



# THE PANDEMIC'S IMPACT ON RACE & DISCRIMINATION IN THE WORKPLACE

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## WHAT TO EXPECT FROM TODAY'S PRESENTATION

- Entering the Endemic & Rethinking EEO
- Perception is reality
- EEO investigations
  - Prima Facie
  - Credibility Assessment
  - Case Study – Conducting an Investigation

# DISCLAIMER

During this presentation, Covid-19 guidance will be discussed periodically. It is imperative that each individual here stay abreast to the updates and requirements from the CDC, EEOC, state, county and/or local municipality.

FINDING OUR  
FOOTING IN THE  
EVER CHANGING  
LANDSCAPE

New variants & vaccine protocols

Social justice movement

Court cases

Changing guidance from federal, state, and  
local officials



# ENTERING THE ENDEMIC & RETHINKING EEO



# HOW DO REAL WORLD EXPERIENCES AND CONFLICT SHOW UP IN YOUR WORKPLACE?

- Covid-19
- Inflation
- Recession
- Confusion
- Accommodations
- Protests
- LGBTQI+ Rights
- Black Lives Matter
- Pandemic
- Divisiveness
- Conflict
- Vaccination
- Discrimination
- Exhausting
- Women's Rights

WHAT IS  
CHANGING

## Intersectionality of Covid and:

- Race
- Gender
- Religion
- Disability

## RACE & COVID-19

- Essential workers still have EEO protections
- Social justice movement intersecting with the workplace
- Asian hate in the workplace



## TITLE VII: BASED ON RACE

### **Discipline for Wearing BLM Masks Was Not Based on Employees' Race - I**

Frith v. Whole Foods Mkt., No. 21-1171 (1st Cir. June 28, 2022).

- Plaintiffs alleged race discrimination when Whole Foods enforced dress code policy against both Black and non-Black employees who wore Black Lives Matter face masks.
- Plaintiffs' theory that their race is irrelevant if they advocate on behalf of Black people is foreclosed by *Bostock*.
- Replaces textual "because of such individual's race" with "because of such individual's advocacy for protected inds."

## TITLE VII: BASED ON RACE

### **Discipline for Wearing BLM Masks Was Not Based on Employees' Race – 2**

**Frith v. Whole Foods Mkt.**, No. 21-1171 (1st Cir. June 28, 2022).

- Per *Bostock*, proper focus in assessing Title VII claim is on the protected characteristic of the plaintiff.
- In typical associational claim involving interracial relationship, plaintiff alleges discrimination based on own protected status and associating with someone of another race.
- Here, not based on race of complainants.

## HARASSMENT: TITLE VII RACE

### **Supervisor's Use of N-word Created Hostile Work Environment Based on Race – I**

Woods v. Cantrell, 29 F.4th 284 (5th Cir. 2022).

- Black plaintiff alleged that his Hispanic supervisor directly called him a “lazy a\_\_ n\_\_\_\_\_” in the presence of other employees.
- The 5th Circuit had previously indicated that a single instance of a racial epithet will not create a hostile work environment.
- Circuit had also indicated, though, that a single incident could be sufficiently severe under totality-of-circumstances test to be actionable.

## HARASSMENT: TITLE VII RACE

### **Supervisor's Use of N-word Created Hostile Work Environment Based on Race – 2**

Woods v. Cantrell, 29 F.4th 284 (5th Cir. 2022).

- As recognized by other circuits, “[p]erhaps no single act can more quickly ‘alter the conditions of employment and create an abusive working environment’ than the use of an unambiguously racial epithet such as [the N-word] by a supervisor in the presence of his subordinates.”
- Quoting then-Judge Kavanaugh in a D.C. Circuit opinion: “The N-word has been further described as ‘a term that sums up ... all the bitter years of insult and struggle in America, [a] pure anathema to African-Americans, [and] probably the most offensive word in English.’”

