's Name and Mailing Address
- B. Date Complaint File Received by Investigator
- C. Name(s) and Address(es) of Witness(es) to be Interviewed

Note: There will be other employees/managers involved in or knowledgeable of the issues. The investigator will determine who they are during discussions and interviews of those individuals who have relevant information.

- D. Investigative Method

Example: On-site interviews will be conducted to obtain affidavits from the complainant, complainant witnesses, and management officials. Document request will be provided to the agency.

- E. Documents to Be Requested — See Attached Request for Information.

- F. Information Sought from Complainant

Example: Complainant will be requested to provide the rationale as to why she believes she was discriminated against based on her race when she was not selected for the position of Program Manager. The complainant will also be asked to provide any supporting statements and objective evidence as to her discrimination claims, her claim for compensatory damages, and how the claim for damages is linked to her discrimination claim.

- G. Identify the Applicable Theory of Discrimination and How the Theory of Discrimination Will Be Applied in the Investigation

Example: This claim falls under the disparate treatment theory. Comparative evidence will be sought which compares the complainant with the individual who

was selected to determine if that individual is similarly situated to the complainant. In addition, the agency will be requested to provide lists of the selecting officials and other selections made by the selecting officials in the last two years that show the race of each applicant and prior EEO activity. This information will also be used as comparative evidence.

REQUESTS FOR INFORMATION

Once an investigator has developed an Investigative Plan, the next step is to begin collecting evidence. We do this by interviewing the complainant and preparing a Request for Information (RFI) to obtain documentary evidence.

The Importance of Written Documentation

Why is it important to obtain documentary evidence? What do we aim to achieve through an RFI?

- Documents kept in the normal course of business can be a reliable source of evidence (wage records, job descriptions, employment applications, personnel forms).
- Documents can identify or explain the agency's policies and practices (regulations, manuals, collective bargaining agreements, harassment policies).
- Documents can confirm or refute other information, particularly testimony.

Requesting Information/Records in Various Formats

What kinds of records might we receive? What are the advantages and disadvantages of each?

The different kinds of records obtained through an RFI may include

- Documents normally kept by an agency,
- Documents prepared in response to the RFI, and
- Computerized records.

One kind of records are those **normally kept in the course of business**, such as wage records, job descriptions, employment applications, and policies. These may be more reliable than the other kinds, but they may be hard to decipher or understand and may be cumbersome to review.

Documents prepared or compiled **specifically in response to your request**, such as lists or summaries, may be easier to use or review, but may not contain all the information you need. Moreover, they can be altered or written in a manner that disguises the true facts.

When requesting **computerized records**, such as employee lists, wage information, and personnel data, be specific about what you are requesting and in what format the documents should be provided. These records can be helpful in document-intensive cases. They can reduce the amount of actual document review needed. However, they also can be altered or may not contain everything you need.

Timing of the RFI

When is the best time in the investigation to send an RFI? What factors influence timing?

The RFI should be sent as soon as possible. You should include a deadline for responses and follow up if the deadline passes.

- Usually, your first step is to interview the complainant upon receipt of a case file and then create a document request.
- If the investigator is conducting an on-site investigation at a location other than where the investigator normally works, the investigator should request the response to the RFI prior to obtaining the complainant's affidavit.
- There will be times when witness interviews will prompt you to send a follow-up RFI to clarify claims.

The key is to develop a case strategy applicable and appropriate to the complaint you are investigating.

Note: the documents provided in response to the RFI should be accompanied by an affidavit authenticating the documents.

Request for Information Model Checklist

Purpose: To collect documentary evidence related to a complaint of discrimination. The intent is to seek evidence of discrimination, an agency's defense for its actions, and factual, documentary, and statistical evidence regarding how members of an allegedly aggrieved class are treated under a particular policy or practice.

Process:

- Determine what documents are relevant to the investigation.
 - Personnel records
 - Job descriptions
 - Payroll records
 - Time and attendance records
 - Disciplinary records
 - Medical records
 - Collective bargaining agreements
 - Other labor/management documents
 - Operating procedures
 - Regulations, manuals, procedures for personnel decisions
 - Office records
 - Internal communications
 - External communications
 - Hard copies of electronic data

- Training documents
- Organizational chart
- Other
- Determine who is the custodian of the documents being sought.
 - Human Resources office
 - Clerical staff
 - Office manager
 - Management official
 - Union office
 - Witness
- Determine in what format the documents are available and in what format the documents should be provided to the investigator.
 - Hard copy
 - Electronic
 - Other
- Prepare the RFI
 - Tailor to the scope and time period of the investigation
 - Be clear and succinct about documents sought
 - Address to custodian of documents sought
 - Set a time period for production of documents
 - Request that explanation be provided if documents are not available
 - Explain possible sanctions for not producing documents:
 - adverse inference
 - matters established in favor of opposing party
 - decision in favor of opposing party
 - exclusion of favorable evidence
 - other actions as appropriate
 - Request that documents be provided in organized manner
 - If computerized or electronic data sought, request all code books and documentation that explain the electronic format, including file layout, creation and expiration dates, and data set names
- Review evidence obtained; determine if follow-up RFI is necessary.

INVESTIGATIVE INTERVIEWS

Gathering Testimonial Evidence

Introduction

The quality of the documentation of an interview can make or break an investigation. Whether in the form of interview notes or an affidavit, the evidence taken from a witness may be used as evidence to reach the ultimate decision about whether discrimination occurred. Therefore, it is critically important that investigators know how to record this evidence. Investigators need to know what information should be recorded in an affidavit and how an affidavit is drafted.

The Initial Interview with the Complainant

The documentation of the initial interview should be thorough and detailed. The investigator should take care to get as many details as possible and record them. A good initial interview and documentation means the investigation can go forward. A bad initial interview and documentation means an investigator will have to revisit the same factual incidents over and over, resulting in a poor investigation and inefficient use of time.

The initial interview of the complainant determines how the complaint will be further investigated. Generally, the following steps should be performed, and the resulting information should be contained in the documentation of the initial interview of a complainant:

- Identify the date the interview was conducted;
- Identify the interviewer;
- Identify the agency location where the complainant worked.

For each claim and/or allegation

- Establish the complainant's work history, job title, duties, promotions, salary, disciplinary actions, and job performance (including union involvement if relevant).
- Establish the identity of witnesses by the nature and source of their testimony, and the relevance of their information (i.e., name, relevant protected status, home and work phone numbers, home address, position held, and source and nature of information given). If the complainant has no witnesses, so state.
- Identify, as appropriate, relevant composition by basis of agency's workforce.
- Include a statement of the complainant's physical and psychological work environment.
- Include a statement of the complainant's knowledge of agency's record-keeping system(s) and of personnel policies and practices relevant to the claim raised in the complaint.
- Include a statement about the size and type of agency facility where the complainant worked.

- Include a statement of whether the complainant is covered by a collective bargaining agreement and how it affects the claim, if applicable.
- Establish **what** happened to the complainant: how was the complainant harmed as it relates to the complaint?
- Establish **who** (i.e., name, title, relevant bases) was responsible for the action(s) taken against the complainant.
- Establish **where** (location) and **when** (dates) the action(s) occurred.
- Identify **how** the information was obtained by the complainant (e.g., hearsay, direct observation).
- Establish **why** the complainant believes the action was discriminatory.
- Establish how similarly situated employees were treated as compared with the complainant. Identify these individuals by name and relevant protected status.

Include a statement of what the agency will probably tell the investigator about the complainant in defense of the complaint being filed.

Other Interviews

During the course of an investigation, you will interview other individuals besides the complainant. Record the witness's name, address, point of contact who can reach the witness, date of the interview, title, and other identifying information about the witness. Make sure you accurately record the information provided. Make sure you get **details** of the story the witness tells you. Probe what the witness tells you, don't just write it down.

Characteristics of Successful Interviewers

A **successful interviewer**

- prepares and plans for the interview,
- treats the witness with respect and displays professionalism,
- maintains objectivity and neutrality throughout the interview and listens to the response,
- maintains control of the interview,
- listens well, concentrates on the answers given, and probes answers to assure accuracy and completeness,
- is flexible,
- does not assume that the witness knows what the investigator knows,
- does not reveal what the investigator knows in every situation, and
- 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 are likely to miss a key piece of information that could give you a valuable lead.

The Interview Process

The steps of a typical witness interview are

1. Introduce yourself and identify the purpose of the interview.
2. Conduct the oath.
3. Ask background questions.
4. Ask increasingly more detailed questions.
5. Conduct follow-up and seek clarification.
6. Identify other sources of evidence.
7. Close the interview by explaining the next steps in the process and by verifying the witness's address and phone number.
8. If taking an affidavit, have the witness review and sign the affidavit.

Conducting the Oath

It is the responsibility of the investigator to swear in each witness at the beginning of each interview. (During follow-up interviews, including informal phone calls to clarify interview testimony, the investigator may simply remind the witness that s/he is still under oath.) The investigator will ask the witness to raise his/her right hand and respond affirmatively to an oath. There is no prescribed language for the oath, but here is an appropriate model:

“Do you swear or affirm that the testimony you are about to give is true and correct to the best of your knowledge, information and belief?”

The witness must respond in the affirmative, such as “yes” or “I do.” The investigator may then begin posing interview questions to the witness.

Interview Documentation

Documenting the interview is a critical step in an investigation. An interview is only as good as the affidavit that ends 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. Send affidavits to witnesses for review and signature as soon after the interview as possible. Many EEO investigators find it useful to prepare the affidavit on a laptop computer as the interview is being conducted. This facilitates review and signing of the affidavit by the witness.

Electronic mail may be a useful device for sending affidavits to witnesses unless there are concerns about the confidentiality of the agency's electronic mail system. Witnesses should always return signed affidavits. Timely completion of affidavits assures accuracy and provides better case management.

Common Interview Problems

What are your most common interview problems? What techniques have you used to effectively handle these problems?

Reluctant or Uncooperative Witnesses

Try to find out why the witness is being uncooperative and attempt to remove the barriers to cooperation. Try to use persuasion and emphasize the importance of the testimony to the witness. Schedule interviews and confirm the interview schedule in writing. Do not limit the amount of time you will allow for the interview.

Attorneys

Before commencing the interview, explain to the attorney that you expect the witness to cooperate, that your role is as a neutral, objective fact finder, and that you will take appropriate actions if the attorney interferes with the interview.

A witness has the right to request that an attorney be present during the interview. For example, a management official may ask an attorney from the Office of General Counsel to attend the interview. However, agency counsel may not ask to attend witness interviews absent the request by a witness.

Confidentiality

An EEO investigation is a confidential process. Generally, witness statements should not be disclosed to another witness except when necessary to obtain information from the witness. Remember that the complainant will receive a copy of all witness statements at the conclusion of the investigation.

Also note that sometimes a complainant may want to sit in on the interview of his/her witness, or witnesses may want to be interviewed together. To maintain confidentiality and to ensure that witnesses do not influence testimony, witnesses should always be interviewed separately.

Witnesses may also ask the investigator to go “off the record.” Investigators should be cautious about “off-the-record” discussions. It may be appropriate to clarify questions about the investigative process or interview process. Discussions about the substance of a complaint should never be held “off the record.” If they are, the EEO investigator should always document the “off-the-record” discussion in the complaint file (for example, in an affidavit or on the record in a taped interview).

Human Factors

Be conscious that you may be influenced by workday stresses, circumstances surrounding your own personal life, or other “human” factors. As you conduct interviews, be aware of what you also bring to the interview. In the worst-case scenario, when an interview is going badly, take a break and consider starting from scratch.

Interviewing Etiquette

What are some challenges to interviewing? What methods could you use to meet these challenges?

- Language barriers
- Egregious sexual harassment
- Egregious racial/ethnic harassment
- Some disability claims
- Your own personal biases
- Conflicts of interest

Where should interviews be conducted?

Interviews should be conducted at a neutral location where the witness feels comfortable (e.g., witness's office, EEO office, other location).

Generally, witness interviews should not be conducted in a location that the witness may find hostile or intimidating (e.g., the Office of the General Counsel). Part of good interviewing etiquette is conducting the interview at a location that is conducive to eliciting evidence from the witness.

Investigative Interviewing

Learning Objectives

At the conclusion of this session, participants will have reviewed the importance of the following:

- Being prepared for an interview,
- Using different interviewing techniques,
- Phrasing questions to elicit relevant information, and
- Handling difficult witnesses and attorneys.

Be Prepared: The Importance of Planning

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 — that is, what evidence is likely to prove or disprove the case. An investigator who understands what evidence is relevant is more effective in dealing with uncooperative witnesses and with attorneys who may interfere in an attempt to control the interview and keep harmful information from surfacing.

How do you plan for an interview?

- Know the elements of proof and the theory of discrimination for your case.
- 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.
- Leave ample space to record answers and add follow-up questions.

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.

Types of Questions and Styles to Use

What are the most common types of questions used in investigative interviews?

- Open-ended, narrative, or descriptive
- Closed or narrow
- Opinion, feeling
- Follow-up, reflective
- Leading

What is an example of each type of question and what are its advantages and disadvantages?

Open-ended, narrative, or descriptive questions allow a witness to present his/her story. For example, "Describe the events that led up to your discharge."

- Advantages: Can be used to relax a witness, to get the witness to open up and get involved in the interview. May elicit information the investigator may not have thought to ask about.
- Disadvantages: Encourage those who talk endlessly, do not allow the investigator much control, and are not useful for obtaining details.

Narrow or closed questions are typically used when seeking precise information. For example, "What time did you leave work?"

- Advantages: Can be used to control the interview if the witness is rambling or not being cooperative.
- Disadvantages: Require you to already have some information about the claims discussed. Can also be too restrictive and result in leading the witness. Can distort testimony by not allowing a witness to fully explain an answer.

Opinion and feeling questions get information about a witness's beliefs or attitudes. For example, "What do you mean when you say the complainant had a 'poor attitude'?"

- Advantages: Allow you to test for bias. Elicit information that you did not specifically request and that otherwise may not have been developed. Generally, you would save these questions until all other questions have been asked.
- Disadvantages: Elicit testimony that is subjective and seldom factual, encourage those who talk endlessly, and may lead to the perception that you are sympathetic to the witness.

Follow-up and reflective questions are used to clarify testimony and assure that you understand what the witness is saying. For example, an investigator may ask a complainant to restate a chronology of discipline and fill in gaps about what happened to trigger each disciplinary action.

Leading questions are used to pin down a reluctant or unfocused witness or to summarize testimony. As a general rule, you should avoid using leading questions.

- Advantages: Can be used to control the interview.
- Disadvantages: Tend to suggest the answer to a question. Often lead to distorted and unreliable information. May give rise to antagonism by the witness and a perception that the investigator is biased.

