



# U.S. Equal Employment Opportunity Commission

## EEOC Investigations

Rodney Klein

Outreach and Training Manager

# Honorary EEOC Investigator Oath

I, (state your name)

Am hereby an honorary EEOC  
Investigator.

I understand...

That I will not be paid.

“ Intelligent observation is not an isolated event, it’s an unfolding.”

-Roy Bedichek

The EEOC processes complaints of employment discrimination based on race, color, religion, sex, national origin, age, disability, and genetic information.

# What is Illegal Employment Discrimination?

- Race
- Color
- Religion
- Sex (including pregnancy)
- National Origin
- Age
- Disability
- Genetic Information
- Retaliation for making a complaint of employment discrimination

# The Civil Rights Statutes

- Title VII of the Civil Rights Act of 1964
- The Age Discrimination in Employment Act of 1967 (ADEA)
- Title I of the Americans with Disabilities Act of 1990 (ADA)
- The Equal Pay Act of 1963 (EPA)
- Genetic Information Non-Discrimination Act (2008)
- Lilly Ledbetter Fair Pay Act (2009)

# It all starts with a policy

- o Do you have an anti-discrimination and anti-harassment policy?
- o Does it cover all the protected bases?
- o Is it in writing?
- o Does it clearly communicate what actions violate the policy?
- o Does it clearly communicate the consequences for violating the policy?
- o Does it offer multiple avenues of complaint?
- o Are your staff and managers regularly trained on the policy?

# Anti-Harassment Policy (Preventive Measure)

- Define workplace harassment
- Protect against retaliation
- Create multiple and accessible avenues of complaint
- Protect confidentiality
- Promise a prompt, thorough and impartial investigation
- Assure immediate and appropriate corrective action

# A Complaint is Made - What now?

- First impressions are lasting impressions
- Be neutral
- Take notes. Don't rely on your memory
- Ask about immediate needs
- Who, what, when, and where
- ID issues to be resolved, witnesses and documents
- Discuss retaliation (not a one time discussion)

# The Perfect Investigator

- Trustworthy
- Loyal
- Helpful
- Friendly
- Courteous
- Kind
- Obedient
- Cheerful
- Thrifty
- Brave
- Clean
- Reverent



# You Need a Plan

- It is a roadmap for your investigation
  - But, it should be continually under construction based on the latest information
- It should identify the evidence you need and the best places to find it
- Must be based on the legal standards of proof

# Investigator Quiz #1

One day Bob comes into your office and says he wants to speak with you about a workplace situation that he believes is discriminatory. You should...

- a) Pretend to take a cell phone call.
- b) Point and yell, "Hey! What's That!" and then dive under your desk when Bob turns to look.
- c) Regale Bob with stories about how tough it was when you were a new employee (five minutes of that and he will surely leave).
- d) Immediately fire Bob; thus, resolving this particular EEO issue in a prompt manner.
- e) Invite him in, set aside your work and give him your complete attention

# Investigations

# Types of Investigations

- o Disparate Treatment (different treatment)
- o Harassment
- o Retaliation
- o Adverse Impact
- o Reasonable Accommodations (disability and religion)
- o Wage

# Disparate Treatment

# Disparate Treatment

- o **Circumstantial (indirect) Evidence** - Evidence from which disparate treatment can be inferred (also called “indirect evidence”).
- o **Direct Evidence** - Evidence of a close causal relationship between a protected characteristic and an employment decision.

Evidence should be judged  
on its relevancy and its  
credibility

# Hiring and Promotion

## (disparate treatment standard of proof)

- Applicant is a member of the protected class
- Applicant applied for a job for which she/he met the stated qualifications
- Applicant was rejected
- Employer filled the job with someone outside the protected class or continued to seek applications from persons with similar qualifications
- Employer articulates a legitimate, nondiscriminatory reason for rejecting applicant
- The reason is a pretext to hide discrimination

# Hiring and Promotion (made simple)

- If the position was selected, is the applicant at least as qualified as the selectee?
- Is there some link to discrimination?

# SCENARIO - Disparate Treatment

Anne, a mid-level analyst, applies for a promotion to a higher level analyst position in another department. The company awards the position to Bill. She is not interviewed. Anne learns that Bill's tenure with the company is significantly less than hers and that he formerly held a similar job to hers. She also learns that Harry, whom she does not know, made the decision.

# SCENARIO - Disparate Treatment

A manager interviews Andrew, a 55 year-old, 30-year employee for a computer systems manager position. The manager tells Andrew that he's concerned that he (Andrew) might not stick around because he's already near retirement age. He also makes the comment: "Computers, especially now, are a young person's game. There's so many new things going on, it's hard to keep up." Andrew does not get the job.