## GENDER & COVID-19

- Caregiving Responsibilities & Covid-19
- Sex-based and sexual harassment in the workplace has changed due to the pandemic
  - Perception of women v. men in the workplace
  - Sexual harassment

## HARASSMENT: TITLE VII/SAME-SEX

### **Same-sex Harassment Established by Stereotyping Evidence**

Roberts v. Glenn Indus. Grp., 998 F.3d 111 (4th Cir. 2021).

- Plaintiff who worked in all-male environment alleged supervisor sexually harassed him, calling him “gay” and making sexually explicit comments.
- Three evidentiary routes discussed in Oncale v. Sundowner Offshore Servs., 523 U.S. 75 (1998), are not exclusive.
- Gender stereotyping evidence also shows harassment was sex-based.
- Bostock extends broadly to workers who fail to conform to gender stereotypes.
- Actionable harassment includes any gender-based conduct, not just sexual conduct.

## RELIGION & COVID-19

- Accommodations for sincerely held religious beliefs
  - Accommodations regarding vaccinations
  - Mask mandates
  - Religious expressions

## TITLE VII: RELIGIOUS DISCRIMINATION – RA

### **Members of Same Faith May Require Different Religious Accommodations**

EEOC v. Greyhound Lines, 554 F. Supp. 3d 739 (D. Md. 2021).

- Muslim bus driver was denied religious accommodation to wear untucked shirt and ankle-length skirt.
- Other Muslim employee wore shorter skirt over pants did not mean it was reasonable in this case.
  - Two members of same faith may have different religious practices and degrees of observance.
- Jury question as to undue hardship: EEOC offered expert evidence that skirt not unsafe; but Defendant offered no evidence on safety.



## TITLE VII: RELIGION – 1ST AMEND

### **Demonstrative Prayer Is Protected Speech and Religious Expression – I**

Kennedy v. Bremerton Sch. Dist., No. 21-418 (U.S. 2022).

- Did not reach Coach's Title VII religious accommodation claim; constitutional decision.
- However, if a public employer asserts that accommodating a religious employee is an undue hardship due to concern about violating the Establishment Clause, then this analysis is relevant to assessing undue hardship.

## TITLE VII: RELIGION – 1ST AMEND

### **Demonstrative Prayer Is Protected Speech & Religious Expression – 2**

Kennedy v. Bremerton Sch. Dist., No. 21-418 (U.S. 2022).

- High school football coach was suspended for kneeling in prayer on 50-yard line immediately after games ended.
- His prayer was private and not government speech; not coercive
- School district action not based on a neutral & generally applicable rule.
- Free Speech, Free Exercise, & Establishment Clauses are complementary.
- Establishment Clause does not include “heckler’s veto” allowing limits on religious conduct based on discomfort.
- Establishment Clause is interpreted by “reference to historical practices”

## DISABILITY & COVID-19

More accommodation requests

Different accommodation needs for the same disability

Difference in treatment complaints from other employees

Maintaining confidentiality in light of infections & accommodation needs

## LONG-HAUL COVID: POSSIBLE NEW DISABILITY

Although many people with COVID-19 get better within weeks, some people continue to experience symptoms that can last months after first being infected, or may have new or recurring symptoms at a later time. This can happen to anyone who has had COVID-19, even if the initial illness was mild. People with this condition are sometimes called “long-haulers.” This condition is known as “long COVID.

## THE REALITIES OF COVID-19

COVID-19 leveled the playing field for some, while widening the gap for others, but created a new reality model and version of work for workplaces, resetting expectations and amplifying injustices

The “Lens” by which employees and employers have traditionally used to view their workplace changed as a result of the impact and outcomes related to COVID. This lens reflected differently regarding the reasons people work, their values, purpose and their politics changed direction (i.e. political polarization, health care focus, food insecurities, caregiver responsibilities, finances and access to justice)