Most interviews begin with open-ended narrative questions that allow the witness to tell his/her side of the story. As the interview progresses, the scope of the questions narrows to focus on relevant events and people. As questions become more specific, utilize the “**five Ws**”: **who, what, where, when, and why**. These questions are great to use because they can elicit very specific factual information. The broad-to-narrow style of questioning is called **funnel questioning**.

Sometimes, you will start with very specific questions and build a foundation of specific information. After the foundation is built, move to more descriptive questions, relying on information that has already been elicited. This is known as **pyramid questioning**. Sometimes it is useful to provide the witness with some factual information to stimulate his/her memory and to prevent exaggerated responses. Sometimes, if a witness is not being responsive, you may use a technique called **tunnel questioning**, where you ask the same type of question repeatedly, usually a closed question, to press for facts.

Interview Question Types

QUESTION TYPE: OPEN

Use: One of the best ways to start (unless you need to get to the heart of the matter immediately). Gets the witness involved; gives the witness control; gives the witness recognition.

Examples:

- “Tell me what happened.”
- “Could you describe the events ...?”

QUESTION TYPE: **CLOSED**

Use: Follow-up after open question to get specific, objective information; limits answers. Too many suggests badgering; may be threatening.

Examples:

- “Were you late for work?”
- “Did you call in?”
- “Whom did you speak to?”

QUESTION TYPE: **REFLECTIVE**

Use: Clarify or verify so that you are not assuming, not jumping to conclusions. Repeats in question format what witness has said; shows investigator is listening

Example: “Are you saying that ...?”

QUESTION TYPE: **FACTUAL**

Use: Asks for specific facts such as dates, names, terminology. Tunnel effect if you ask too many; boring.

Example: “How many people work in this office?”

QUESTION TYPE: **OPINION**

Use: Asks for witness beliefs, attitudes, opinions.

Example: “What do you mean when you say ‘poor attitude’?”

QUESTION TYPE: **DESCRIPTIVE**

Use: Similar to OPEN. Asks for narrative account of an experience or situation.

Example: “Describe the events leading to your discharge.”

QUESTION TYPE: **FEELING**

Use: Asks for the emotional state of the witness. Gives the witness control, recognition.

Example: “Why do you feel you were harassed?”

Interview Question Wording

Use appropriate **wording** to achieve the following: questions should be purposeful, clear, natural, brief, thought-provoking, limited in scope, and unbiased.

QUESTION WORDING: **DIRECT**

Use: Guides interview in a specific direction; gets a short, specific answer; can block witness responses.

Examples:

- “Did you see who started the fight?”
- “When did this policy go into effect?”

QUESTION WORDING: **INDIRECT**

Use: When information is embarrassing, threatening; can be hypothetical, for example, “What if ...”

Examples:

- “Did you ever consider reporting his sexual advances to management?”
- “What would have happened if you had reported him?”

QUESTION WORDING: **LEADING**

Use: A type of direct question; phrased to suggest the right answer; may bias witness’s response; may affect accuracy of response.

Examples:

- “Don’t you think that’s a good settlement offer?”
- “You’re going to withdraw this complaint, aren’t you?”

QUESTION WORDING: **DOUBLE-BARRELED**

Use: Avoid; introduces more than one idea in the same question.

Example: “What do you think of this complaint and what are you going to do about it?”

QUESTION WORDING: **NEGATIVE/SHARP**

Use: Avoid; leads to defensive and endless qualifying.

Example: “Why would anyone do a thing like that?”

Question Preface

A **preface** is a statement that introduces a question; it provides a framework that allows a witness to correctly interpret a question.

QUESTION PREFACE: **FACTUAL**

Use: Gives witness facts or data to stimulate memory; can prevent response distortion.

Example: "The vacancy announcement was posted on January 3, 2017. When did you personally apply for the position?"

QUESTION PREFACE: **MOTIVATIONAL**

Use: Arouses witness interest; witness may feel obliged to answer; reduces threat of question; include witness name or "you" in preface to increase rapport and cooperation.

Example: "I know you felt what happened to you was discriminatory ..."

QUESTION PREFACE: **FUNNEL**

Use: General to narrow; open to closed; witness needs to vent feelings; gives witness greater freedom

Examples:

- "Tell me about ..."
- "What happened when you ...?"
- "Were there any witnesses?"

QUESTION PREFACE: **PYRAMID**

Use: Specific to general; closed to open; can motivate witness; short questions, easy to answer.

Examples:

- "Have you seen the complaint filed by Mr. Z?"
- "Did you follow the normal discipline policy with Mr. Z?"
- "Explain the events leading to his discharge."

QUESTION PREFACE: **TUNNEL**

Use: A series of all one kind of questions, for example, all closed, all open; better to vary question types; may be used to press for facts.

Example: "Did you call in? Whom did you speak to? What time did you call?"

Question Probes

A **probe** is a follow-up question that requests more information. It expands the range and depth of an answer. It can reveal circumstances, reasons, and attitudes. A follow-up question for **clarification** ensures that the investigator understands what the witness said; it eliminates confusion and ambiguity, and it breeds confidence.

QUESTION PROBE: **DIRECT**

Use: Come right out and ask for more information.

Examples:

- “What happened after that?”
- “What do you mean by ‘poor attitude’?”

QUESTION PROBE: **SILENCE**

Use: Usually not more than 10 seconds; has many context-dependent meanings:

- “I don’t believe you.”
- “I approve, please continue.”
- “I agree.”
- “I don’t understand.”
- “I’m interested.”

QUESTION PROBE: **MINIMUM ENCOURAGEMENT**

Use: Just a few words to keep witness talking.

Examples:

- “I see.”
- “Yes, please go on.”

QUESTION PROBE: **RESTATEMENT**

Use: Repeat witness’s statement, but don’t parrot.

Examples:

- “You called in ...”
- “You said ...”

QUESTION PROBE: **REFLECTION**

Use: Reveals the feelings behind the statement

Example: “Why do you believe ...?”

QUESTION PROBE: **PARAPHRASE**

Use: Repeat witness’s statement in other words; better than restatement.

Example: “You only heard about the fight and did not actually witness it?”

QUESTION PROBE: **CONFRONTATION**

Use: Challenges witness's words or actions; could make witness hostile; avoid arguing or direct accusations.

Examples:

- "Could you be mistaken?"
- "Didn't you just say that ...?"

QUESTION PROBE: **WHY**

Use: Gets information on reasons behind a decision; challenges validity or authority of a response; gets the rationale; helps witness reason through a problem.

Use with caution: witness may become defensive, emotional.

Examples:

- "Why did you do that?"
- "Why did he react that way?"
- "Why didn't you call in?"

Obtaining Reliable Evidence

Let's briefly review some factors to consider about obtaining 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.

At the conclusion of this session, participants will have reviewed methods to objectively determine the reliability of and resolve conflicts in testimony.

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* what s/he tells 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 it is
 - What did the witness actually see or hear?
 - How well could the witness 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, for example, tired, medicated, upset, or alert at the time of the event in question?
- If the information is **not** firsthand
 - Who is the source of the information?
 - Who told the witness? Did the source have firsthand knowledge?
 - Is the source connected with either the complainant or the agency? Does the source have any interest in the outcome of the case?
 - Did the witness believe the source?

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, did s/he actually perform the job duties as opposed to merely drafting position descriptions?)
- How much experience has the witness had in the area being discussed? (For example, how long has the Director of Human Resources been in that position — three weeks or three years?)

Note: Keep in mind that we are not necessarily talking about “expert witnesses” — they are a special category unto themselves.

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 well because of its relative impact, unexpectedness, or frequency of occurrence, or its linkage to another important event in the witness's life?

Can you provide an example of this?

- An applicant may be more likely to remember what was said in his/her specific job interview than the personnel officer, who may have conducted many such interviews.
- An individual who does or sees the same thing repeatedly might be more likely to remember an incident that varied from the routine.
- An individual often better remembers events because they occurred on a birthday, a holiday, or the last or first day on the job, for example.
- 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

What are some of the key factors to consider when examining the content of testimony?

- Whether the evidence is uncontradicted and why.
- The form of the testimony:
 - Sworn testimony is generally considered to be more reliable.
 - Oral testimony may be assessed differently from written testimony.
 - Who prepared the written testimony (a lawyer, a friend, the witness)?

What should you look for when evaluating the content of testimony?

- Consistency in testimony and evidence
 - 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 truthful, such as the date on a letter of discipline?
 - Is the evidence corroborated by other witnesses or documents?
 - Is the testimony 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 an individual's testimony and his or her conduct.

- Look for inconsistencies or contradictions between witness testimony or statements and other evidence in the record, such as documents.

Records and Other Documents

What questions should you ask when evaluating the consistency of testimony with documents and records?

- Is the 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/her possession or control that would support the testimony? If not, why not? Is it because they might actually contradict the witness?
- Are the records original? Complete? Unaltered? Accurate? Reliable?
- When were the records made in relation to the matters being testified about?
- Who created and/or completed the documents?

Testimony of Other Witnesses

What questions should you ask when evaluating the consistency of testimony with the testimony of other 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?

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, or the like. In other words, **does the story make sense?**

Demeanor

Demeanor can include tone and pitch of voice, hesitancy or reluctance, facial expressions, gestures, body language, evidence of surprise, air of candor, and 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/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/her testimony, or the fact that s/he testified?
- Has this “interest” affected the testimony?

When the witness testifies against such an “interest,” that is important. For example, does a neutral witness testify that s/he has engaged in the same misconduct as the complainant, when that might result in discipline of the witness?

AFFIDAVITS

Drafting Affidavits

When preparing affidavits, remember the story is the witness's — it is not the investigator's nor what the investigator wants the story to be. Allow the witness to review and make corrections to the affidavit. If a witness makes multiple corrections to an affidavit, there may be two causes:

- the witness has credibility problems and wants to manipulate his/her testimony, or
- the investigator did not listen to what was being said and did not record the information in the witness's own words.

All affidavits must be sworn or affirmed. A common phrase included in affidavits for this purpose is usually included at the top of the affidavit or just above the signature line:

“I swear or affirm under penalty of perjury that the information contained in this affidavit is true to the best of my knowledge and belief.”

Affidavits should contain clear and concise statements, and should capture all of the relevant information on the complainant's protected status.

Tips for Preparing Affidavits

The following suggestions may facilitate the preparation of affidavits.

- If possible, take notes of an interview on a computer and, before the witness leaves, draft the affidavit using the notes.
- Use electronic mail to send draft affidavits to witnesses. Remember that a signed affidavit must be returned by the witness (although an electronic version may also be provided).
- Allow the witness time to review and correct the affidavit. It is permissible for a witness to ask a representative to review an affidavit before the witness signs it. Investigators should be aware that it is not permissible for an agency representative to require that an affidavit be submitted to him/her for review before a non-supervisory witness signs it.
- If a representative of a party or witness substantially revises or submits a different affidavit, the investigator should document this information in the complaint file. The investigator should determine if additional information or clarification is needed and follow up with the witness. Document it in the record if the witness does not cooperate or otherwise provide the requested information.

A witness may keep a copy of his/her signed affidavit.

What Can Go Wrong

Sometimes, an interview does not go well and subsequent documentation of the interview is poor. These are some factors that contribute to unproductive interviews and documentation:

- Lack of time to properly plan and prepare to conduct the interview
- Boredom — the investigator finds the testimony of the witness dull and loses interest in listening
- The investigator is tired of listening
- The investigator doesn't know how to listen
- The investigator does not ask clear questions
- The investigator does not maintain control of the interview

The consequence of a bad interview is bad documentation. Bad documentation is incomplete, inaccurate, and disorganized, and results in a bad investigation. The consequences of a bad investigation are that a case file is returned, and the investigator has to start over.

Contents of Affidavits

Introduction

The quality of the documentation of an interview can make or break a case. Whether in the form of interview notes or an affidavit, the evidence taken from a witness may be used as evidence to reach the ultimate decision about whether discrimination occurred. Therefore, it is critically important that investigators know how to record this evidence. Investigators need to know what information should be recorded in an affidavit and how an affidavit is drafted.

The documentation of the interview should be thorough and detailed. The investigator should take care to get as many details about the claim as possible and record them. A good interview and documentation mean the investigation can go forward. A bad interview and documentation mean an investigator will have to revisit the same factual incidents over and over, resulting in a poor investigation and inefficient use of time.

As discussed earlier, the initial interview of the complainant determines how the complaint will be further investigated. Generally, the following information should be contained in the initial interview of a complainant:

- Identify the date the interview was conducted.
- Identify the interviewer.

Identify the agency location where the complainant worked.

For each claim and/or allegation:

- Establish **what** happened to the complainant: how was the complainant harmed as it relates to the complaint?
- Establish **who** (i.e., name, title, relevant bases) was responsible for the action(s) taken against the complainant.
- Establish **where** (location) and **when** (dates) the action(s) occurred.
- Identify **how** the information was obtained by the complainant (e.g., hearsay, direct observation).
- Establish **why** the complainant believes the action was discriminatory.
- Establish how similarly situated employees were treated as compared with the complainant. Identify these individuals by name and relevant protected status.
- Establish the complainant's work history, job title, duties, promotions, salary, disciplinary actions, and job performance (including union involvement if relevant).
- Establish the identity of witnesses by the nature and source of their testimony, and the relevance of their information (i.e., nature of information witness has, name, relevant protected status, home and work phone number, home address, and position held). If the complainant has no witnesses, so state.
- Identify, as appropriate, the relevant composition by basis of the agency's workforce.
- Include a statement about the complainant's physical and psychological work environment.
- Include a statement about the complainant's knowledge of the agency's record-keeping system(s) and its personnel policies and practices relevant to the claim raised in the complaint.
- Include a statement about the size and type of agency facility where the complainant worked.
- Include a statement of whether the complainant is covered by a collective bargaining agreement and how it affects the claim, if applicable.

Include a statement of what the agency will probably tell the investigator about the complainant in defense of the complaint being filed.

CONCLUDING THE INVESTIGATION

After you have determined that no further investigation is necessary, you are ready to complete your investigation. There are two steps to completing the investigation:

1. You must compile the evidence you have obtained and assemble the Investigative Report, which is included in the complaint file.
2. You must draft the Investigative Summary.

Assembling the Complaint File

Although agencies may differ in how this material is assembled, we are going to follow the guidelines in the EEOC's Management Directive 110, Chapter 6. The text of MD-110 may be found on EEOC's website at www.eeoc.gov/laws/index.cfm, and the specific links are included in the Additional Resources provided with this manual. MD-110 provides specific guidelines on how to assemble a complaint file.

Agencies are required to assemble the complaint file as an electronic document, absent good cause shown, with searchable text and digital bookmarks identifying key documents, exhibits, and specific sections of the file. The complaint file must include a typed summary of the investigation, signed and dated by the investigator, containing a discussion and analysis of the evidence.