# Hiring and Promotion Tips

- Hiring investigations: which came first, the criteria or the selectee?
- If the criteria came first, less chance of discrimination
- If the selectee came first, greater chance of discrimination
- Nearly all promotions are pre-selections

# Hiring and Promotion

## (Job Application Questions)

- From an EEO perspective, it is best to limit job application questions to basic identifying information (e.g. name, address, social security number)
  - Questions about job qualifications
  - Questions related to the ability to perform essential functions
  - Required licenses or degrees

# Investigator Quiz #2

You know the EEO investigation into Jane's hiring complaint is going south when you read the following in the interview notes:

- a) "Wow! She looks a lot older than her Facebook photo."
- b) "Did not respond in a godly way when I asked her if she attends church regularly."
- c) "Appeared flustered when I told her the job involved long hours and would not be a good fit for a mother with small kids - probably a sign she's not a patient parent."
- d) "Pushed me away when I gave her a post-interview hug. Obviously, not a team player."
- e) All of the above

# Discipline/Discharge (standard of proof)

- o Complainant is a member of a protected class,
- o Complainant was harmed,
- o Other employees of a different class were not harmed **under similar circumstances**,
- o The employer **articulates** a legitimate, non-discriminatory reason for the harm,
- o The reason articulated by the employer is a **pretext to hide discrimination**.

## Discipline/Discharge (made simple)

- Is there anyone similar to the complainant? (not harmed)
- Is the supervisor's articulated reason believable?
- Is there any connection between employment harm and complainant's membership in a protected class?

- Mr. Wheeler (African American), a factory production line worker, was discharged for clocking in at the beginning of his shift and then spending the first hour of his shift in the break room. He claims that others (Caucasian) did the same thing and were not disciplined in any way. The supervisor states that the others who spent time in the break room did not clock in until they actually went to their line, or were not production workers.
- **With whom should we compare Mr. Wheeler?**
- **Are the best comparators other production line workers?**

Monica is Filipino, and she works as sales representative. By policy, sales representatives are supposed to make between 7-10 field calls per day (8:30 AM to 5:30 PM) to meet their quota. The policy states that failing to meet the quota can result in disciplinary action to include termination. Monica's supervisor learns that she has "banked" calls. In other words, when she has made more than 7 calls in one day, she has listed the extra calls on the next slow day (less than 7 calls). Her supervisor decides to discharge Monica for not making the required number of daily calls.

# Discipline/Discharge (some factors to consider for similarly situated)

- Are the charging party and comparators both hourly employees?
- Are both bargaining unit or non-bargaining unit employees?
- Are both non-supervisory employees or managers/supervisors?
- Are both in the same department or do they have similar functions?
- Are both probationary or non-probationary employees? (Except where the issue of the charging party being placed on probation for disciplinary reasons is the issue.)
- Are both at the same stages of the disciplinary process?
- Did both individuals commit rule violations known to the employer or were the comparator's violations *unknown* to the employer?
- **NOT EXHAUSTIVE**

# Discipline/Discharge

Generally, the term “similarly situated” is used to describe a person in the same job category as the harmed party. However, the pool of who is considered “similarly situated” may expand depending on the policy infraction. For example, policies dealing with behavior often times don’t distinguish between labor and management; thus, expanding the pool of “similarly situated” persons.

# Discipline/Discharge Tips

- Managers shouldn't break their practice because someone is a member of a protected group
- We look for people who are similarly situated
- Policies are not always a true indicator of how things are actually done
- How has the situation has been handled in the past?

Diane Cook, a woman, applied for a company-paid fellowship and was rejected. Cook was the third woman to apply and be rejected. The training committee, which considers fellowship applications, stated that Cook was rejected because she failed to meet the prerequisites of having completed 18 credit hours in business administration. The training committee also states that Cook satisfied all other prerequisites, including superior job performance, but that the credit hours were a major criterion under company policies.

# Investigator Quiz #3

If Bob complains that you reprimanded Jack unfairly because of his race, you should...

- a) Fire Bob
- b) Fire Jack
- c) Fire Jack but blame it on Bob
- d) Fire both Bob and Jack and blame it on the economy
- e) Fire Barry because you're mad that you can't fire Bob or Jack
- f) None of the above

# Interviewing 101

- Introduce yourself
- Introduce your purpose
- Engage in a dialogue (no depositions)
- Let the interviewee tell the story
- Don't let the interviewee define terms (e.g. offensive, harassing, words ending in "ly")
- The way we lie (denial vs. spin)
- Interview alleged harasser last
- Perry Mason is broke
- Don't be afraid to lead (but not at the end)

## ...More Tips

- Start interviews soon
- Never promise absolute confidentiality
- Hold the interviews in a neutral, private place
- Take your time
- Proceed chronologically (helps everyone stay focused)
- Work outside in
- Don't script (follow up on what you hear)
- Watch body language (but don't get carried away)

# Challenges Witnesses Bring

Lack of practice in describing events

Emotional Investment

Fears

Assumptions About the Listener's Knowledge

Omissions

Exaggerations

Reliance on the Interviewer's Assumptions

Outright Lies

# Answers about Questions

- Closed

- Are usually answered Yes or No
- Examples: Do you, Did you, Was she, Is that
- Discover little new information
- Wrap up a subject
- Cut off information flow
- Should be used as little as possible

- Open

- Cannot be answered Yes or No
- Examples: Who, What, When, Where
- Discover new information
- Draw out a story
- Keep the witness talking
- Should be used as much as possible

# Closed v. Open

- Closed: **Are you** a machinist?
- Open: **What** is your job?
- More Open: **Tell me** your history with the company.
  