1

Employees are wanting more engagement from their workplaces

2

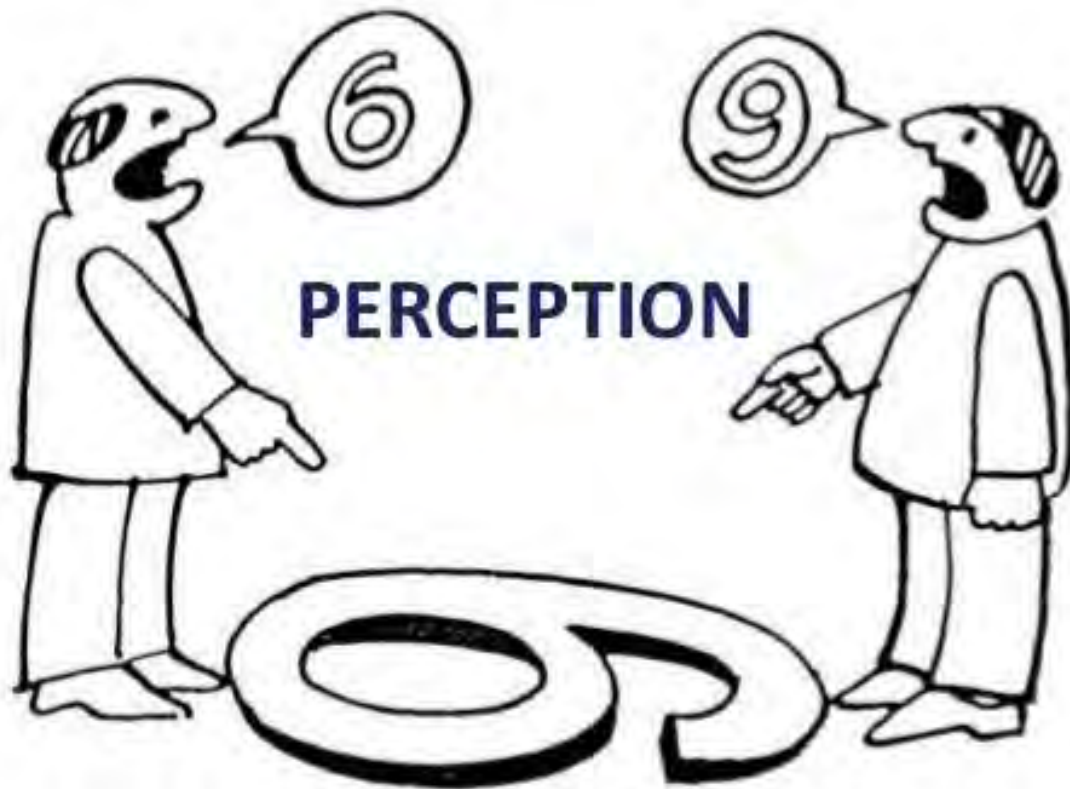
Employees want more understanding and compassion from their workplaces

3

Employees are expect professionalism and timely responses to their needs

## CHANGING IDEAS OF WORK

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PERCEPTION  
IS REALITY

## PERCEPTIONS INFLUENCE OUR UNDERSTANDING OF CASES

Discrimination and harassment can be about an individual's perception of actions. This does not mean that just because their perception differs from yours that discrimination/harassment did not occur.

As investigators, our perception of others can affect the reality of an EEO case.

Understanding our biases (this is for another training) and being self-aware, allows us to conduct more thorough, impartial and complete investigations





# EEO INVESTIGATIONS

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# A REMINDER:

- 
- Civil Law Enforcement v. Criminal Law Enforcement:
    - Preponderance of Evidence v. Beyond a Reasonable Doubt
    - More likely than not that discrimination or harassment occurred—a 51% threshold for the finding of a violation

# STEP # 1

**ESTABLISH YOUR  
CREDIBILITY  
AND  
INTEGRITY**

# OBJECTIVE

- Get employees to raise concerns as soon as they arise
  - Which means supervisors and managers get the best results when complaints are at the “nuisance” level
  - Counter productive to label those raising early issues as “whiners” or “thin skinned”
  - These are manageable conflicts

## RESPONSES TO REQUESTS FOR CONFIDENTIALITY



I cannot guarantee that what you tell me can stay between us.



If something is causing you concerns, it is unlikely to go away on its own. I'd certainly like to help you address it before it gets worse, but I cannot keep it a secret.