The complaint file must have a title page, and contain all documents related to the complaint, organized as follows:

- Section 1 should contain the formal complaint (bookmarked) and documents submitted by the complainant.
- Section 2 should contain the EEO Counselor's report (bookmarked) and all documents generated in the informal process pursuant to 29 C.F.R. § 1614.105(c). Included here should be the notice of right to file a complaint (bookmarked) pursuant to 29 C.F.R. § 1614.105(d).
- Section 3 should contain the agency's notice of claims to be investigated (bookmarked) pursuant to Section IV.A.1 of this Chapter. Copies of any other documents bearing on delineation of the claims to be investigated should also be included. Documents pertaining to the partial dismissal of claim(s) (bookmarked) and/or the notice of late investigation should be included in this tab.
- Section 4 should contain documented attempts at resolution, including any settlement agreement reached on any aspect of the complaint (bookmarked); however, documentation should not include the substance of such attempts.
- Section 5 should contain any documentation of appellate activity and any decisions affecting the processing of the complaint if any (bookmarked).
- Section 6 should contain the summary of investigation/summary analysis of the facts (bookmarked). The summary should cite exhibits and evidence (bookmarked) and be signed and dated by the investigator.

- Section 7 should contain the investigative evidence and documents in a logical order. The notice of incomplete investigation pursuant to 29 C.F.R. § 1614.108(g), if one was issued, should be included.
- Section 8 (if applicable) should contain all pre-hearing submissions, including those relevant to summary judgment, and all discovery documentation, and motions, orders, exhibits (bookmarked), and transcripts (bookmarked).
- Section 9 (if applicable) should contain all submissions from an administrative hearing, including motions, exhibits (bookmarked), and transcripts (bookmarked).
- Section 10 (if applicable) should contain the decision(s) of the Commission's Administrative Judge (bookmarked).
- Section 11 should contain the Final Agency Action (bookmarked) and any documentation related to service on the parties.
- Section 12 should contain any miscellaneous material.

The EEO investigator may not have information for every tab at the conclusion of an investigation, depending on the circumstances of each investigation. However, the EEO investigator is responsible for gathering the evidence obtained during the investigation and assembling it for Section 7.

The Investigative Summary

Learning Objective: At the conclusion of this session, participants will have hands-on experience in drafting an Investigative Summary.

What is the purpose of the Investigative Summary?

The Investigative Summary is a narrative document that succinctly states the claims and presents the evidence addressing both sides of each claim in the case.

What is the scope of the Investigative Summary?

The summary should state facts (supported in the complaint file) sufficient to permit the ultimate fact finder to reach a conclusion about whether discrimination occurred. The summary should cite the evidence and the exhibits collected. The summary should not contain the investigator's conclusions about what the evidence shows.

How should an Investigative Summary be prepared?

A good rule of thumb is to follow the analytical framework that applies to the case. In a typical disparate treatment case, there are three parts: the prima facie case, the agency's articulated reason, and evidence of pretext. You may use the Models of Proof in the Appendix to this manual or follow the models of analysis contained in MD-110, Appendix J-1. The text of MD-110 may be found on EEOC's website at www.eeoc.gov/laws/index.cfm, and the specific links are included in the Additional Resources provided with this manual.

Tips for Preparing an Investigative Summary:

- Create an outline before writing the summary. For each major topic, include references to the record for location of evidence.
- Begin drafting the Investigative Summary as evidence is obtained. For example, if affidavits are created in computer format, cut and paste relevant portions for the Summary. Include any corrections or revisions made by a witness.
- Cite the evidence as compiled in the Investigative Report.

After the complaint file is prepared, the Investigative Report will be sent to the agency's EEO office. The EEO office will provide the complainant and his/her representative one copy each of the complaint file and Investigative Summary.

OVERCOMING OBSTACLES IN EEO INVESTIGATIONS

It is important that the investigator notify witnesses and custodians of documents of their obligation to cooperate. The investigator should advise these individuals that failure to cooperate may result in sanctions.

The following **sanctions** against the complainant or agency may be imposed:

- An adverse inference: a conclusion that evidence requested would reflect unfavorably on the party refusing to provide it
- A determination that the matters to which the requested evidence pertains are established in favor of the other side
- An exclusion of other evidence offered by the party refusing to cooperate
- The issuance of a decision in favor of the opposite side
- Other actions as appropriate

Can an EEO investigator show evidence to a witness?

Witnesses are not generally shown information or documents from the complaint file. In some instances, witnesses may be shown information or documents when the EEO investigator determines that such disclosure is necessary to obtain information from the witness.

If a management witness insists on seeing the complainant's affidavit, the EEO investigator should instruct the management witness to contact the EEO Director. The investigator should not give a copy of the complainant's affidavit to any management official.

The complainant will receive a copy of the completed complaint file at the conclusion of the investigation. The complainant may also be shown other evidence obtained by the EEO investigator to provide rebuttal or clarifying evidence.

Are there confidentiality requirements?

There are two aspects to confidentiality.

1. The EEO process is a confidential process, and the investigator should not discuss evidence obtained or the claims in the complaint except as required to conduct the investigation.
2. The investigator should not disclose the identity of witnesses or sources of documents unless necessary to conduct the investigation.

If the investigator has concerns or questions about disclosure, s/he should contact the EEO office.

However, witness statements are not confidential to the extent that they are provided to the complainant with the investigative file. **Investigators should inform witnesses that their statements will be disclosed.**

Note that investigators often have to obtain records about third parties (e.g., comparators to the complainant). Investigators should only include **relevant** information about third parties in a complaint file because the file will be disclosed to the complainant. Investigators may redact information such as Social Security numbers, home addresses, and telephone numbers before putting a record in the file.

What should the investigator do if a witness is uncooperative?

EEO investigators should always confirm interview appointments in writing. This will forestall witnesses from breaking appointments or limiting the amount of time they spend with the investigator.

Remind a witness who is employed by the agency of his/her obligation to participate in the investigation. The investigator should give notice to the witness that failure to cooperate and provide evidence when requested may result in sanctions against the complainant or the agency by the ultimate decision maker or by EEOC. The investigator should notify the complainant if a complainant's witness is not cooperative.

Management witnesses are critical to conducting an EEO investigation. If a management witness is uncooperative, the investigator should notify the EEO office. The investigator or EEO office should also report the manager to his/her chain of command.

The investigator should document in the complaint file all information regarding a manager's unwillingness to cooperate and steps taken to obtain cooperation.

What should the investigator do if the witness seems biased in favor of one party?

The investigator should elicit from the witness any potential bias such as friendship or family ties, hostility toward a party because of a past disagreement, or self-interest in the outcome of the complaint. This information will be part of the record in the investigation as contained in the witness's affidavit.

What should the investigator do if a witness thinks the investigator is biased?

Because each federal agency investigates its own complaints, there is frequently a perception that EEO investigators are biased in favor of one party. The role of the federal EEO investigator is well defined: s/he is strictly a fact finder and has to let the documents and affidavits in the file speak to the claims raised in the complaint. The EEO investigator does not have an enforcement role and does not make the ultimate decision about whether discrimination occurred. The EEO investigator must conduct a fair and even-handed investigation.

What if a necessary witness is no longer employed by the agency?

If the witness is still employed by the federal government, the witness has an obligation to provide evidence.

If the witness is no longer employed by the federal government, the investigator cannot compel the witness to provide information. If the investigator encounters this situation, evidence should still be sought through interrogatories or telephone interviews. The investigator should document efforts to obtain evidence and the reason why the evidence was not obtained.

What else can an investigator do if witnesses are uncooperative or unavailable?

Where available, investigators should use agency electronic mail to confirm appointments. However, investigators should be aware that there are confidentiality issues in some agency electronic mail systems. Electronic mail can be used to transmit affidavits or interrogatories to witnesses who have e-mail at home.

When witnesses are uncooperative or unavailable, document it in the file and explain in detail all the relevant circumstances. The investigator's efforts to obtain cooperation should also be documented in the complaint file.

Investigators should attempt to obtain evidence from other sources: documents or other witnesses.

Notify the EEO Director or Complaints Manager when witnesses are uncooperative or unavailable.

What should an investigator do if the complainant names the head of the agency as a witness or identifies numerous witnesses to be interviewed?

Investigators should determine the relevance of all witnesses named by the complainant. The investigation should ascertain from the complainant what knowledge the proposed witnesses have, the source of that knowledge (i.e., knowledge from the complainant or independent and direct knowledge). There may be circumstances where the head of the agency or a senior agency official possesses evidence relevant to a complaint. In those instances, you should consult with your EEO office to determine how to proceed.

Where a complainant has named numerous witnesses, the investigator should press the complainant for all information the complainant has about the proposed witnesses. The investigator may also speak with some of the witnesses to determine if they have evidence relevant to the complaint.

What should an investigator do if it appears that the investigation will not be completed within 180 days?

Delays in completing an investigation may arise due to an agency's lack of timely response to an RFI, difficulties in scheduling interviews to take affidavits, and/or difficulties in assembling the Investigative Report and writing the Investigative Summary.

To prevent delays in completing a timely investigation, the EEO investigator should

- always **prepare an Investigative Plan** to use during the investigation,
- **be assertive and follow up** in scheduling interviews and taking affidavits,
- **report and document** uncooperative witnesses,
- **set deadlines** for RFI responses and the complainant's rebuttal, and
- **track deadlines** and immediately follow up if not met.

Finally, you should consult with the EEO office at your agency. Depending on the circumstances, the parties may agree to extend the period for investigations. Your EEO office can advise you of the applicable time periods depending on the circumstances requiring an extension. It is important that investigators work closely with their EEO offices to ensure that the investigations will be timely completed.

RECAP OF THE INVESTIGATIVE PROCESS

Role of the EEO Investigator Revisited

What is the role of an EEO investigator?

To discover and collect evidence related to a claim of discrimination.

How do EEO investigators investigate complaints of discrimination?

- Interview witnesses for both sides, take testimony under oath, and prepare affidavits,
- Prepare interrogatories and Requests for Information,
- Collect and review documents that are relevant to the claims in the complaint,
- Organize and tab file documents according to agency requirements, and
- Write an Investigative Summary supported by evidence in the file.

Does the EEO investigator represent either party?

No. The EEO investigator is a neutral, objective fact finder. The investigator's role is to collect evidence regardless of the parties' positions. The EEO investigator should not investigate complaints where s/he has a conflict of interest.

How does an EEO investigator know when the investigation is appropriate and sufficient?

An appropriate investigation is one that allows a reasonable fact finder to determine whether discrimination occurred. The facts of each case will determine the scope of the investigation.

Does the EEO investigator decide whether discrimination occurred?

No. Ultimately, the EEO office of the agency, an EEOC administrative judge, or the EEOC on appeal concludes whether discrimination occurred. That decision is beyond the authority of the EEO investigator.

Investigative Procedures Revisited

What are the first steps in an investigation?

- Review the complaint file,
- Identify the players,
- Develop an Investigative Plan, and
- Prepare a Request for Information to send to the agency.

What happens next?

Following the Investigative Plan, the investigator begins to collect evidence. Remember that there is no cookie-cutter approach to how an investigation should be conducted. Likewise, there is no quantitative measure of an adequate or thorough investigation. Your job is to conduct an appropriate and sufficient investigation using the tools and techniques you have learned.

Investigative Tools and Techniques Revisited

What are some of the investigative tools and techniques used by EEO investigators?

- Interviews
- Requests for Information
- Interrogatories
- Fact-finding conferences
- On-site investigations

In our case studies we have used interviews and Requests for Information. What is the purpose of these tools?

- Interviews

The purpose of an interview is to obtain testimony regarding the complainant's claim of discrimination. Interviews may be conducted in person or on the telephone. Interviews allow full exploration of claims and the underlying facts of a complaint. In addition, it is often more efficient to follow up with an interview than with written questions or documents. The objectives of an interview may include these:

- To gain an understanding of employment records,
- To test the accuracy and validity of those employment records,
- To obtain information from witnesses regarding alleged discriminatory statements, events, policies, or practices,
- To obtain information on the qualifications and job performance of employees and job applicants,
- To test various theories of discrimination and agency defenses, and
- To resolve job equality issues in sex/wage investigations.

- Requests for Information

A Request for Information (RFI) is a written request for documentary evidence that is tailored to the scope of the investigation and the appropriate time period to be addressed by the investigation. Information that can be obtained from an RFI includes the following:

- Evidence of intentional discrimination,

- The agency's asserted reasons for any difference in treatment, and
- Factual, documentary, and statistical evidence indicating how the complainant and members of the complainant's allegedly aggrieved class are treated under or affected by the policy or practice being reviewed, as compared with non-aggrieved class members.

What does the investigator do at the conclusion of the investigation?

- Assemble the complaint file
- Draft the Investigative Summary
- Submit the complete investigative report to the EEO Director or staff

**Tab D:
Santiago Investigation**

INTRODUCTION TO CASE STUDIES

What is the claim of the complaint?

What are the contents of the file?

MIGUEL SANTIAGO V. BUREAU OF CIVIL COMPLIANCE AND REGULATION (BCCR)

Claim: Non-selection Based on National Origin

Contents

- Formal complaint
- EEO counselor's report and counseling documentation re alternative dispute resolution (ADR)
- Agency acceptance/acknowledgment letter with notice of rights
- Assignment letter

Note that the agency's acceptance/acknowledgment letter defines the claim of discrimination that will be investigated.

What information can you obtain from the formal complaint?

The formal complaint states the issues as defined by the complainant. It may or may not properly state the legal claim of discrimination.

What does the EEO Counselor's Report tell you? How can you use the Counselor's Report?

The EEO Counselor's Report describes the processing of the complaint at the informal stage. The information obtained by the EEO counselor is **not** evidence. The people contacted by the EEO counselor did not provide sworn testimony, and it may not be apparent from whom the EEO counselor obtained documents. At most, the Counselor's Report may provide information about the legal claim in the case.

Note that the Counselor's Report in *Santiago* shows that the complaint went through ADR and that ADR was unsuccessful. Be aware that the amount of information contained in a Counselor's Report where the complaint went through ADR will be limited to defining the claim.

What is the purpose of the agency's acceptance/acknowledgment letter?

The agency's acceptance/acknowledgment letter defines the legal claim that will be investigated. It also allows the complainant an opportunity to comment on the agency's definition of the legal claim.

Review the assignment letters in both case studies. What happens if the complaint is not properly investigated?

The agency can be sanctioned for failure to properly investigate a complaint. Sanctions include a default finding for the complainant, adverse inference that information not obtained would have reflected unfavorably on the party refusing to provide it, exclusion of evidence at a later stage (hearing or appeal before the EEOC), and other actions as appropriate.

