



Maximizing the Investigative Process: Tips and Best Practices

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Prevention is the key

- ▶ Does leadership in your organization know and follow internal policies and processes?
- ▶ Would your leadership teams recognize harassment and retaliation?
- ▶ Would your leadership teams know their roles and responsibilities in the complaint process and the ADA reasonable accommodation process?
- ▶ Does your leadership team know they can put the organization at risk and incur liability with the things they do and don't do?



The *Faragher-Ellerth* affirmative defense

- ▶ 1998 landmark U.S. Supreme Court opinions:
 - *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) and *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 765 (1998).
- ▶ Two elements:
 - “(a) that the employer exercised **reasonable care** to prevent and promptly correct any sexually harassing behavior, **and**
 - (b) that the employee **unreasonably failed** to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.”



How to exercise reasonable care? (1)

- ▶ Publish and circulate a **clear** written policy prohibiting all forms of workplace harassment.
- ▶ Implement a **simple** complaint process that includes:
 - Multiple avenues to complain – including **oral** complaints
 - Anti-retaliation provisions
 - Statement that violators will be subject to appropriate disciplinary action
 - Accounts for employee language issues
- ▶ **Disseminate the complaint policy and conduct mandatory training for all employees.**



How to exercise reasonable care (2)

- ▶ Conduct **prompt** investigations of **all** complaints.
- ▶ Conduct **thorough** and **impartial** investigations of **all** complaints.
- ▶ Take **prompt** corrective action and **appropriate remedial measures**.
- ▶ Prohibit **all** forms of **retaliation**.
- ▶ Document, document, and document!



What are the employee's responsibilities?

- ▶ Take advantage of and reasonably use preventive or corrective measures.
- ▶ Take advantage of and follow the employer's complaint process and procedures.
 - Talk to their supervisor, HR, or other representative.
 - Unreasonable failure to use any complaint procedure provided by the employer may impact the employee's claim.
- ▶ Keep a record of all events, documents, etc.
- ▶ Follow-up!



What triggers an investigation?

- ▶ Employee makes an internal formal or informal complaint, grievance, or concern (written or oral).
- ▶ Employer receives an external charge of discrimination from the EEOC or state agency counterpart.
- ▶ Employer has notice of:
 - Complaint received directly
 - Conduct or behavior witnessed or observed
 - Pervasive behaviors (the employer should have known)



Conducting the investigation (1)

- ▶ Remember – **first** impressions are **lasting** impressions.
- ▶ Be prompt, neutral, and objective.
- ▶ Obtain as much detailed information as possible from the complainant, witnesses, and respondent.
- ▶ Identify the issues to be resolved and develop a plan of action.
- ▶ Address immediate needs.
- ▶ Explain the non-retaliation policy to all parties and witnesses.
- ▶ Encourage individuals to report any retaliation.



Conducting the investigation (2)

- ▶ Identify next steps and remain in contact with the complaining party.
- ▶ Document all actions taken and retain records.
- ▶ Ensure the process is confidential.
- ▶ Take the opportunity to review policies with all involved parties.
- ▶ If issues are identified, take prompt remedial action to correct the environment.



Investigation quick points

- ▶ The scope of every investigation will be unique.
- ▶ Investigations should be comprehensive.
- ▶ Harassment investigations
- ▶ Discrimination investigations
- ▶ Retaliation investigations



Conducting investigation interviews

- ▶ Rethink the 5 W's: Who, What, When, Where, and Why.
- ▶ Explain the purpose of the investigation and the importance of the individual's participation.
- ▶ Prepare for difficult interviews and situations.
- ▶ Document and retain all investigation notes, documents, records, and other related materials and information.
- ▶ Restate and emphasize the employer's anti-retaliation policies.



Preparing the investigation report

- ▶ Describe the full investigation process
- ▶ Summarize all the evidence
- ▶ Address all issues raised in the complaint
- ▶ Reach a conclusion based on the merits of the complaint
- ▶ Ensure that all conclusions are supported by the evidence
- ▶ Avoid editorial comments and opinions
- ▶ Assume all investigation notes will be made public



What are common investigation mistakes?

- ▶ The investigation was not promptly conducted.
- ▶ The investigation was incomplete or insufficient.
- ▶ The employer or investigator failed to take the complaint seriously or treated the complainant dismissively.
- ▶ The investigation report was based on opinion and not facts.
- ▶ The employer or investigator failed to provide assurances of non-retaliation.
- ▶ The employee was subjected to retaliation.



I received a charge of discrimination – now what?

- ▶ Take a deep breath.
- ▶ Do you have all the information and documents to move forward with the next steps?
- ▶ Consider mediation.
- ▶ If you have questions, reach out to us.



Preparing effective Position Statements

- ▶ A **fact-based statement** that addresses **all** allegations in the discrimination charge.
- ▶ **Effective** position statements:
 - Include applicable policies, practices, and supportive evidence.
 - If discrimination is alleged, clarify and identify comparators.
 - Provide thorough details regarding decision-makers' actions.
 - Include all results and reports from internal investigations.
 - Address inconsistencies or misrepresentations in the discrimination charge.



How to handle confidential evidence

- ▶ Identify and segregate confidential information into separate attachments to the position statement:
 - Sensitive medical information
 - Personally Identifiable Information (PII)
 - Confidential commercial or confidential financial information
 - Trade secrets information
 - References to other charges filed by other charging parties



What happens next?

- ▶ Requests for information (additional information)
- ▶ Onsite visits
- ▶ Mediation (agreed upon by all parties)
- ▶ Settlement
- ▶ Determination (cause or no cause)
 - Dismissal
 - Conciliation
 - Litigation



Charge Receipts (FY-2022): top categories

Percent	Basis
51.6%	Retaliation (All Statutes)
38.7%	Retaliation (Title VII)
34.0%	Disability
27.0%	Sex
28.6%	Race
18.8%	Religion – in FY 2022, there was a significant increase in vaccine-related charges filed on the basis of religion. As a result, FY 2022 data may vary compared to previous years.
15.6%	Age
7.5%	National Origin



EEOC resources

- ▶ EEOC's website:
 - Employees & Job Applicants
 - Employers/Small Business
 - Contact us to find your nearest EEOC office
- ▶ EEOC Enforcement Guidance: Vicarious Liability for Unlawful Harassment by Supervisors
- ▶ EEOC Checklists for Employers:
 - Select Task Force on the Study of Harassment in the Workplace
 - Checklist Three: A Harassment Reporting System and Investigations



Pregnant Workers Fairness Act (PWFA) resources

- ▶ Effective June 27, 2023:

[What You Should Know About the Pregnant Workers Fairness Act \(PWFA\)](#)

- ▶ For workers:

[Download Infographic: Tips for Asking for Reasonable Accommodation](#)

- ▶ For employers and healthcare providers:

[Pregnant Workers Fairness Act: What Employers Need to Know Webinar](#)



Thank You!



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