What are your worries if you tell me what is on your mind?

THE GIFT



# GIFT GETTING

Thank	Thank them
Express	Express appreciation and prompt for more
Name	Name feelings
Get	Get the contours of the issue
Determine	Determine safety
Finish	Finish with action

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# ELEMENTS OF EFFECTIVE COMPLAINT HANDLING

- 
- Listen. Listen more.
  - Don't debate or argue.
  - Name the feelings.
  - Don't cast blame or assign responsibility
  - Give them all the time they need and then some more.
  - No hot potatoes. You are "it."
  - Don't judge. Ask an open-ended question until the impulse goes away.



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# AVOID

- 
- “Why” questions
  - “What was your part in it?”
  - Closed ended questions (Did you tell them to stop?)
  - Directly asking what they want
    - Use “magic wand” or “crystal ball”

## GOALS OF COMPLAINT HANDLING



Let the employee know you will take them seriously.



Let the employee know that how they feel matters.



Let the employee know that, if what they describe is happening, it will stop.



Let the employee know you will take action.



# **GOALS OF AN INVESTIGATION/INQUIRY**

## GOALS OF INVESTIGATION

To establish a sound, factual basis for any employment-related decisions or management actions

Reveal whether misconduct has occurred, identify or exonerate specific employees and deter future misconduct or inappropriate behavior

# THE INVESTIGATION

Must be flexible because new allegations may be identified during investigation/inquiry



Person selected to be investigator/counselor must be credible and regarded as objective



Must be knowledgeable concerning agency policies, have good interviewing skills, be well-organized and be able to communicate well with all the potential interviewees



INVESTIGATOR MUST BE TRUSTWORTHY WITH CONFIDENTIAL AND SENSITIVE INFORMATION



ALL THE RELEVANT DOCUMENTS AND INFORMATION KNOWN BEFORE THE COMMENCEMENT OF THE INVESTIGATION SHOULD BE IDENTIFIED, GATHERED, AND REVIEWED PROMPTLY FOLLOWING THE COMPLAINT.



MUST PRESERVE ALL POTENTIALLY RELEVANT DOCUMENTS OR ITEMS

- 
- Make sure the complainant understands the policy, procedures, and investigative process
  - Reassure the complainant about the process
  - ***Take a strong stand against retaliation & check in***
  - Ensure that the investigation is impartial
  - The investigator must be trained and effective; consider alternate options as needed
  - Complainant should NOT be made to feel uncomfortable in any way about bringing forward concerns.

# CREATION OF INVESTIGATIVE FILE

- MUST BE DONE AS SOON AS POSSIBLE
- SHOULD CONTAIN:
  1. All of the relevant documents including emails, letters, etc.
  2. Company policies
  3. Appropriate documents from personnel files




# CREATION OF INVESTIGATIVE FILE CONT.

4. Prior complaints by complainant
5. Prior complaints against accused
6. Written plan identifying who will be interviewed\*

\*The file should be constantly updated with any new relevant information, including witness interview notes, signed statements from witnesses as appropriate and ultimately a copy of the investigator's or team's final report and recommendations.

## STEP # 2

**DETERMINE  
THE  
APPROPRIATE  
STATUTE,  
THEORY OF  
DISCRIMINATION  
AND ELEMENTS  
OF PROOF**

- 
- Disparate Treatment
  - Disparate Impact
  - Harassment
  - Reasonable Accommodation – Religious
  - Reasonable Accommodation – Disability
  - Retaliation

# DISPARATE TREATMENT - PRIMA FACIE CASE

- Charging Party is a member of a protected group.
- Charging Party was harmed.
- Others not of Charging Party's class were not treated the same (i.e. discipline, discharge, lay off, terms and conditions) although they were similarly situated.

## HIRING AND PROMOTION - PRIMA FACIE CASE

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Charging Party belongs to a protected class.

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A vacant position existed.

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Charging Party applied for or expressed interest in the position.

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Charging Party was qualified for the position.

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Charging Party was not selected but a lesser qualified person not of Charging Party's class was selected.