Conclusion

The forms and letters we have reviewed are models. However, every complaint of discrimination that is assigned to you should contain the following:

- The formal complaint of discrimination
- An EEO Counselor's Report (whether the case went to ADR or not)
- The Notice of Rights to the complainant
- The agency's acceptance/acknowledgment letter
- An assignment letter that sets forth the claim(s) to be investigated

INVESTIGATIVE PLAN: MIGUEL SANTIAGO

- COMPLAINT AND REPRESENTATIVE INFORMATION

- Name of Complainant: Miguel Santiago
- Name and Address of Office, Department, Facility Where Alleged Discrimination Occurred:

Bureau of Civil Compliance & Regulation
2518 Grover Cleveland Parkway
Alexandria, VA 22399

- Name and Address of Office, Department, Facility Where Complainant Is Employed:

Bureau of Civil Compliance & Regulation
2518 Grover Cleveland Parkway
Alexandria, VA 22399

- Name and Address of Complainant's Designated Representative: N/A

- DESCRIPTION OF COMPLAINT

- Agency Docket No.: EEO-00-09
- Dates of
 - Alleged discrimination: 05-25-2017
 - Contact with EEO Counselor: 06-15-2017
 - Notice of Right to File a Formal Complaint: 07-14-2017

- Statement of the Accepted Issues and Basis:

Whether the Agency discriminated against you on the basis of your national origin (Hispanic) when you were not selected on May 25, 2017, for the position of Senior Budget Analyst, GS-0560-14/15, advertised under Vacancy Announcement No. BCCR-OB-091.

- Complainant's Claim:

Basis: National Origin (Hispanic)

Issue: I was denied a promotion to Senior Budget Analyst, GS-14, by Dennis Hatcher because he hates Hispanics.

- Has Complainant Specified Compensatory Damages? No

- DESCRIPTION OF PROPOSED INVESTIGATION

- Investigator's Name and Mailing Address:

I.M. Reddee
1000 Neutral Fact Finder Way
Washington, DC 20011

- Date Complaint File Received by Investigator: July 30, 2017
- Name and Address of Witnesses to Be Interviewed:

Complainant, Complainant Witnesses, Interview Panel, Decision Maker (Hatcher?)

- Investigative Method:

On-site interviews will be conducted to obtain affidavits from the complainant, complainant witnesses, and management officials. Document request will be provided to the agency.

- Documents to Be Requested:

- Copy of Vacancy Announcement (RFI to personnel specialist)
- Selection criteria (RFI and Hatcher interview)
- Selection procedures, regulations, or orders for BCCR promotions (RFI and Hatcher interview)
- List of applicants' national origins (RFI to personnel specialist)
- Complainant's performance appraisals for past two years (RFI)
- Complainant's current position description (RFI)
- Application packages for complainant and those on best qualified list (RFI)
- Organizational chart reflecting Office of Budget: staff name, title, grade, and national origin (RFI)

- Information Sought from Complainant:

Complainant will be requested to provide rationale as to why he believes he was discriminated against based on his national origin when he was not selected for the position of Senior Budget Analyst. The complainant will also be asked to provide any supporting statements, witnesses, and objective evidence as to his discrimination claim.

- Questions for Complainant:

- Investigator must identify the Applicable Theory of Discrimination and How the Theory of Discrimination Will Be Applied in the Investigation:

This claim falls under the disparate treatment theory. Comparative evidence will be sought which compares the complainant with the individual who was selected to determine if that individual is similarly situated to the complainant.

- Evidence to be gathered to show complainant is Hispanic (already have testimony from complainant on complaint but will get again in affidavit)
- Evidence to be gathered to show complainant applied for the position of Senior Budget Analyst and that he met the stated qualifications
- Evidence to be gathered to show complainant was not selected
- Evidence to be gathered to show the agency filled the position with an individual with similar qualifications who was not Hispanic, or the agency continued to seek applications

INTERVIEW WITH MIGUEL SANTIAGO, COMPLAINANT

(Allow 45 minutes for completion of this exercise.)

Exercise Directions

The purpose of this exercise is to provide participants with their first opportunity to practice their interviewing skills. In this instance, the complainant was not available immediately, but the investigator scheduled the interview for as soon as the complainant was available.

Investigators should create an outline or plan for every interview. Here is an outline for the Santiago interview.

Interview Plan

1. Introduction—Rights, Responsibilities, and Role of the Investigator; Oath
2. Background—Title, Duties, etc.
3. Denied Promotion: Qualifications, Skills and Knowledge of Duties, Reason Given for Being Denied Promotion, Knowledge of Selectee's Qualifications, etc.
4. Reason Believes National Origin Is Basis? Witnesses? Documentation?
5. Relief sought
6. Additional information
7. Explain EEO process from here
8. Closing

What We Learned from the Santiago Interview

- 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 BCCR prior to her selection. He does not know her national origin.
- Santiago heard Hatcher make a disparaging remark about the management skills of the former Director of the Office of Budget, Melanie Perez. Santiago believes that this remark shows Hatcher's animus toward Hispanics. Santiago states that a co-worker, Michelle DeWitt, also heard the comment about Perez's management skills.
- Santiago has information showing an underrepresentation of Hispanics in government generally, but does not have any specific data regarding BCCR's profile.

Analysis of the Santiago Case

What type of case is this?

Is the comment made by Hatcher direct evidence?

Does Santiago have a prima facie case?

Did Santiago provide evidence about the agency's articulated reason for the selection of Newton?

What do we need to find out from Hatcher?

Do we need to interview Michelle DeWitt? Why or why not? When?

INTERVIEW WITH COMPLAINANT WITNESS MICHELLE DEWITT

(Allow 45 minutes for completion of this exercise.)

Exercise Directions

The purpose of this exercise is to demonstrate reliability issues that can arise in an investigation. Investigators may encounter witnesses who do not tell the same story that the complainant or responsible management official have said they would. The investigator must still collect relevant evidence from these witnesses and include it in the case file.

In this case, the investigator has decided to interview the witness to ask about the alleged ethnic slur that was made by the responsible management official, Dennis Hatcher, and to determine whether this witness has any other evidence relating to this case.

Interview Plan for Michelle DeWitt

Script for Michelle DeWitt Interview

[Setting: The investigator interviews Michelle DeWitt in the EEO office.]

Investigator: Ms. DeWitt, I am the investigator assigned to investigate the discrimination complaint filed by Miguel Santiago. He alleged that he was discriminated against on the basis of his national origin when he was not selected for the position of Senior Budget Analyst. He named you as a witness in support of his case. Do you have any questions before we get started?

DeWitt: Well, I don't really have much to say. Do I have to be interviewed?

Investigator: Yes, even if you think you don't have a lot of information, federal employees must cooperate in an EEO investigation.

DeWitt: Does Mr. Hatcher know that I am giving a statement and will he see my statement?

Investigator: No, he does not know you are giving a statement and he is not entitled to see any witness statements. You should understand that your statement will not be confidential, however, in the sense that others will see it in the Report of Investigation, such as decision makers in the case, and the complainant's and agency's lawyers. You should also know that the law protects witnesses from retaliation for giving testimony in an EEO case. Are you concerned about the possibility of retaliation?

DeWitt: No. I am not afraid of retaliation, just uncomfortable with talking about things like this. Will I see my statement before it goes into the report?

Investigator: Yes, I will draft an affidavit based on what you say here today and then I will give it to you to review before I ask you to sign it. Are you ready now to give your testimony?

DeWitt: Yes, I am ready.

Investigator: (*Investigator gives the oath.*) Please state your name, grade, and position with the agency.

DeWitt: My name is Michelle DeWitt and I am a Budget Analyst GS-12 in the Office of Budget. Mr. Dennis Hatcher is my supervisor.

Investigator: For the record, do you self-identify as Hispanic?

DeWitt: I am American-born and so are my parents.

Investigator: How long have you worked for Mr. Hatcher?

DeWitt: I have been a Budget Analyst for five years, but I have only worked for Mr. Hatcher for two years, since Melly Perez, the former Office Director, left.

Investigator: Do you work with Miguel Santiago?

DeWitt: Yes, he and I both work for Mr. Hatcher as budget analysts. We have worked together on budget issues.

Investigator: Have you ever heard Mr. Hatcher make any remarks about the former Director of the Office of Budget, Melly Perez?

DeWitt: He made a statement about her management of the office and Miguel said he felt it was an ethnic slur.

Investigator: When did Mr. Hatcher make this statement?

DeWitt: It was around the time he first came on board. He said it in one of his first meetings with me and Miguel. I'll say two or three months after he arrived.

Investigator: What exactly did Mr. Hatcher say?

DeWitt: He said something like "she couldn't manage her way out of a paper bag."

Investigator: Did you think his statement was an ethnic slur or directed at Ms. Perez's national origin?

DeWitt: No, I think he was just criticizing her management of the office.

Investigator: Do you know anything about why Mr. Santiago was not selected for the job of senior budget analyst?

DeWitt: No, Miguel seemed to think this was somehow related to why he wasn't selected for the job. I don't have enough information to reach that conclusion. Mr. Hatcher made that one statement about Ms. Perez, but I have never heard him make any negative statements about Miguel, Hispanics, or any ethnic group.

Investigator: What about Mr. Santiago’s qualifications when compared to the selectee, Ms. Newton. Do you have any opinion about who was more qualified?

DeWitt: I don’t know anything about Ms. Newton’s qualifications. I think Miguel was well qualified for the job based on my knowledge of his work.

Investigator: Did Mr. Hatcher rate your performance last year?

DeWitt: Yes, he did. I was disappointed with it, though, because I didn’t receive an “outstanding,” as I did before. The word around the office was that Mr. Hatcher thought Melly Perez inflated our ratings, and so no one was going to receive an “outstanding.”

Investigator: Did Mr. Hatcher tell you that Ms. Perez inflated ratings?

DeWitt: No, he didn’t say it directly to me. In that same meeting, he said that we should expect that his ratings would be tougher.

Investigator: Do you have any other information to give that I have not already covered?

DeWitt: No, I don’t have any other information.

Investigator: Thank you for testifying today. I will be drafting your affidavit based on what you said here today and you will have a chance to read it before I ask you to sign it. Do you understand?

DeWitt: Yes, I understand.

[End of interview]

Information Learned from Complainant Witness Michelle DeWitt

- This witness confirmed that Hatcher made a statement about Perez. Witness did not believe statement was an ethnic slur or directed at Perez’s national origin. This witness has not heard Hatcher make any derogatory statements about any ethnic groups.
- Hatcher did not give “outstanding” performance evaluation to her last year. Hatcher stated he believed that Perez inflated performance ratings.
- DeWitt thought that Santiago was qualified for the position but did not know what the selectee’s qualifications were.

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 the questions have been rephrased?

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? Why or why not?

Interview with Dennis Hatcher

In the investigation of Mr. Santiago’s case, you would interview the responsible management official, 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 complainant’s affidavit; the vacancy announcement for the position; the application packages of Santiago and the selectee, Alice Newton; and the affidavit of Santiago’s witness, Michelle DeWitt.

Profile of Dennis Hatcher

[**Note:** Dennis Hatcher role players will have most of the information they need from the witness PROFILE]

Dennis Hatcher is the Director of the Office of Budget. His national origin is British. He was placed in this position two years ago after serving as the Executive Assistant to Valerie Simon, Director of BCCR. During his tenure with BCCR, the agency has seen dramatic downsizing and cuts in its budget. The result has been a severe shortage in qualified senior managers within BCCR, particularly at the GS-15 level.

When Hatcher became Director of the Office of Budget, he replaced Melanie Perez, 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 BCCR were not at risk.

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 Senior Procurement Analyst. Because of the shortage of qualified staff within BCCR, and the fact that Hatcher did not want to lose a slot by promoting from within, all of the selectees for these positions were hired from outside BCCR. Hatcher believes Maurice Brown is from the West Indies. He does not know Sara Longfellow's national origin.

[**Note:** You may refer to Tab F-8 in the Santiago case file materials for the organization chart for the Office of Budget, containing the names and national origins of employees in the Office of Budget.]

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 OMB had offered BCCR in which BCCR could operate under a two-year budget cycle. Hatcher is a big proponent of the two-year budget cycle and has participated in an interagency task force to explore the viability of moving the federal government to a two-year budget cycle. He is anxious to show that BCCR 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 agency.

Because of 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 serving on the interagency task force and was impressed with her quick mind and knowledge of the federal budget cycles. She also seemed to grasp the finer points of the two-year budget cycle. During a task force meeting 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, but that was his intention in encouraging her to apply.

After the vacancy announcement for the Senior Budget Analyst position was posted and applications submitted, Hatcher received a list of the two qualified candidates and their applications from Rosemary Compton in BCCR's personnel office. Compton included a

transmittal memorandum that explained that Hatcher should review and evaluate the applications. Hatcher could base his selection on the applications or he could conduct interviews with all of the qualified candidates. However, once Hatcher saw Newton's name on the list, he didn't bother to read the applications. He called Compton and told her that he had made his selection and to please notify her. He also asked Compton to inform the other applicant that he had not been selected.

[Note: Hatcher did not exactly follow the selection procedures by not reviewing the applications in detail. Hatcher is convinced that Newton was the best-qualified candidate and that once he saw her name on the list of qualified candidates, there was no need to do anything else. 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 testifies that he did carefully consider the other candidate. 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, the other candidate did not have that experience.]

Hatcher was not aware that Santiago had alleged that the selection was discriminatory until he was contacted by the EEO counselor, Lola Fisher. Hatcher was outraged that anyone would challenge his selection of Newton, given her outstanding qualifications. He also believes that 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. Hatcher told the EEO counselor this and also denied being motivated by national origin bias or any other illicit motive.

Since he was contacted by the EEO counselor, Hatcher has been trying to treat Santiago exactly the same because he does not want anyone to believe that he is retaliating against Santiago.

Hatcher confirms that he has been critical of the former Director, Perez, and her management style. 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 because he thought Perez inflated prior performance ratings based on what he has seen of his employees' work.

Hatcher denies making any ethnic statements or slurs about any protected group.

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 the other candidate had this experience. **[Note:** Complainant's application package shows that he participated in special projects related to the two-year budget cycle under Melanie Perez.]

- Hatcher admits to being critical of Melanie Perez’s management style. Hatcher denies making any ethnic slurs about her or anyone else.
- Hatcher did not give “outstanding” performance ratings to anyone.

Next Steps: Where Are We in Our Investigation of This Complaint?

- The agency has articulated a legitimate, non-discriminatory reason for the selection of Newton and the non-selection of Santiago.
- Is there evidence of pretext? What about the conflict between Hatcher’s statement that he selected Newton because of her knowledge of the two-year budget cycle and the complainant’s application, which shows that he also had knowledge of the two-year budget cycle model?
- Does it matter that Hatcher added a selection criterion that was not in the vacancy announcement?

