

Practice Tips:

1. Where the Claim is vague, make sure you get all of the information from reading the Complainant's affidavit.

Ex.: From May 17, 2011 to January 20, 2012, she received six failing reviews.

Please make sure you ask the Complainant to identify the six failing reviews, and make sure you produce the six specific reviews.

2. Please produce all relevant documents.

Ex. The accepted issue included the claim that the Complainant did not know, at the time of hire (April 10, 2010), that he was serving a 2-year probationary period. The Complainant's appointing SF-50 should have been produced to the record.

3. Don't provide general headings in the table of contents where the documents are multiple pages in length. Identify the documents by subject and date, especially where there are dispositive documents, e.g., disciplinary letter, performance letter. This is especially essential where these dispositive documents are only contained in the counselor's report, and cannot be found in the report of investigation. It doesn't matter where these documents appear in the report of investigation, but please identify them by title and date. Where witnesses use acronyms, please unpack them for the reader and have the witness identify the person or entire name of the organization. Ex. "DM"s or "FM"s, ECCO, quarterly ISPR, FDIC, IAQ, COA, AWMS, FORT, etc. While not an acronym, the phrase "Types 1 and 3 Annual Leave" is also problematic, if leave is at issue and no witness explains what s/he means by "types 1 and 3 annual leave." It's not just that we can't understand the acronyms; when EEOC gets this case on appeal, it won't be able to interpret the acronyms either.
4. Where retaliation/disability is at issue, please ask the Responsible Management Officials (RMO's) if they knew if the comparison employee participated in prior EEO activity, or if they knew that the compared employee had a medical condition/impairment/disability
5. Subjective Assessments: Where the witnesses say they did not choose complainant because the complaint lacked/selectee possessed confidence, ambition, leadership skills, attitude, decisiveness, interpersonal skills, multitasking, self-management, team work, oral communication, flexibility, attention to detail, etc., ask specific questions of the witness to find out how they assessed these characteristics in the complainant/selectee: how did the complainant show a lack of confidence/ how did the selectee demonstrate better oral communication skills, was assertive, enthusiastic, had a professional

demeanor and positive attitude, was professional, trustworthy, had communication skills etc.

Ex. what do you mean by leadership skills; how does a candidate demonstrate leadership skills; with precise examples, how did the selectee demonstrate those leadership skills during the interview? Precisely what did you expect from the Complainant? Where in your interview notes do you express the selectee's articulated leadership skills; where in your notes do you express your conclusion that the complainant failed to articulate his leadership skills?

Where subjective reasons for the challenged reason are apparent, they must be examined closely to determine if they are a pretext for discrimination. “[S]uch ‘reason[s] will satisfy the employer's burden of production . . . only if the employer articulates a clear and reasonably specific basis for its subjective assessment.’” *Materi v. Department of Housing and Urban Development*, EEOC Appeal No. 0120103646 (Oct. 9, 2012), citing *Browning v. Southwest Research Inst.*, 288 Fed. Appx. 170, 176-77 (5th Cir. 2008).

6. Equal Pay Act (EPA) Cases – remember that the evidence required to make out an EPA case and defend against an EPA case is different from a Title VII (T7) case. The evidence must show whether the duties performed by the Complainant required the same skill, effort and responsibility, under similar working conditions, as those duties performed by the higher graded males (or females).

EPA agency defense: investigate evidence regarding whether the agency can defend its higher wage because of a 1) seniority system; (2) merit system; (3) a system which measures earnings by quantity or quality of production of work (also referred to as an incentive or piecework system); or (4) a differential based on any other factor other than sex.

7. Grievance: Remember to copy for the file the section of the National Agreement which provides that covered employees could raise discrimination claims in the union grievance.
8. Names of Comparators – don't black them out. Without the names of the comparators (and hopefully accompanied by their protected class characteristics), comparisons of whether the responsible management officials treated the Complainant differently from similarly situated employees, can't be made
9. Ask appropriate follow-up questions; and read the witnesses answers to ensure they've answered your questions.