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# IS THE MANAGEMENT'S REASON LEGIT OR PRETEXT?

- 
- Management has articulated a legitimate, non-discriminatory reason for the employment decision
  - The management's stated reason for the employment decision is pretext
  - Is there direct evidence that supports Charging Party's allegation?
  - Were similarly situated employees outside of Charging Party's protected group treated more favorably? (Indirect or circumstantial evidence)

INDICATORS OF  
PRETEXT  
DURING  
INVESTIGATION

False information

No information and/or documentation

Normal policy/practice not applied evenly

Normal policy/practice arbitrarily changed

Inconsistent or conflicting data

Changing defenses in mid-stream

# DISPARATE IMPACT THEORY

- Theory aimed at “practices fair in form, but discriminatory in operation” in that they operate as “built-in headwinds [for a protected class] and are unrelated to measuring job capability.” *Griggs v. Duke Power Co.*, 401 U.S. 424, 431-32 (1971).
- **Three analytical steps:**
  - Does policy or practice have significant disparate impact?
  - If so, has the employer proven that the policy or practice is job related and consistent with business necessity?
  - Is there a less discriminatory alternative that meets the business need?



## BEHAVIORS THAT CAN BE HARASSMENT

Unwelcome teasing, jokes, remarks, that are sexual, derogatory based on a protected bases, or ethnic slurs.

Unwelcome letters, telephone calls, e-mails or distribution of materials that are sexual or derogatory based on a protected bases.

Physical assaults based on a protected bases.

Demands for sexual favors for job benefits.

Unwelcome and deliberate touching.

Unwelcome sexually suggestive looks/gestures.

Unwelcome pressure for sexual favors or dates.

Favorable treatment for sexual favors.

DETERMINE IF  
UNWELCOME

Harassment is unlawful only if it is unwelcome.

Unwelcome:

- Employee did not solicit or incite it and
- Employee regarded the conduct as undesirable or offensive.

# DETERMINING WHETHER BEHAVIOR IS HARASSMENT UNDER THE LAW

Use “reasonable person” standard


- What’s “reasonable”?

Primary criteria

- Context
- Severity
- Frequency

Isolated comments rarely create a hostile environment

A single incident of physical sexual conduct can create a hostile environment



WHAT WILL MAKE  
AN EMPLOYER  
LIABLE FOR  
WORKPLACE  
HARASSMENT?

## CO- WORKER/NON- EMPLOYEE HARASSMENT



Liability is not automatic.



Must establish the employer knew or should have known about the harassing conduct



Employer must then show it took immediate and appropriate corrective action to correct harassment and prevent its recurrence

## WAS HARASSMENT BY AN ALTER EGO OF THE EMPLOYER?



- Liability is automatic
- Alter ego - someone of sufficiently high rank to be treated as the employer's proxy.
- Examples - president, owner, partner, corporate officer.

## HARASSMENT BY A SUPERVISOR

Liability may or may not be  
automatic



### Types of supervisory harassment

Tangible employment action  
harassment

- Automatic liability

Hostile environment harassment

- Liability not automatic
- Recourse to the affirmative defense

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# IS IT HOSTILE ENVIRONMENT HARASSMENT BY A SUPERVISOR?

- 
- The affirmative defense is available to the employer to avoid liability
  - The employer has the burden and must prove both prongs of the affirmative defense
    - First prong: did the employer exercise reasonable care to prevent and correct the harassment?
    - Second prong: did the employee unreasonably fail to utilize the employer's complaint procedure or to avoid all harm otherwise?



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# ELEMENTS OF PROOF FOR RELIGIOUS ACCOMMODATION

- 
- Did Charging Party request an accommodation for sincerely held religious belief or practice?
  - Did management deny the request?
  - If so, could respondent have provided a reasonable accommodation without undue hardship (more than a minimal burden on the business operations)?

Is Charging Party a qualified individual with a disability?

Can Charging Party perform the essential functions of their position with or without a reasonable accommodation?

Did Charging Party request an accommodation?

Did the employer engage in the interactive process?

Was the request denied?