What questions could the investigator ask Hatcher to elicit an explanation of the conflict?

- Re-interview Hatcher about complainant’s application package. Point out complainant’s knowledge of the two-year budget cycle and ask Hatcher to explain his prior testimony.
- Probe Hatcher on his insistence that Newton had experience in the two-year budget cycle versus knowledge of how this model could be implemented. Wasn’t that the purpose of the task force?
- Remind Hatcher of his obligation to give truthful testimony.

REBUTTAL INTERVIEW WITH MIGUEL SANTIAGO

Rebuttal and Relief

We will briefly discuss the evidence we need to cover with Santiago to obtain his rebuttal, and what relief he may be entitled to. You will not prepare an interview plan or conduct the second interview of Miguel Santiago.

Based on the testimony of Michelle DeWitt and Dennis Hatcher, what evidence should the investigator review with Miguel Santiago to obtain his rebuttal?

- Statement Hatcher made about Melanie Perez was critical, but not ethnic in nature
- DeWitt has not heard Hatcher make ethnic slurs
- No one got an “outstanding” evaluation from Hatcher
- Newton was selected because of her knowledge and experience in two-year budget cycles
- Comparison of Newton’s qualifications with Santiago’s

What Relief Is Available to Miguel Santiago?

Back Pay

How would the agency calculate back pay?

In the Miguel Santiago case, back pay would be generally calculated from the date the complainant would have been promoted until the settlement date or until Santiago is placed in the higher position, multiplied by the pay rate he would have earned if he had been promoted.

The issue of mitigation is most common in failure-to-hire cases. In the Santiago case, Santiago would generally be required to apply for any other similar positions in his agency that become open. He would not, however, need to apply for similar positions outside his agency.

The amount that can be established that a complainant could have earned with reasonable diligence can be subtracted from the amount of back pay owed if the complainant has not mitigated the damages.

If the agency offers the complainant an unconditional position and s/he declines, the back pay period ends at that time. The individual may still pursue the complaint of discrimination.

If the complainant finds another job which pays less than s/he would have earned working for the agency, the difference in earnings continues to accrue until the case is resolved.

The back pay amount also includes any additional benefits such as contributions to pension plans and pay raises, for example, that the complainant would have accrued had the discrimination not occurred.

The complainant is also entitled to interest on lost earnings.

Compensatory Damages

Would Santiago be eligible for compensatory damages? Why or why not?

Maybe. The average individual who was denied a promotion may have some out-of-pocket and/or emotional losses. However, the complainant must prove the existence, nature, and severity of emotional harm and its connection to the discrimination.

Non-monetary Relief

What are some examples of non-monetary relief available to Santiago?

- Training for managers
- Correction of discriminatory practice
- Record-keeping requirements
- Posting of a notice

Profile of Miguel Santiago for Rebuttal and Remedies Interview

Miguel Santiago is the GS-13 Budget Analyst who applied for the position of Senior Budget Analyst, GS-14/15. He is anxious to hear what the investigator has learned from the investigation. Santiago is responsive to the investigator's questions.

Santiago is perplexed that Michele DeWitt did not support his earlier statements that Dennis Hatcher has made ethnic slurs about Melanie Perez. Santiago insists that the statement that "Perez could not manage her way out of a paper bag" was an ethnic slur. Santiago does not have evidence of any other ethnic slurs and does not have any evidence that refutes DeWitt's testimony.

Santiago is still convinced that he is the best-qualified candidate for the Senior Budget Analyst position. If the investigator permits Santiago to review the application packages or if the investigator summarizes Newton's qualifications and Hatcher's reasons for selecting Newton, Santiago should admit that Newton is doing a great job in the position. Santiago does not have any additional information regarding his qualifications for the position, except to state that he does have limited experience in the two-year budget cycle. Santiago attended a training course a while ago on the two-year budget cycle. He does not have any other experience in that area. However, he remains steadfast in his belief that Hatcher is guilty of national origin discrimination.

Santiago tells the investigator that he only wants what he believes he deserves, nothing more. He believes that he is entitled to the promotion to the GS-14/15 level and should receive back pay. He has not applied for any other positions because there have not been any vacancies for budget analysts at higher grades. He wants Hatcher to write a letter of apology. Santiago also wants a commitment from Valerie Simon that she will support better affirmative action for Hispanics at higher grades. Santiago does not claim compensatory damages and acts indignant if the investigator pursues a line of questioning about compensatory damages.

Information Learned from Interview with Complainant Miguel Santiago

- Santiago insists that the statement that “Perez could not manage her way out of a paper bag” was an ethnic slur. Santiago does not have evidence of any other ethnic slurs and does not have any evidence that refutes DeWitt’s testimony.
- Santiago is still convinced that he is the best-qualified candidate for the Senior Budget Analyst position. Santiago admits that Newton is doing a great job in the position. Santiago does not have any other evidence regarding his qualifications for the position, except that he did attend a training course on two-year budget cycles.
- Santiago still believes that Hatcher is guilty of national origin discrimination.
- Santiago believes that he is entitled to the promotion to the GS-14/15 level and should receive back pay.
- Santiago has not applied for any other positions because there have not been any vacancies for budget analysts at higher grades.
- Santiago also wants Hatcher to write a letter of apology and wants a commitment from Valerie Simon that she will support better affirmative action for Hispanics at higher grades.
- Santiago does not claim compensatory damages.

ANALYSIS OF THE SANTIAGO CASE

Did Santiago provide any evidence to refute Hatcher’s reasons for selecting Alice Newton (i.e., evidence of pretext)?

Maybe. Santiago has had training in the two-year budget cycle, which is the reason offered by Hatcher for his selection of Newton. His experience is not as extensive as Newton’s in this area.

Did Santiago provide evidence regarding the remedies he is seeking in this case?

Yes. He wants the promotion, back pay, a letter of apology, and a commitment from Valerie Simon regarding affirmative action for Hispanics at higher grades. He does not want compensatory damages.

Would Santiago be entitled to these remedies if he prevailed in his discrimination complaint?

Santiago would be entitled to the promotion and back pay. He would not be entitled, however, to an apology or the commitment regarding affirmative action for Hispanics.

Would Santiago be entitled to any relief that he did not specifically request?

Yes:

- Training for managers
- Correction of discriminatory practice
- Record-keeping requirements
- Posting of a notice

Preparing an Investigative Summary

Assignment: *You will draft an investigative summary of the Santiago case, using the evidence and affidavits in the Case File Materials. You should use the outline below for this assignment. Provide citations for each of the documents you cite in your summary. You may use the Reed investigative summary in the Case File Materials as a guide.*

**OUTLINE FOR
Summary of Investigation
Santiago versus Bureau of Civil Compliance and Regulation (BCCR) EEO Complaint
Case File EEO-00-09**

- A. The Accepted Claim.
- B. Procedural Background.
 - 1. Evidence of Timeliness by Complainant and Agency
 - 2. Model of Proof for Disparate Treatment Non-Selection Case
- C. Complainant's Background.
- D. Complainant's Evidence as Presented.
- E. Agency's Contentions (Response to Allegations).
 - 1. Review of Official Documents
 - 2. Review of Management Witness(es)
- F. Complainant's Rebuttal.
- G. Relief Sought.

Tab E

**Tab E:
Reed Investigation**

INTRODUCTION TO CASE STUDIES

What is the claim of the complaint?

What are the contents of the file?

**LESLIE REED V. BUREAU OF CIVIL COMPLIANCE AND REGULATION
(BCCR)**

Claim: Harassment Based on Sex

Contents:

- Formal complaint
- EEO Counselor's Report and counseling documentation
- Agency acceptance/acknowledgment letter with notice of rights
- Assignment letter

INVESTIGATIVE PLAN: LESLIE REED

- COMPLAINT AND REPRESENTATIVE INFORMATION
 - Name of Complainant:

 - Name and Address of Office, Department, Facility Where Alleged Discrimination Occurred:

 - Name and Address of Office, Department, Facility Where Complainant Is Employed:

 - Name and Address of Complainant's Designated Representative:

- DESCRIPTION OF COMPLAINT
 - Agency Docket No.:

 - Dates of
 - Alleged discrimination:

 - Contact with EEO counselor:

 - Notice of Right to File a Formal Complaint:

 - Statement of the Accepted Issues and Bases:

 - Complainant's Claim:
 - Basis:
 - Issue:
 - Has Complainant Specified Compensatory Damages?

- DESCRIPTION OF PROPOSED INVESTIGATION

- Investigator's Name and Mailing Address:
- Date Complaint File Received by Investigator
- Name and Address of Witnesses to Be Interviewed:
- Investigative Method(s):
- Documents to Be Requested:
- Information Sought from Complainant:
- Identify the Applicable Theory of Discrimination and How the Theory of Discrimination Will Be Applied in the Investigation:

INTERVIEW WITH COMPLAINANT LESLIE REED (GENDER HARASSMENT CASE)

Learning Objectives

- Participants should learn how to handle a complainant's attorney during interviews and during an investigation.
- Participants should learn how to handle new claims/allegations raised during the course of an investigation

Interview Plan for Leslie Reed

1. Introduction — rights, responsibilities, role of the investigator, oath
2. Background — title, duties, etc.
3. Gender harassment
 - Co-workers (comments, behavior, and why Reed believes each is gender-related)
 - Winters (comments, behavior, and why Reed believes each is gender-related)
4. Other harassment since case filed
5. Relief sought
6. Additional information
7. Explain EEO process from here
8. Closing

Tips for Investigating Harassment Claims

The nature of harassment claims requires investigators to employ a wide range of skills and techniques to gather evidence as to whether the conduct complained of meets the standards for harassment. Investigators should understand the following when investigating claims of harassment.

- Proof of a harassment claim 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 for drafting a complaint. However, your interview notes or an affidavit must contain the graphic details of the alleged harassment. Investigators must put a witness at ease to elicit this type of information while being persistent about documenting the claims in detail.
- Be sensitive to the nature of the claims without being judgmental or overly sympathetic. Do not minimize the emotional effect of the conduct on the complainant even if you would not be so affected.
- Use the words used by the complainant (or other witness).
- Do not gloss over details of graphic sexual acts or other egregious conduct because you or the witness is uncomfortable talking about the incidents.

- The **credibility** of the victim and the alleged harasser can determine the outcome of the claim. 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 complainant leaving the harasser's office in a highly emotional state 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 agency took corrective actions on previous complaints of harassment and how effective they were.
- The 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 individual cannot be harassed. The real issue in harassment cases is the power relationship between the harasser and his/her target.

Be aware that poor management techniques or skills are not harassment. On the other hand, an individual who disparages everyone because of race, sex, religion, or another protected basis creates a discriminatorily hostile working environment for which an agency may be liable.

Role of Complainant's Attorney During an Investigation

The complainant's attorney, or representative, can assist the investigator in obtaining complete information from the complainant. Upon the introduction of an attorney, the investigator should clarify the roles of each party (investigator and attorney) with the complainant. The attorney is not the adversary of the investigator, but should not be allowed to control the interview. All testimonial evidence should be obtained from the complainant (or agreed upon by the complainant).

Sometimes the attorney representing the complainant 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 consult with the complainant and may provide advice and assistance in the investigative process.

The investigator should not involve a complainant's attorney in the investigation until a written statement of representation has been received. Once proper notification has been received, the investigator should mail copies of all correspondence to the complainant and the attorney simultaneously. The attorney should have access to all investigator requests to the complainant for information, to assist the client in responding to the requests.

Profile of Leslie Reed

The EEO investigator who has been assigned to investigate this complaint of discrimination is interviewing Ms. Reed to collect evidence about the harassment complaint. **This is the investigator's first interview with the complainant.**

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.

The following information can be expected to be elicited by the participants. It is important that the Reed role player emphasize the gender-based comments, even if the participants do not ask questions about all of the incidents. Leslie Reed is a GS-12 Public Affairs Specialist in the Office of Regulatory Review at BCCR. The Office of Regulatory Review is responsible for monitoring and assessing regulatory revisions proposed by other federal agencies.

Reed was hired in March 2016. Prior to that she worked for a public relations firm in Washington, D.C. doing lobbying for the small business clients of the PR firm. Reed's job duties involve drafting correspondence, speeches, news releases, and other information dissemination activities for the Office of Regulatory Review. ORR issues monthly press releases publicizing its oversight activities of other federal agencies. Reed specializes in small business issues.

Reed was hired into her position by Marvin Winters, the Director of ORR. Winters told Reed at the time she was hired that he expected her to work hard and get along with the rest of the staff. He informed her that ORR never had a particular focus on small business and that she would bear the sole responsibility for ensuring that BCCR's activities concerning small business were properly monitored and reported on.

Reed was assigned to a shared work area under an air vent. ORR 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 Public Affairs Specialist in ORR. Meany's public affairs focus was Fortune 500 companies.

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 public affairs activities. Meany told Reed that he believed his work was the heart and soul of ORR's work, and that small business was only being given attention because a woman was currently in charge of the agency.

In July of last year, Reed attended the quarterly luncheon that ORR employees attended to discuss ORR and BCCR activities. Frequently, at these luncheons, a speaker was invited to talk about a particular topic. At that luncheon, Reed had arranged for a female speaker from the Small Business Administration to talk about their activities and SBA's interaction with BCCR to eliminate some small business regulations. After the luncheon, Reed heard some of Reed's co-workers and Winters comment that the luncheon had been a waste of time. Reed was upset by the comment.

Last fall, Winters assigned Reed and Meany a joint project to write a report about ORR's accomplishments. While working on this project, Meany was very critical of Reed's writing style and demanded that she rewrite various sections of the report. Meany also made derogatory comments when Reed wanted to include information about the large proportion of small businesses that were being started by women. Meany commented that women were incapable of running large companies, and were delusional to think they could even run a small business. According to Reed, when she complained to Winters about Meany, Winters commented that she just didn't understand how to write a report. Winters then took Reed off the project. Meany was given a performance award for the report later that fall.

According to Reed, Winters continued to be very critical of work. He frequently required her to rewrite her monthly press releases. He told her that she was "too sensitive" to be in a public affairs 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 head of BCCR. He frequently referred to Simon as "chief bitch" and "the broad in charge."

Reed was very upset about Winters's actions regarding the accomplishments report. Reed has asthma and the stress caused her to begin to experience more severe symptoms. Reed took a few hours off several times during the fall and early winter to see her allergist. After trying several different medications without success to alleviate her symptoms, Reed was finally able to take Ventolin 220 mg. twice daily, which controls her symptoms.

Initially, Winters approved Reed's requests for sick leave to see her doctor without question. After the fifth request in early December, however, Winters began to ask her why she had to see her doctor so often. In January, 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. She told Winters that she had asthma and was having a hard time finding a medication that controlled her symptoms. She told Winters that she did not appreciate his question.

