Maximizing the Investigative Process: Tips and Best Practices

Marina Guerra
Outreach and Education Coordinator
EEOC Houston District Office
(346) 327-7674
marina.guerra@eeoc.gov
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:

- 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 and 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

- 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

<table>
<thead>
<tr>
<th>Percent</th>
<th>Basis</th>
</tr>
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<tbody>
<tr>
<td>51.6%</td>
<td>Retaliation (All Statutes)</td>
</tr>
<tr>
<td>38.7%</td>
<td>Retaliation (Title VII)</td>
</tr>
<tr>
<td>34.0%</td>
<td>Disability</td>
</tr>
<tr>
<td>27.0%</td>
<td>Sex</td>
</tr>
<tr>
<td>28.6%</td>
<td>Race</td>
</tr>
<tr>
<td>18.8%</td>
<td>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.</td>
</tr>
<tr>
<td>15.6%</td>
<td>Age</td>
</tr>
<tr>
<td>7.5%</td>
<td>National Origin</td>
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</tbody>
</table>

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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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