If so, could a reasonable accommodation without undue hardship (significant difficulty or expense)?

## ELEMENTS OF PROOF - DISABILITY ACCOMMODATION

## RETALIATION THEORY

Opposition to Discrimination or  
Participation in a Protected Activity

An adverse employment action  
occurred

Causal connection between the  
opposition or participation and the  
adverse action

## THRESHOLD ISSUES: ADVERSE ACTION

### **Must a change in Terms or Conditions be “materially adverse” to be actionable?**

- Judicial doctrine: courts require plaintiffs to show action was “materially adverse.”
  - Some actions, e.g., lateral transfers, excluded under this standard.
- DOJ and EEOC filed briefs –
  - Statutory language does not include materiality threshold.
  - Any change to a term/condition/privilege of employment based on a protected characteristic is actionable.
  - Decision like a lateral transfer is actionable because it is a term/condition/privilege of employment.

## THRESHOLD ISSUES: ADVERSE ACTION

### **Shift Change Is Covered Adverse Action**

**Threat v. City of Cleveland**, 6 F.4th 672 (6th Cir. 2021).

- Raced-based shift change is actionable under Title VII.
- To "discriminate" incorporates "an adversity and a materiality" threshold ensuring that claim involves "meaningful difference in the terms of employment and one that injures the affected employee."
- "[O]ur approach honors a de minimis exception that forms the backdrop of all laws."
- Shift change from preferred day to night, or vice versa, exceeds de minimis exception or text of Title VII.

# THRESHOLD ISSUES: ADVERSE ACTION

## **Lateral Transfer Is Adverse Action**

**Chambers v. District of Columbia**, 35 F.4th 870 (D.C. Cir. 2022) (en banc).

- Sex-based lateral transfer is actionable under Title VII.
- Undefined phrase “terms, conditions, or privileges of employment” shows intent of Congress to “strike at the entire spectrum of disparate treatment ... in employment.”
- ”Discrimination” refers to “differential treatment” and includes no distinction between “economic”/“non-economic” or “tangible
- ”/”intangible” discrimination.

**EVIDENCE OF  
CAUSAL  
CONNECTION  
MAY INCLUDE:**

Timing

Deciding official in adverse action knew of (or should have known) of the opposition/participation

Contrast in treatment before and after opposition or participation.

Disparate treatment of similarly situated persons not engaged in protected activity.

Direct evidence of retaliatory motive.

## GOOD INVESTIGATORS ARE

- Knowledgeable
- Inquisitive
- Focused
- Strategic
- Flexible
- Analytical
- Objective/Open-minded
- Confident
- Persuasive



YOU HAVE A  
COMPLAINT...  
NOW *WHAT?*

## CASE STUDY

You are recently hired as an Employee Relations Specialist at Educators R Us, a national tutoring company. You receive an email from Thomas Olivos, a Hispanic male in his 20s, a tutor from the Southwest Region, Las Vegas Office, who has one year on the job. Las Vegas is one of 5 offices in the Southwest Region, currently overseen by Jackie Forest, SW Regional Manager, an African American female in her 50s. Thomas seems to be complaining about Jackie.

Your new boss, asks you to handle it.

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## THE EMAIL

4/11/22

To the HR Dept:

Can we talk? I have had problems under our SW Regional Manager, Jackie. I just don't feel that she treats our LV team fairly. James and Bradley get the best assignments, where it seems easy for them to get the more lucrative tutoring contracts. The others work their tails off — especially Yolanda — while James and Bradley just don't seem to carry their weight. I've brought this to her attention several times, and she just dismisses me and now gets irritated when I bring anything up. Jackie is overly friendly with James and Bradley, to the point of creepy. I can't deal with this toxic environment anymore, and I feel I need to take time off to deal with the anxiety this is all causing me.

Sincerely,

Thomas Olivos

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**STEP #3**

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**INTERVIEW  
THE  
COMPLAINANT**

# THE PURPOSE OF AN INTERVIEW

WHY WOULD  
YOU WANT  
TO  
INTERVIEW?