Winters continued to heavily criticize Reed's work product. He demanded that she rewrite almost every assignment, including press releases and reports to Congress. The only assignments he seemed not to care about were speeches Reed wrote for Valerie Simon. These actions made it hard for Reed to do her job. Although Reed's asthma symptoms had abated by mid-winter, the emotional stress she was feeling by the springtime caused more severe symptoms. As a result, and because of other allergies and the emotional stress, Reed had three severe asthma attacks in March, April and May, and was required to take several days of sick leave each time. Reed's allergist put her on a bronchial inhaler in late June, and she has not had any asthma attacks since using the inhaler.

By this spring, Meany had stopped speaking directly to Reed. Reed heard Winters and Meany 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 just needed to see a shrink who could straighten them out.

As a result of her absences this spring, some of Reed's work was reassigned to Meany. When Reed returned to work after Memorial Day, Meany blew up at her because he'd 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.

On that same day, BCCR distributed via e-mail, its new policy on sexual harassment. After reading the policy, Reed decided to contact the EEO office about Winters. Reed initiated EEO counseling on June 1.

INSTRUCTOR/ROLE PLAYER NOTES: The following incidents are new and should be handled as fragmentation issues. The failure to accommodate claim is pending before the EEO office. The new incidents of harassment should be the subject of another request to amend. The Reed role player should be very confused if the investigator refused to take information on these incidents. The attorney role player should demand that the investigator take evidence on these incidents and threaten to report the investigator to Alexandra Wu, the Director of the EEO office, for being incompetent.

In late June, Reed decided to contact an attorney. She hired the firm of Pearce, Lettvich and Vine on the recommendation of a friend. She told Pearce, who is with her today, that her allergist recommended that she not work in a dusty work area because of her asthma. Pearce recommended that she request a transfer to a different work area as an accommodation for her asthma. On June 29, she asked Winters if she could move to a different work space to avoid the dust coming from the air vent. Winters told her no without any other discussion. Pearce has written to the EEO Office to request that this complaint be amended to include this incident and they are still awaiting a response.

There are other incidents since June that Reed believes are part of the continuing harassment. Winters continues to be critical of Reed's work. Since late July, Reed has noticed that Meany has been drafting all press releases. She learned that Valerie Simon had decided to hire her own speech writer and that Reed and Meany had not gotten any assignments to write speeches. Generally, Reed has been handling inquiries from the public and drafting responses to Congressional letters. Reed was very unhappy about the lack of variety in her work, but has not said anything to Meany or Winters.

Last month, Winters announced that BCCR was going to revise all of its publications for businesses. Reed expected to participate in the revisions to the small business brochures, but instead all of the work has been given to Meany. Meany has complained that he's had to do Reed's job by preparing graphics and new language for the small business brochures. Winters told Reed that he didn't think she was up to the job and he needed someone to handle the correspondence while Meany worked on the new brochures.

Reed is very frustrated and thinks that Winters should be removed as a supervisor because of his poor communications skills and lack of sensitivity. Reed is very upset because Winters has made sexist comments and has refused to instruct Meany to refrain from

making similar comments. Reed also believes that she is not getting good assignments as part of the continuing harassment. She does not understand how Winters has been allowed to remain in his position given the provisions of the sexual harassment policy.

Reed Case Time Line

March 2016: Complainant hired, harassment begins.

November 2016: Mother injured in train crash.

December 2016: Initially, Mr. Winters approved CP requests for sick leave without question. After the fifth request in early December 2016, however, Mr. Winters started questioning why CP had to see her doctor so often. CP began taking mother to physical therapy and requested leave for this as well.

January 2017: Winters asked CP if she was really in therapy to learn how to deal with all the female problems women had.

March, April, May 2017: CP had three severe asthma attacks in March, April and May of 2017, and was required to take several days of sick leave each time.

May 2017: last asthma attack, saw physician. Prescribed medication that has completely relieved asthma symptoms.

June 1, 2017: CP reads BCCR's new policy on sexual harassment distributed that day.

June 1, 2017: Winters gives and withdraws counseling memorandum on excessive use of leave.

June 1, 2017: Counselor Contact on harassment complaint (EEO-13).

June 8, 2017: Counselor meets with CP on EEO-13.

June 29, 2017: Disability – date of alleged discrimination (request for an accommodation was denied by her supervisor).

July 5, 2017: Counselor meets with CP 2nd time on EEO-13.

July 5, 2017: Request to Amend EEO-13 (to add disability) / Counselor Contact on disability complaint (acknowledged July 19).

July 5, 2017: NRTF issued on EEO-13.

July 17, 2017: Filed formal EEO-13. Whether the Agency discriminated against Leslie Reed on the basis of her sex (female) when she was harassed by her supervisor from March 2016 to the present.

July 28, 2017: Acceptance EEO-13, assignment to Investigator.

Late July 2017: Ms. Reed has not been assigned preparation of press releases.

August 31, 2017: NRTF issued on EEO-21.

September 15, 2017: Disability complaint - second complaint of discrimination filed. The issue accepted for investigation in EEO-00-21 is: Whether the Agency discriminated against Leslie Reed on the basis of a disability when her request for an accommodation was denied by her supervisor on June 29, 2017.

October 1, 2017: Request to Amend EEO-13 to add additional acts of harassment (acknowledged October 4).

October 1, 2017: CP Affidavit.

October ?? 2017: Meany quit.

October 4, 2017: Acceptance and Assignment to Investigator: First complaint (EEO-13) amended to include additional incidents of harassment, which are described below.

- Whether since late July 2017, the Agency discriminated against Ms. Reed, based on her sex, by not assigning to her preparation of press releases, which is one of her normal job duties;
- Whether the Agency discriminated against Ms. Reed, based on her sex, when she was denied the opportunity to work on updating ORR's business publications, which is within the scope of her duties and expertise.

October 5, 2017: Acceptance and Consolidation (EEO-21), assignment to Investigator.

October 12, 2017: CP Supplemental Affidavit on amended complaint

October 14, 2017: Winters Affidavit

October 15, 2017: CP Supplemental Affidavit on consolidated complaint

October 15, 2017: CP Rebuttal Affidavit on consolidated complaint

Information Learned from Interview with Complainant, Leslie Reed

- BCCR has a sexual harassment policy.
- Reed described several incidents which she described as gender harassment by Meany:
 - Meany made a comment that small business was only being given attention because a woman was currently in charge of the agency.
 - He resented sharing work space with her.
 - He made derogatory comments when working on an ORR accomplishments report last fall that women were incapable of running large companies and were delusional to think they could even run a small business.

- Meany stopped speaking directly to Reed.
- He joked with Winters about women always needing to see their doctors and being hypochondriacs.
- When Reed returned to work after Memorial Day, Meany blew up at her because he'd had to work on a "stupid women's issues" speech for Valerie Simon.
- Meany has complained that he's had to do Reed's job by preparing graphics and new language for the small-business brochures.
- Reed described harassment by Winters:
 - She heard 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.
 - Winters took assignments away from her (ORR accomplishments report and rewrite of brochures).
 - He made a comment after a luncheon last July that the luncheon had been a waste of time.
 - He frequently required her to rewrite her monthly press releases.
 - He told her that she was "too sensitive" to be in a public affairs job and that if she couldn't handle the stress, she should stay at home with her children.
 - He made derogatory comments about Valerie Simon, the head of BCCR, whom he frequently referred to as "chief bitch" and "the broad in charge."
 - He asked Reed if she was really in therapy to learn how to deal with all the female problems women had.
 - He demanded that she rewrite almost every assignment, including press releases and reports to Congress; the only assignments he did not care about were speeches Reed wrote for Valerie Simon.
 - He issued her a counseling memorandum regarding her attendance.
- Incidents which have occurred since her EEO counseling:
 - Reed has not been getting any assignments to write press releases.
 - Winters assigned the project of writing the new brochures to Meany and told Reed that he didn't think she was up to the job.
 - Reed's mother (Yican Reed) was injured in a train accident. Yican Reed has to attend physical therapy for her injuries.
 - Reed has requested/taken additional sick leave to take her mother to physical therapy.
 - Winters learned about the accident and Yican Reed's involvement from a television news report. He was not aware of the extent of injuries from that report.
 - Winters has reassigned work (preparation of press releases and updating of business publications) from Reed to Meany.

- Winters has suggested to Meany that the reason for Reed’s absences is that her mother is in care (“therapy”) for “women’s issues.”
- According to Reed, Winters told Meany that Reed’s mother was attending therapy and that Reed’s problems “must run in the family.”
- Reed’s responses to incidents of harassment:
 - Told Winters she had asthma and didn’t appreciate his questions 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.
 - Sought EEO counseling immediately after reading the new sexual harassment brochure, which explained the complaint procedures.
 - Reed is seeking relief for emotional distress and provided this as evidence:
 - Worsening of asthma symptoms, for which she has had to seek medical attention
 - Crying when given the counseling memorandum about attendance
 - Being upset at comments and loss of good work assignments
 - Reed has asthma; it worsened because of stress; she takes medication and uses an inhaler, which has controlled her symptoms.

Is the information about Reed’s asthma relevant?

Maybe. If the disability claim is accepted, then the information will be relevant. It may also be relevant to establishing harm Reed suffered because of the harassment.

What should the investigator tell Reed and her attorney to do regarding the incidents of harassment that have occurred since the complaint was filed?

Reed and her attorney should be instructed that another request to amend the complaint must be made to the EEO office (the EEO office already has the request to amend regarding the reasonable accommodation denial claim). The EEO office will then determine how the additional incidents will be handled. The investigator should remind Reed and her attorney that although the investigator cannot investigate these new claims without authorization from the EEO office, the investigator will include some information about the new incidents in Reed’s affidavit.

Analysis of the Reed Gender Harassment Case

What type of case is this?

A gender 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, it is clear that the harassing conduct was unwelcome.
- *Conduct is based on complainant's protected status:* Reed's supervisor and a co-worker subjected her to comments related to her gender.
- *Conduct results in a tangible employment action or creates a hostile work environment:* The comments occurred regularly, 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. Reed would have a harder time if she had been derided only on isolated occasions, although some epithets are so patently offensive that even rare utterances of them may be enough to make out a violation.

Does a basis exist for holding the agency liable?

BCCR is liable for the harassment because Winters knew (based on Reed's complaints about Meany and to Winters himself) and/or should have known (based on Winters' observations) of the harassment and failed to take immediate and appropriate corrective action.

Is the disability claim like or related to the gender harassment claim?

Not really.

Are the later incidents about work assignments and the new brochures like or related to the gender harassment claim?

They appear to be. If the EEO office accepts the incidents as amendments, they would be relevant to the overall claim of gender harassment.

Next Steps: Where Do We Go from Here in the Leslie Reed Case?

Now that we have obtained information from the complainant which indicates that it is more likely than not that Reed was discriminated against because of her gender, what are our next steps?

- Prepare Leslie Reed's affidavit.
- Follow up with the EEO office on Reed's request to amend her complaint regarding the additional incidents of harassment.
- Check with the EEO office to determine the status of her request to amend the claim of failure to accommodate.
- Prepare interview plans and conduct interviews with Marvin Winters and Roger Meany

Handling the Fragmentation Issues in Reed's Complaint

What did the EEO office do with the request to amend by adding the later harassment incidents Reed raised during the interview?

The EEO office accepted the request to amend.

What are the consequences of accepting the amendments?

- Reed does not have to seek counseling on these later incidents.
- The investigator will have to obtain a supplemental affidavit from Reed.
- The investigation must be completed within the earlier of 180 days from the amendments or 360 days from the date the original complaint was filed.
- The investigator should include these incidents in preparing for the interview with Marvin Winters.

How did the EEO office address Reed's claim of failure to transfer her to a different work space?

The EEO office determined that the request for a transfer to a different work space was not like or related to the gender harassment claim. The office advised Reed to seek EEO counseling, which she did. Reed subsequently filed a second complaint alleging disability discrimination, which the EEO office accepted and then consolidated with her harassment complaint.

What are the consequences of the EEO office's determination?

- The two complaints must be consolidated for investigation.
- The investigation must be completed within the earlier of 180 days from the date of the most recent consolidated complaint or 360 days from the date the original complaint was filed.
- The investigator will develop an Investigative Plan for the disability complaint.

PREPARING THE INVESTIGATIVE PLAN: REED DISABILITY CLAIM

General Topics That Should Be Addressed in the IP

Does Leslie Reed have an impairment that substantially limits a major life activity?

Definition of Disability

There are three definitions of “disability” under the Rehabilitation Act. A complainant must meet only one of the three definitions or be “associated with” someone who meets one of these definitions in order to be protected under the statute. The three definitions are as follows:

- Have a physical or mental impairment that substantially limits one or more major life activities
- Have a record of such an impairment
- Be regarded as having such an impairment (subjected to an action “prohibited by the Act” because of an actual or perceived physical or mental impairment)

Is Leslie Reed “qualified?”

The Rehabilitation Act regulations define a “qualified” individual with a disability as someone who

- satisfies the requisite skills, experience, education, and other job-related requirements of the employment position, and
- can perform the essential functions of the position with or without a reasonable accommodation.

Reasonable Accommodation

An agency’s refusal to make reasonable accommodation for the known physical or mental limitations of an otherwise qualified individual with a disability constitutes discrimination under the Rehabilitation Act unless the agency can show undue hardship.

Does Leslie Reed have an impairment that substantially limits a major life activity?

Investigative Plan Questions

- Has she been diagnosed with a particular medical condition?
- How does her asthma affect her in her everyday life: breathing, walking, sleeping, other major life activities? At home? At work?
- Are there things that she cannot do because of her asthma?
- Are there things that are very difficult to do because of her asthma?
- When was the last time she experienced an asthma attack?

- Has her condition gotten better or worse over time?
- Has she sought treatment for the condition?
- Does she take medication? If so,
 - How does this medication affect her ability to breathe? Walk? Sleep? Some other major life activity?
 - How long has she been on treatment?
 - Does she experience any side effects from the medication?
- Is there something unique in BCCR's work site that causes or exacerbates her asthma?
- Is there something unique about the Public Affairs job at BCCR that causes or exacerbates her asthma?
- Are there other jobs at BCCR that she could perform without having the asthma attacks?
- Would she be able to work as a Public Affairs Specialist at a different agency?

We are trying to collect evidence of whether the complainant is substantially limited in working.

Investigative Plan questions:

- What are the functions of the job of Public Affairs Specialist?
- How much time does she spend performing each one of these functions?
- What would happen if she did not perform one or more of these functions?

We are trying to collect evidence for a determination of which of those functions are essential and which are marginal.