- Closed: **Did you** tell John?
- Open: **Who** did you tell?
  
- Closed: **Is he** white?
- Open: **What's** his race?
  
- Closed: **Were you** interviewed in person?
- Open: **Tell me** about your interview.

## Mistake: Suggesting the “Right Answer” (Let the Witness Tell the Story)

Bad: Did you report it to your boss?

Better: Who did you report it to? Or,

Even Better: What did you do?

Bad: What did you do? Write a letter?

Better: What did you do?

## Mistake: Negative Questions (Ask Positive Questions)

Bad: **Didn't** you tell her to stop?

Better: **What** did you do?

Bad: **Weren't** you going to the office?

Better: **Where** were you going?

Bad: That **wasn't** in July, was it?

Better: Was that in July? Or,

Even Better: **When** was that?

## Mistake: Asking for Conclusions or Opinions (Focus on Actions)

Bad: **Were you** sexually harassed?

Better: **What** happened?

Bad: **Did she** understand you?

Better: **How** do you know?

**What** did she do?

**What** did she say?

**What** happened next?

# Mistake: Slang or Inexact Terms (Clarify Inexact Terms)

Bad: Was he talking **loudly**?

Better: **Where** were you when you heard him?

Bad: Where did Joe **grab** you?

Better: **What** did Joe do? or

**Where** did Joe **touch** you? or

**Tell me** what happened.

Bad: When I made that mistake, she really **took my head off**.

Better: **What** did she do? **What** did she say?

- A witness says:
- “After I started working there, a guy started harassing me. I tried to get him to stop, but he kept doing it. Later my supervisor told me he talked to the guy.”
- What questions would you ask to clarify this statement?

# Making a Decision

- Conducted the interviews
- Reviewed the documents
- Gathered any additional information
  - Prepare report that contains description of issues at hand, list witnesses and documents used as evidence, summarize information, make credibility assessments and present a finding of fact.
  - Recommend action, if appropriate

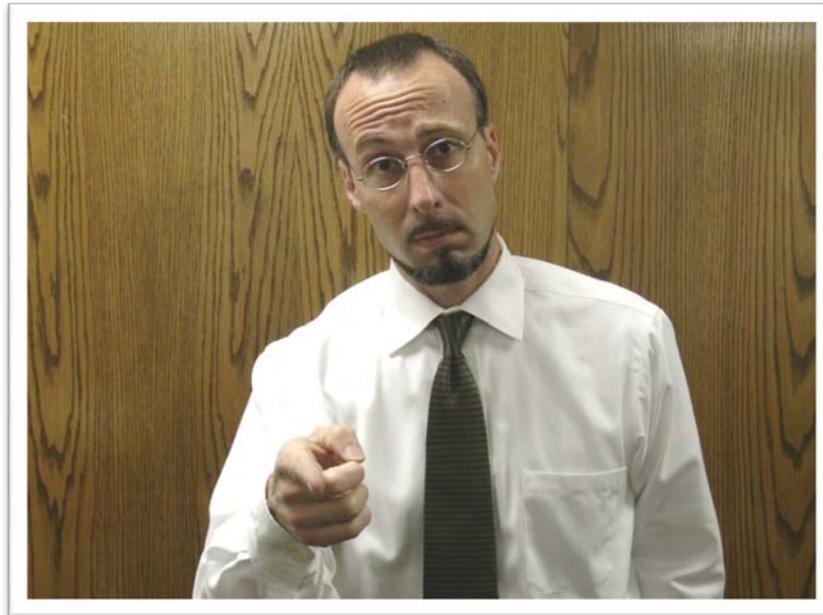
# When all else fails, remember this...

- Check your bias
- Move quickly
- Know the standards of proof
- Make a plan
- Keep the complainant in the loop
- Ask questions that start with “w”
- And above all, listen

# Investigator Quiz #4

(T or F) This is the best training course I have ever attended

**True, of course**



# QUESTIONS

**Rodney Klein**

**Education and Training Manager**

**Dallas District**

**U.S. Equal Employment Opportunity Commission**

**210.281.7666 (office)**

**210.693.9618 (cell)**

**[rodney.klein@eeoc.gov](mailto:rodney.klein@eeoc.gov)**