WHEN AND  
HOW  
INTERVIEWS ARE  
CONDUCTED IS  
IMPORTANT.

# BEFORE BEGINNING THE INTERVIEW YOU SHOULD KNOW:



What is the purpose of the interview



What to do to prepare for the interview



What potential problems you may face



What will the witness seek from you



What do I need to do to prepare the witness after the greetings have been exchanged



What topics that I will cover



What are the key questions I want to ask

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# BREAK OUT ROOMS: IDENTIFY THE FOLLOWING

- 
- Basis(es):
  - Issue(s):
  - Statute(s):
  - Theory of Discrimination:
  - Elements of Proof:
  - List of questions you would ask to Thomas Olivos at your first interview

## ESTABLISH THE SCOPE

It's very easy for a conversation to go into a direction that has no bearing on the topic at hand. Try and stay focused on the reasons you are conducting the interview.

Aside from establishing rapport, and maybe initial small talk to establish a sense of comfort understand that as the interviewer, you establish the pace of the interview.



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# ONCE THEY START TALKING

- 
- Be an active listener.
  - Be patient
  - Listen for critical content (and always be open to revisiting a particular element of their story later on in the interview).
  - Be mentally prepared for whatever information they may give you. Don't let your physical reactions impact their story.

## ONCE THEY START TALKING

 Ask follow up questions

 Ask open-ended questions

 Get details, including any information that may corroborate their story: time line, places, witnesses, documents to obtain

 Remember, this is a first hand account for them, try to get as comfortable with their facts as they are

 Avoid getting emotional

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# QUESTION TYPES

- 
- Direct (yes/no)
  - Leading
  - Open-ended questions
  - Factual question
  - Opinion Question
  - Sequence Questions

# DIRECT QUESTIONS

- When to use these?
- Pros?
- Cons?
- When an absolute answer is needed and nothing else. Remember, an individual responding to this type of question may not be forthcoming with subsequent information.
- EX: “Did you say Randy was a ....”

## LEADING QUESTIONS

Be very careful with these.

When used in conjunction with an admission, it could reflect poorly on the interviewer.

Used mainly to introduce the scope of the complaint or transcend into a new realm of the interview.

EX: “So tell me Sally, you were there when the incident with Ray and Sarah took place right?”

## OPEN-ENDED QUESTIONS

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Considered by many to be the best.

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These questions serve as the standard in getting full responses from the person being interviewed.

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Understand you may get some information that may not seem relevant, but it all plays an important part.

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EX: “So what can you tell me about the incident where Mike was allegedly being too touchy with Pam”

# FACTUAL QUESTIONS



Similar to yes/no, though usually used towards the end of the interview once the interviewer has a sense of familiarity and is seeking confirmation.



When you need to get to the specifics.



When you want to establish witnesses.



When you need to substantiate particulars to the complaint.



EX: "So then you do admit to saying it"



## OPINION QUESTION



# SEQUENCE QUESTIONS

Start out big and work your way in.

Pyramid theory.

Tends to put the interviewee at ease

Open ended question to gather the information to make you familiar enough with the situation that will empower you with the confidence to be able and derive conclusive answers from some direct and follow up open ended questions.

## RECORDING

Be familiar with company and state regulations with respect to consent when it comes to audio recordings

Always take notes.

A team approach is a proven technique that allows for one to ask questions and the other to take detailed notes.

# THE IMPORTANCE OF FOLLOW UP QUESTIONS



Follow up questions are a necessity in an interview

They allow the investigator to delve deeper into the interviewee's story



If you are unsure what someone means—ask clarifying questions. It's better to fully understand than guess or assume what someone meant

- 
- Someone somewhere is going to review your notes and what your notes contribute to with respects to a follow up report.
  - You are essentially introducing someone new to the ordeal that you just became somewhat familiar with. Do what you can to share you sense of familiarity with the reader.
  - Decision makers need to have confidence in those collecting the information at the interview stage.
  - Include your impartial assessment – credibility call