Reasonable accommodation Investigative Plan questions:

- Is there any accommodation that the agency could have made which would have enabled her to perform her duties as a Public Affairs Specialist?
- Were there any other positions at BCCR she was qualified to perform which would not require her to enter the agency facility? Were there any vacancies in these jobs?

Analyzing the Reed Disability Claim

Does Reed have a mental or physical impairment?

Yes. Her breathing is impaired due to asthma.

Does Reed use the available mitigating measures?

Yes. She uses a Ventolin inhaler daily and an albuterol inhaler when she experiences an asthma attack.

Is Reed substantially limited in a major life activity?

With regard to breathing as a major bodily function: Yes. Reed's breathing is substantially limited, particularly in her office area. The dust she encounters there sometimes triggers her asthma attacks, but she does not regularly encounter it except in BCCR's building. The determination of whether an impairment substantially limits a major life activity must be made without regard to the ameliorative effects of mitigating measures, and an impairment that is in remission or episodic is a disability if it would substantially limit a major life activity when active.

With regard to working as a major life activity: No. Reed would not be excluded from a class of jobs or a broad range of jobs because she could perform her duties as a Public Affairs Specialist for many agencies whose work environments would not trigger her asthma.

Is Reed an individual with a disability under the first prong of the definition?

Yes.

Does Reed have a "record of" a mental or physical impairment which substantially limited a major life activity prior to using mitigating measures?

Yes.

Is Reed being regarded as having a substantially limiting impairment?

No, Reed did not offer evidence that the agency took a prohibited action based on an actual or perceived notion that her limiting condition, asthma, was not transitory or minor.

Is Reed entitled to a reasonable accommodation?

Yes.

Do we need to consider whether Reed should have been reassigned to a different work area as a reasonable accommodation?

Yes. If Reed has a "disability" or a "record of a disability" as defined under the Rehabilitation Act, BCCR has to provide a reasonable accommodation unless it can prove an undue hardship.

Is Reed entitled to reassignment?

Only if she could not be accommodated in her current job. In this case, it's not clear whether Reed was unable to work in the office. If so, unless there are other options available to accommodate Reed in her current job, she would be entitled to reassignment to a vacant job for which she qualifies, except if it causes BCCR an undue hardship.

Would Reed have to compete with other applicants for the reassignment?

No, but she would have to meet the minimum qualifications, and there must be a vacancy.

INVESTIGATIVE PLAN: DISABILITY COMPLAINT REED V. BCCR

Investigative Plan: Reed v. BCCR

Complaint No. EEO-00-21

- **Complainant and Representative Information**

- Name of Complainant: Leslie Reed
- Name and Address of Office, Department, Facility Where Alleged Discrimination Occurred:

Office of Regulatory Review BCCR
MD-ORR-02
2518 Grover Cleveland Parkway
Alexandria, VA 22399

- Name and Address of Office, Department, Facility where Complainant Is Employed:
Same as above
- Name and Address of Complainant's Designated Representative:

M.E. Pearce, Esq.
Pearce, Lettvich and Vine, P.C.
1100 Pennsylvania Avenue, NW, Suite 700
Washington, DC 20005
(202) 777-1500

- **Description of Complaint**

- Agency Docket No.: EEO-00-21
- Dates of
 - Alleged discrimination: June 29, 2017
 - Contact with EEO counselor: July 5, 2017
 - Notice of Right to File a Formal Complaint: August 31, 2017

- Statement of the Accepted Issues and Basis:

Whether the Agency discriminated against Leslie Reed on the basis of a disability when her request for an accommodation was denied by her supervisor on June 29, 2017.

- Complainant's Allegation:

Complainant alleges that she was denied an accommodation for her disability (asthma) when she requested a transfer to a different working space. She alleges

that her current work space in the Office of Regulatory Review is dusty and under an air vent. She alleges that her asthma had gotten much worse because of ongoing harassment by her supervisor and a co-worker. Complainant uses an inhaler prescribed by her doctor and has not had any asthma attacks since using the inhaler. Complainant alleges that her supervisor refused to discuss the transfer with her after denying her request.

- Has Complainant Specified Compensatory Damages?

Yes. Complainant made a request for compensatory damages.

- Description of Proposed Investigation

- Investigator's Name and Mailing Address:

I.M. Reddee
Neutral Fact Finder Way
Washington, DC 20011

- Date Complaint File Received by Investigator: October 5, 2017

- Name and Address of Witnesses to Be Interviewed:

Complainant (address above)

Marvin Winters
Director, Office of Regulatory Review BCCR

Co-workers
Office of Regulatory Review BCCR

Complainant's Physician (if medical documentation not provided)

- Investigative Method:

On-site interviews will be conducted to obtain affidavits from the complainant and Marvin Winters. Written document request with medical release form may be provided to complainant's physician.

- Documents to Be Requested:

Medical documentation regarding complainant's asthma, effects on major life activities, effects of inhaler, any other relevant medical information. Anti-harassment and sexual harassment policies. Organizational chart.

- Information Sought from Complainant:

Complainant will be requested to provide rationale as to why she believes she was

discriminated against based on her disability when her request for a transfer to a different working space was denied. The complainant will also be asked to provide information about her medical condition, including symptoms of the condition, how long complainant has had the condition and how long it is expected to last; its effects on major life activities; and the effects of any mitigating measures such as medication.

Complainant will be asked to describe her job functions and other jobs for which she was qualified, the accommodation requested by complainant, how the requested accommodation would enable complainant to perform the essential functions of her job, and whether other accommodations were available. Complainant will be asked to provide medical documentation, any supporting statements, and objective evidence as to her discrimination claim, her claim for compensatory damages, and how the claim for damages is linked to her discrimination claim.

- Identify the Applicable Theory of Discrimination and How the Theory of Discrimination Will Be Applied in the Investigation:

Failure to accommodate under the Rehabilitation Act of 1973.

Evidence will be sought regarding the complainant's medical condition, symptoms of the condition, how long complainant has had the condition and how long it is expected to last; its effects on major life activities; and the effects of any mitigating measures such as medication.

Evidence will be sought regarding complainant's job functions and other jobs for which she was qualified.

Evidence will be sought regarding the accommodation requested by the complainant, how the requested accommodation would enable the complainant to perform the essential functions of her job, and whether other accommodations were available.

The responsible management official will be asked to provide an explanation of his response to the complainant regarding her request.

INTERVIEW WITH MARVIN WINTERS, DIRECTOR, OFFICE OF REGULATORY REVIEW

Each table will prepare an outline for the interview of Marvin Winters, Director, Office of Regulatory Review. Review the case file and prepare an interview plan.

ONLY role players should 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 role players.

Participants should take notes of the interview, as they will draft an affidavit for Winters after the interview.

Marvin Winters Interview

We are now going to conduct an interview with Marvin Winters, Director, Office of Regulatory Review.

As you know from your interview of Leslie Reed, Winters has been identified as one of the alleged harassers and is the named responsible management official. You should consider the evidence provided by Leslie Reed regarding her disability claim in preparing for the interview. Remember that your interview of Winters is relevant to the investigation of both complaints filed by Leslie Reed.

Following the Winters interview, we will discuss how it went, the information you obtained, and the *Reed* cases as a whole.

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, 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 the government for 23 years. He is 18 months from retirement. During the last several years, he has seen the federal workforce change as more women and minorities have been hired. Winters believes generally that females are not as qualified as males for most positions at BCCR. He does believe that women generally make good clerical employees. He was particularly unhappy that Valerie Simon, a woman, was named Director of BCCR. Winters believes this appointment was made only for affirmative action purposes and not because Simon is qualified for the job. He worked directly for Simon prior to this position. That is why he sought his current position. He did not like directly reporting to her. He currently reports to Hamilton Marcus Shively. Unfortunately, Shively has been on extended leave for months, and Winters is again reporting directly to Simon.

Winters hired Leslie Reed into the Public Affairs Specialist position. He did so because he now has an EEO component in his performance standards and believed he would have been rated poorly if he had hired a man. He assigned Reed to work on small-business issues to keep her out of what he considers the most important work of ORR — eliminating government regulation of Fortune 500 businesses. Winters attempts to sidetrack the investigator by going into a convoluted explanation of the historical importance of deregulation of large business in the American economy and how those efforts are now being focused on small business. This commentary is intended to convey his reasoning for assigning small-business work to Reed.

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 small-business 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 “queen bitch,” “broad in charge,” and other derogatory terms because of strong personality differences they have and disagreements over the direction of ORR’s activities.

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 forced him to assign much of her work to the other Public Affairs 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 with his “theory on the finer points of public affairs

work.” Winters states that, in his view, to be good in public affairs, a person must be aggressive, outgoing, and knowledgeable on the issues “that affect the kind of people who run big business.”

If asked to explain the statement, Winters states that he is talking about the “intangibles,” such as being able to talk to CEOs and CFOs of large companies about the burdens of regulations or about the past weekend’s college and pro football games, knowing who is ahead in the world of Wall Street, or having a “real interest or stake” in the March Madness NCAA basketball tournament. Winters goes on to say that it is essential that a Public Affairs Specialist be able to recognize “a ton of red tape” masquerading as a consumer safety regulation.

With respect to the sick leave and reassignment request of Leslie Reed, Winters states that Reed “appeared to be a real nice lady,” but that she seemed “too delicate” for the demanding public affairs work performed by ORR. Winters acknowledges that Reed told him about her asthma at the same time she had to miss a lot of work last fall. Winters states that he did not respond to her request for a different work space because there was not any 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 division 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. Winters is not able to provide any names of Human Resources personnel that he spoke with or dates of the encounters. He notes that he is too focused on his approaching retirement and arranging his leisure time to keep up with administrative things like that. 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 at ORR.

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 about 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 believes that Reed is not up to doing the important work directed toward large business. 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. In addition, Winters assigned the project of updating ORR’s business publications to Meany. Winters volunteers that he thinks something will have to be done to help him out because Meany quit the federal government to work for a lobbying firm. Now Winters is having to work on updating the big-business publications and he has assigned Reed some of the easier press releases. He has no idea whether her performance has improved because he is too busy trying to incorporate getting Meany’s big-business publications and press releases out.

Winters does not admit or deny telling Meany that the complainant’s mother was in therapy. He acknowledges that he was aware of the complainant’s mother’s accident because he

saw her on a news report and he has signed the complainant's leave slips when she has requested leave to take her mother to the physical therapist.

Winters then looks at his watch and tells the investigator he needs to leave for a meeting with his travel agent. His wife talked him into taking a cruise once he retired, and he is trying to figure out how to get out of it.

Post-interview Discussion: Marvin Winters

- What substantive evidence did Winters provide regarding BCCR and ORR?
- What information did he provide regarding the Leslie Reed harassment case?
- What information did he provide regarding the Leslie Reed disability claim?
 - Believes most important work of ORR is oversight of big-business regulation
 - Corroborates Reed's testimony about derogatory comments about Valerie Simon
 - Corroborates Reed's testimony about problems with Meany
 - Denies engaging in any harassing conduct himself
 - Appears to not understand that harassing conduct can be gender-based without being sexual in nature
 - Has read the agency's sexual harassment policy
 - Knew about Reed's asthma as of last fall
 - Corroborates Reed's testimony about not discussing request for different work space. States he knew nothing was available because he unsuccessfully sought to have Reed transferred due to Meany's concerns.
 - He denies discriminating against complainant.
- What else do you need to know about Reed's cases?
- How will you get this information?
- If you intend to make a written request, what would you request?
- If you intend to conduct additional interviews, whom would you interview and what would you ask?

Assessing the Reliability of Marvin Winters' Testimony

- How reliable was Marvin Winters' testimony?
- What is the basis for your evaluation?
- Is Marvin Winters' testimony consistent with other testimony (i.e., 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?

Overall, how would you assess the reliability of Winters' testimony?

EXERCISE: DRAFTING AN AFFIDAVIT FOR MARVIN WINTERS

Now we are going to practice drafting an affidavit. Using the information you obtained from your interview with Marvin Winters, each table will write an affidavit for Winters. When you have finished, each table will report on its affidavit.

Here is a general outline to use:

1. Background information on Winters
2. Background information on Winters' unit
3. Reed's duties and performance
4. Relationship with Reed
5. BCCR's anti-harassment policy
6. Reed's allegations of harassment by Winters
7. Reed's allegations of harassment by Meany
8. Winters' response to harassment allegations
9. Knowledge of Reed's asthma
10. Reed's accommodation request
11. BCCR's accommodation policy
12. Winters' response to accommodation request
13. Additional evidence provided
14. Closing

REBUTTAL INTERVIEW WITH LESLIE REED

Rebuttal and Relief

After an investigator has interviewed the responsible management officials in a complaint, the investigator may need to conduct another interview with the complainant. The purpose of this interview is to allow the complainant an opportunity to provide evidence that rebuts the agency's version of events. At this stage, the complainant may provide evidence of pretext or other evidence that supports his/her claim of discrimination.

The investigator also needs to obtain evidence about what kind of relief the complainant wants.

Please note that in many cases the complainant may wish to see management affidavits, but does not wish to submit any rebuttal.

We need to obtain rebuttal evidence regarding the harassment and disability claims filed by Leslie Reed and what relief she is seeking. We will briefly discuss what kind of rebuttal questions to ask and to what relief Leslie Reed may be entitled. Then you will prepare an interview plan and conduct another interview of Leslie Reed.

What additional information is needed about Reed's disability claim?

You may want to ask a general question to confirm that she provided all documentation and information regarding her disability claim in the Request for Information response.

What additional information is needed about the additional incidents of harassment amended to the complaint?

- Have all the press releases involved big-business issues? Have any involved small-business issues? Has Reed been assigned any to write since Meany left?
- Has Winters assigned any of the work updating the business brochures to Reed since Meany quit? Has she been given the small-business publications to update?

What evidence obtained from Marvin Winters should the investigator ask Leslie Reed about?

- Did he emphasize the importance of the work directed toward "big business" over Reed's work on small-business issues? Did he implicitly or explicitly tell Reed that he did not want her to work on big-business issues?
- Regarding the luncheon with the small-business speaker, did Reed know that Winters had a big deadline? What does Reed know about that project?
- Has the environment in ORR improved since Meany left? Has Winters treated Reed differently since Meany left? How? Have her work assignments changed since Meany left?

- Has Reed heard Winters use any other derogatory terms or make any other biased statements about Valerie Simon or women generally since the last interview? What are they?
- Has Winters ever shared with Reed his “theory on the finer points of public affairs work” (being aggressive, outgoing, and knowledgeable on the issues affecting big business; having sports knowledge; dealing with red tape)? When? What did he say?
- Did Winters tell Reed that there was no other office space where she could be moved when she requested a transfer to different space?
- Did Winters require Reed to rewrite? Was she asked to rewrite any of the speeches she wrote for Valerie Simon?

What Relief Is Available to Leslie Reed?

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 emotional losses. She cried when she received the counseling memorandum, her asthma has worsened because of stress, and she has been upset at the conduct and lack of good work assignments. She has had to take leave for the worsening asthma.

Non-monetary Relief

What are some examples of non-monetary relief available to Reed?

- Injunctive relief (i.e., cessation of the harassment)
- Training for managers
- Correction of discriminatory practice
- Posting of a notice

Plan for Rebuttal Interview with Leslie Reed

Participants should review the evidence obtained to date in the *Reed* case, including Reed’s affidavits and Winters’ affidavit.

- Has Reed been assigned to work on press releases? Has she been asked to work on updating any of the business publications? Has there been a change in her assignments since Meany left?
- What evidence does Reed have to refute Winters’ statements that he has not harassed her?
- Has Winters’ conduct changed since Meany left?

- What evidence does she have that Winters' requiring rewrites is based on her gender? Does he require others to rewrite? Is she asked to rewrite the speeches she writes for Valerie Simon?
- Does she have any other evidence regarding her asthma and how it affects her (i.e., anything to show she meets one of the definitions of disability)?
- What kind of relief is she seeking?
- Is she seeking compensatory damages?
- Does she have evidence to support any claim for compensatory damages?
- What other evidence does she have to support her claim for relief?

Profile of Leslie Reed for Rebuttal and Remedies Interview

Leslie Reed is the Public Affairs Specialist in the Office of Regulatory Review. Her immediate supervisor is Marvin Winters, the Director of ORR. Reed has filed two complaints about her treatment in ORR, a gender harassment complaint and a disability complaint.

Reed's attorney has told her that her claim is weak because her asthma is not that bad. The attorney has advised her that Winters' actions regarding her request for different office space are just more incidents of gender harassment that BCCR is trying to avoid addressing. The Reed role player should try to characterize any information she gives about the disability claim as more incidents of harassment. If asked, she is not experiencing any symptoms since she started taking medication for her asthma (despite working in a dusty area).

In response to questions about Meany, Reed tells the investigator that Winters has left her alone since Meany left because he is now doing all of Meany's work on updating the business brochures. Winters has assigned to Reed some of the press releases Meany previously prepared. Since she filed the harassment complaint, Winters has limited his interaction with her. He seems afraid to talk to Reed about anything other than the specific work projects she has been assigned. Reed is very frustrated by Winters' attitude. She reiterates her allegations that Winters told Meany about her therapy and joked about her mother's therapy.

She also believes that she should be given an opportunity to show that she can do the public affairs work that Meany was doing, but Winters will not give her a chance. She has never been asked to rewrite the speeches she has written for Valerie Simon.

Reed's attorney has instructed Reed to state that she wants the maximum amount of compensatory damages she is entitled to under the law. Since she has filed two complaints, that amount is \$600,000. Reed does not understand how compensatory damages are calculated, but that amount of money sounds good to her because her attorney's fees are so big (\$5,000) and because of the medical expenses she has had to treat her asthma. Reed is now angry about the way Winters has treated her and because he refuses to let her work on other public affairs assignments. She tells the investigator that she has provided medical documentation to her lawyer and that the attorney will provide whatever additional documentation is necessary when the case goes to the EEOC for a hearing.

Reed believes that Winters should either retire or be removed from supervisory duties. A letter of apology is not good enough.

Information Learned from Rebuttal Interview with Complainant Leslie Reed

- Reed considers Winters' actions regarding her disability claim to be additional incidents of harassment.

- Reed is not experiencing any symptoms since she started taking medication for her asthma despite working in a dusty area.
- Winters is working on updating the business brochures since Meany left. Some of the press releases have been assigned to Reed.
- Since she filed the harassment complaint, Winters has limited his interaction with Reed. He talks to Reed only about the specific work projects she has been assigned.
- Reed is frustrated and angered by Winters' attitude. She believes that she could show that she can do the public affairs work that Meany was doing if Winters would only give her a chance.
- Reed wants compensatory damages in the amount of \$600,000. Her attorney's fees are approximately \$5,000. She has also had medical expenses to treat her asthma. Her attorney has that medical documentation.
- Reed believes that Winters should either retire or be removed from supervisory duties. A letter of apology is not good enough.

ANALYSIS OF THE REED CASE

Did Reed provide any evidence to refute Winters' statements that she is not really qualified for the public affairs job?

Yes. Winters has assigned her some of the press releases that Meany had previously been assigned.

Did Reed provide evidence regarding the additional claims that were amended to the harassment complaint?

Yes. She stated that Meany was given all the work on updating the business publications and that Winters has taken over that work since Meany left. Reed also provided information that she had not been given press releases to work on until Meany left.

Did Reed provide evidence supporting a claim for compensatory damages?

Yes. She described emotional distress and anger at Winters' treatment of her. She also has medical documentation regarding her asthma condition, and she took leave.

Did Reed provide evidence regarding other remedies she is seeking?

Yes. She has attorney's fees of approximately \$5,000.

Would Reed be entitled to these remedies if she prevailed in her discrimination complaint?

Reed would be entitled to nonpecuniary compensatory damages, reimbursement of medical expenses, restoration of leave related to the harassment, and attorney's fees.

Would Reed be entitled to any relief that she did not specifically request?

Yes:

- Training for managers
- Correction of discriminatory practice
- Posting of a notice

Is the removal of Winters as a supervisor an appropriate remedy?

Probably not, although he should be trained about his responsibilities regarding harassment. It is within the scope of the EEO process to recommend disciplinary action against managers who have engaged in discriminatory practices.

Tab F

**Tab F:
Models of Proof**

MODELS OF PROOF

I. Disparate Treatment under Title VII, ADEA and Rehabilitation Act

Proof of Disparate Treatment Via Circumstantial Evidence (HIRING/PROMOTION)	
COMPLAINANT PRESENTS A PRIMA FACIE CASE:	<ul style="list-style-type: none"> (1) Complainant (C) is member of protected class (2) C applied for a job for which C met the stated qualifications (3) C was rejected (4) Agency (AG) filled job or continued to seek applications from individuals with similar qualifications (AG's selection of individual outside of C's protected class supports inference of discrimination but this is not always a required element of proof)
AGENCY ARTICULATES A REASON FOR ITS ACTION(S):	<p>AG articulates legitimate, nondiscriminatory reason for rejecting C</p>
COMPLAINANT IDENTIFIES PRETEXT /PROVIDES REBUTTAL	<p>The reasons advanced by AG are a pretext to hide discrimination. Examples of such evidence:</p> <ul style="list-style-type: none"> (1) Evidence that reason advanced by AG is not believable (2) Evidence that similarly situated individuals outside C's class were treated differently (3) Evidence of bias by AG's decision makers towards individuals of C's class (4) Statistical evidence showing underemployment of members of C's class (this evidence is helpful but not usually determinative)

Proof of Disparate Treatment Via Circumstantial Evidence (DISCHARGE/DISCIPLINE)	
COMPLAINANT PRESENTS A PRIMA FACIE CASE:	(1) C is member of protected class (2) C was performing at satisfactory level (3) C was discharged or otherwise disciplined (4) C was replaced by employee outside the protected class (this is not always a required element of proof)
AGENCY ARTICULATES A REASON FOR ITS ACTION(S):	AG articulates legitimate, nondiscriminatory reason for discharging or disciplining C
COMPLAINANT IDENTIFIES PRETEXT/ PROVIDES REBUTTAL	The reasons advanced are a pretext to hide discrimination (see examples above)

* NOTE: C's claim is not necessarily defeated if an element of the prima facie case is missing, 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 C was not in a position to have access to such evidence.

Direct Evidence of Exclusionary Policy under Title VII, ADEA	
COMPLAINANT PRESENTS A PRIMA FACIE CASE:	Testimony or documentary evidence of an employment policy or practice to exclude from a job or otherwise adversely treat individuals in C's protected class
AGENCY ARTICULATES A REASON FOR ITS ACTION(S):	AG disproves discriminatory policy or practice, or proves statutory defense such as BFOQ

* NOTE: Under the Rehabilitation Act, an AG can justify a blanket policy that excludes individuals with a particular covered disability if it can prove that the policy is job related and consistent with business necessity, and that the particular C could not perform the job even with a reasonable accommodation.

Proof of Mixed Motives for Disparate Treatment	
COMPLAINANT PRESENTS A PRIMA FACIE CASE	Testimony or documentary evidence that directly proves discrimination against C on the basis of his/her protected class was a motive in the challenged action
AGENCY ARTICULATES A REASON FOR ITS ACTION	AG discredits proof of discriminatory motive or raises statutory defense such as BFOQ
RELIEF	AG is liable at minimum for injunctive relief and attorney's fees. If AG proves that the challenged action was also 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.

After Acquired Evidence of Legitimate Motive for Disparate Treatment	
PROOF	C proves either through circumstantial or direct evidence that discrimination was the true motive operating at the time of the challenged action.
RELIEF	If AG proves that there was a legitimate basis for challenged action that AG discovered after-the-fact, and that this evidence would have induced it to take the same action regardless of the discrimination, then AG will usually avoid liability for reinstatement, back pay and compensatory damages (other than damages for emotional harm) for the period after the evidence was discovered.

Harassment (ON ANY PROTECTED BASIS)	
COMPLAINANT PRESENTS A PRIMA FACIE CASE	<ul style="list-style-type: none"> (1) C 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 C's work performance to create a hostile environment (measured by standard of reasonable person in C's situation) (3) Basis exists for holding AG liable for harassment
AGENCY ARTICULATES A REASON FOR ITS ACTION	<p>For supervisory/management harassment: AG is automatically liable if the harassment resulted in a tangible employment action. If it did not, AG is still liable unless it proves that it took reasonable care to prevent and correct promptly the harassment and that C unreasonably failed to take advantage of any preventive or corrective opportunities provided by AG</p> <p>For co-worker harassment: AG is liable if it knew or should have known of the harassment and failed to take immediate and appropriate corrective action</p> <p>For non-employee harassment: AG is liable if it knew or should have known and failed to take immediate and appropriate corrective action and AG had some control over the harasser</p>

Retaliation	
COMPLAINANT PRESENTS A PRIMA FACIE CASE	<ul style="list-style-type: none"> (1) C opposed what C reasonably and in good faith believed to be an unlawful employment practice or C participated in the EEO process (2) AG subjected C to adverse treatment (3) There was a causal connection between C's protected activity and the adverse action (shown, e.g., by timing of adverse treatment soon after C's protected activity)
AGENCY ARTICULATES A REASON FOR ITS ACTION	AG articulates a legitimate nondiscriminatory reason for the adverse action
COMPLAINANT IDENTIFIES PRETEXT/ PROVIDES REBUTTAL	<p>Reasons advanced by AG are a pretext to cover retaliatory motive. Examples of such evidence:</p> <ul style="list-style-type: none"> (1) Evidence that reason advanced by AG is not believable (2) Evidence that similarly situated individuals who did not oppose discrimination or participate in the EEO process were treated differently

II. Disparate Impact under Title VII, ADEA and Rehabilitation Act

Disparate Impact Title VII, ADEA	
COMPLAINANT PRESENTS A PRIMA FACIE CASE	Neutral employment practice has disproportionate adverse effect on C's protected class
AGENCY ARTICULATES A REASON FOR ITS ACTION	AG proves that challenged practice is job related and consistent with business necessity
COMPLAINANT IDENTIFIES PRETEXT/ PROVIDES REBUTTAL	There is an alternative employment practice that would be substantially as effective but would have less disparate impact

Discriminatory Qualification Standards and Selection Criteria Under Rehabilitation Act	
COMPLAINANT PRESENTS A PRIMA FACIE CASE	<ul style="list-style-type: none"> (1) C has physical or mental impairment that substantially limits one or more major life activities (2) A neutral qualification standard or selection criterion screens out C on the basis of his/her disability and C satisfies the other job requirements
AGENCY ARTICULATES A REASON FOR ITS ACTION	<ul style="list-style-type: none"> (1) AG proves that challenged standard is job related and consistent with business necessity (2) AG proves that C could not meet the standard with reasonable accommodation

III. GINA

GINA ACQUISITION	
COMPLAINANT PRESENTS A PRIMA FACIE CASE	<ul style="list-style-type: none"> (1) CP is an applicant, employee, or former employee of ER (2) ER requested, required, or purchased, genetic information about CP
AGENCY ARTICULATES A REASON FOR ITS ACTION	ER asserts one of six exceptions to the general prohibition: (1) inadvertent acquisition; (2) offer of health or genetic services, e.g., wellness program; (3) FMLA request to care for family member with serious health condition; (4) commercially & publicly available documents; (5) genetic monitoring of effects of toxic substances in the workplace; or (6) DNA testing of employees by employer who engages in DNA testing for law enforcement or human remains identification purposes if used for quality control only.
COMPLAINANT IDENTIFIES PRETEXT/ PROVIDES REBUTTAL	The reason advanced by ER is not believable

GINA USE	
COMPLAINANT PRESENTS A PRIMA FACIE CASE	<ul style="list-style-type: none"> (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.
AGENCY ARTICULATES A REASON FOR ITS ACTION	ER articulates a legitimate, nondiscriminatory reason for its adverse action.
COMPLAINANT IDENTIFIES PRETEXT/ PROVIDES REBUTTAL	<p>The reasons advanced by ER are a pretext to hide genetic discrimination. Examples of such evidence:</p> <ul style="list-style-type: none"> (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

IV. Other Forms of Unlawful Discrimination

Title VII: Failure to Provide Religious Accommodation	
COMPLAINANT PRESENTS A PRIMA FACIE CASE	(1) C sincerely holds religious belief that conflicts with job requirement (2) C informed supervisor of conflict and need for accommodation (3) AG failed to provide a reasonable accommodation
AGENCY ARTICULATES A REASON FOR ITS ACTION	C's requested accommodation would result in more than minimal hardship to AG

Rehabilitation Act: Failure to Provide Reasonable Accommodation

COMPLAINANT PRESENTS A PRIMA FACIE CASE	<ul style="list-style-type: none">(1) C is a qualified individual with a physical or mental impairment that substantially limits one or more major life activities(2) C notified AG of his/her disability and need for accommodation(3) There is an accommodation that would allow C to participate in the application process; to perform the essential functions of the job; or to enjoy equal benefits and privileges of employment(4) AG failed to provide an effective accommodation
AGENCY ARTICULATES A REASON FOR ITS ACTION	The requested accommodation would pose an undue hardship

EPA: Sex Based Wage Disparity

COMPLAINANT PRESENTS A PRIMA FACIE CASE	<ul style="list-style-type: none">(1) Unequal pay between C 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
AGENCY ARTICULATES A REASON FOR ITS ACTION	Wage difference is based on a seniority, merit, or incentive system, or on any other factor other than sex