## CAPTURE/SUMMARIZE

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# DETERMINING CREDIBILITY

- Think Objectively
- Describe the behavior and how that impacts credibility
  - Did the story change?
  - Note the tone of voice and inflection during the questioning
  - Describe the body language, facial expressions, eye contact—did it match with the emotions and information being provided?
- Remember different cultures may have different behavioral cues and that should be taken into account when determining credibility
- Individuals who have been through a traumatic event may not be able to provide sequential information – cognitive interviewing skills or trauma informed interview training should be considered for EEO investigators

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# CREDIBILITY ASSESSMENT

- 
- A credibility assessment should be part of your report:
    - It allows you to remind yourself of the behavior of the individual you interviewed
    - It allows others to understand the individual that was interviewed
    - It can aid in your investigation

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**STEP #4**

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**DRAFT A PLAN**

# BREAK OUT ROOMS: DRAFT THE INVESTIGATIVE PLAN



What are you investigating (bases, issues, statutes, elements of proof)?



What is the scope of the investigation?



What documents/information do we need and in what format?



Why do we need it?



Where do we get it?



Who do we need to talk to and why?



Methodology



Time frames



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# METHODOLOGY - INVESTIGATIVE STRATEGY DECISIONS

- 
- Review documents: personnel files, other complaints, job descriptions, announcements, applications, resumes, interview notes, pay records
  - Interview decision maker(s)
  - Interview witnesses
  - Interview prior employees
  - A combination of the above

## INVESTIGATIVE PLAN UPDATE

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Basis(es):

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Issue(s):

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Statute(s):

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Theory of Discrimination:

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Elements of Proof:

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What documents are needed & why?

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Who should we talk to and why?

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Methodology

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Time frames

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## STEP #5

*(DEPENDING ON  
METHODOLOGY)*

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INTERVIEW THE  
ALLEGED  
DISCRIMINATING  
OFFICIAL

WHO IS OUR ALLEGED  
DISCRIMINATING  
OFFICIAL?

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**STEP #6**  
*(DEPENDING ON  
METHODOLOGY)*

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**INTERVIEW THE  
WITNESSES**

**WHO WOULD  
YOU INTERVIEW  
AS A WITNESS?**

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## STEP #7

*(DEPENDING ON  
METHODOLOGY)*

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REVIEW THE  
DOCUMENTS/  
INFORMATION

WHAT DOCUMENTS WOULD YOU  
WANT TO REVIEW?



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# STEP #8

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ANALYZE THE  
EVIDENCE TO MAKE A  
DETERMINATION

## REVIEW/ANALYZE:

Refer back to your investigative plan

Cross reference the evidence you have with the elements of proof

Which elements are met? Which are not?

How does credibility factor in?

How do you fix the situation? Start thinking about remedies

The facts leading up to your determination must be clear, with evidence to substantiate the recommendation every step of the way

The investigation and determination should be well-documented.

## **STEP #9**

**YOUR PRESENTATION OF  
RECOMMENDATIONS & PROPOSED  
CORRECTIVE ACTIONS**

# PRESENTATION TIPS



Prepared



Positive



Persistent



Persuasive



Patient



Practical

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# EFFECTIVE EEO INVESTIGATIONS – BEST PRACTICES

- 
- Impartial
  - Investigator is competent, effectively trained
  - Prompt (starting & ending)
  - Confidential to the extent possible
  - Starts with the complainant
  - Thorough
  - Casts a wide enough net

# EFFECTIVE EEO INVESTIGATIONS – BEST PRACTICES

Detailed questioning of players involved

Gathers all the relevant evidence

Sufficient information to determine credibility

Well documented

A determination is made based on the evidence obtained/analyzed

Keeps the parties informed and reassured

Zero tolerance against retaliation

# PROPER DOCUMENTATION

IF IT'S NOT DOCUMENTED—HOW  
CAN YOU PROVE IT REALLY  
HAPPENED?

# INVESTIGATION DOCUMENTATION



Take notes for each interview you conduct



Make sure the notes are legible (type them up if possible)



Always include date, time, place, and who you interviewed



Keep separate any notes of your analysis, thoughts of the allegations



QUESTIONS?



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