



Welcome

American Association for Access, Equity and Diversity



Educate. Activate. Advocate.

AAAED is an active advocate for affirmative action and other equal opportunity laws to enhance the tenets of access, inclusion, and equality in employment, economic, and educational opportunities.

www.aaaed.org



EEO Counselor/Investigator Refresher Training

**American Association for Access, Equity, &
Diversity**

**April 24, 2025
9:00 am – 5:00 pm**

Facilitators:

Delia L. Johnson

Donald S. Johnson, Sr. Esq.

WELCOME

- **Introductions**
- **Please tell us:**
 - **Your Name and Title**
 - **Your organization/agency**
 - **Your tenure in the EEO field**

DISCUSSION

- The greatest challenges as an EEO Counselor and/or EEO Investigator
- Tips that helped you become a better EEO Counselor and/or EEO Investigator
- Changes that could be made to improve the current process



CONDUCTING EEO COUNSELING

Role of EEO Counselor

- Explain rights and responsibilities
- Explain ADR
- Explain other processes
- Conduct limited inquiry
- Identify legal claim
- Attempt resolution
- Complete counseling within 30-90 days
- Prepare EEO Counselor's Report
- Attend new/refresher training

Purpose of Counselor's Report

- Helps define and establish the scope of the claims and issues in controversy
- Helps determine whether a claim(s) or complaint is timely
- Helps decide if complaint is within the purview of 29 CFR Part 1614
- Provides data in the Accept/Dismiss (A/D) process involving special situations

Why is the Counselor's Report Important?

- First written document and first presentation of the claims in the complaint
- First explanation of management's reason for the decision
- One of two documents available to the agency to decide whether to accept or dismiss a complaint
- Used with the complaint of discrimination as planning tools to conduct the investigation



CONDUCTING THE INVESTIGATION

Role of EEO Investigators

- Identify sources of and gather evidence relevant to EEO complaint
- Develop impartial and appropriate factual record to allow decision as to whether discrimination occurred
- Remain unbiased and objective
- Preside at a fact finding conference
- Issue requests for information: requests for documents, interrogatories, affidavits, and/or face-to-face interviews
- Prepare an investigative summary
- Timely complete the investigation

Types of Evidence

- **Circumstantial evidence:** Comparative evidence or other evidence giving rise to an inference of discrimination
- **Direct evidence:** Facts revealing that intentional discrimination occurred
- **Statistical evidence:** Or survey of the general environment may be conducted as appropriate

Evidence

- The evidence should be:
 - Material to the complaint
 - Relevant to the issue(s) raised in the complaint
 - Reliable as possible

Investigative Report

- Notice of the Rights to File a Formal Complaint
- EEO Counselor Report
- Copy of the complaint
- Agency's acceptance letter of the complaint (including partial dismissal, amendments, & withdrawal of any claims)
- Documentation related to problems encountered during investigation
 - Interference by General Counsel's Office
 - Witness refusal/failure to respond

Investigative Report (cont'd)

- If resolution of the complaint is reached, include the terms of the resolution
- A record of any activity before the EEOC, OFO
- Evidence collected by the investigator:
 - Witness statements
 - Documents – policies, procedures, personnel records, etc.
- A summary of the investigation

Summary of the Investigation

- Signed and dated by the investigator
- Discusses and analyzes the evidence
- Succinct narrative that states claims and presents evidence addressing both sides of each claim in the case
- States facts supported in the complaint file and cites to evidence and the exhibits collected
- No conclusions about what the evidence shows or credibility determinations

Special Considerations in EEO Investigations

- Avoid conflicts of interest
- Amendments and consolidated complaints
- Properly defined legal claim:
 - Fragmented “issues” as individual claims instead of harassment, terms and conditions, or continuing violation claims
- Interference by General Counsel staff

Who is a Supervisor?

- ***Vance v. Ball State University*, 133 S.Ct. 2434 (2013)**

- Who is a supervisor?
 - Only people with the power to hire, fire, demote, promote, transfer or discipline an employee.
 - Excludes anyone with only the power to direct an employee's daily activities.

Timeliness Issues

- Burden of proof is on Agency.
- Understand effective date of personnel action.
- Collect information about when Complainant (C) developed “reasonable suspicion.”
- One incident must be timely in harassment and continuing violations.
- Pay claims – each discriminatory paycheck triggers a new filing period.
- Extending the time limits when unaware of them or health reasons interfere.

Procedural Dismissals – Common Errors

- Fragmentation of the legal claim.
- Improper standard for retaliation.
- Improper decisions on the merits.
- Issues of standing.
- Dismissals based on collateral attack on another process.
- Issues surrounding the cancellation of vacancy announcements.

Procedural Dismissals – Avoiding Errors

- Capture multiple incidents as harassment or discriminatory terms and conditions.
- Keep like incidents together.
- Collect basic information from former employees and contractor employees.
- Understand limitations of EEO counseling – no sworn testimony, limited inquiry.
- Collect information about complainant's activities and allegations about other processes.
- Collect information about whether complainant alleges vacancy announcement was cancelled to avoid giving job to complainant because of discrimination.

Consequences of Reversals

- Counseling may have to be reopened.
- Evidence is stale.
- Witnesses may have poor memories, changed jobs, or retired.
- Records may or may not be available.

Keeping Employees Informed

- September 2, 2014 Guidance of Common Practices
- Notify employees quarterly of rights, 45-day timeframe, and contact information for EEO Counselors
- Design and disseminate informative brochures explaining the EEO complaint process
- Produce and post video messages in which the agency head and/or the EEO Director discuss various EEO topics

Keeping Employees Informed (cont'd)

- Use the agency's intranet home page to post information about EEO and Special Emphasis Programs
- Create and hang EEO posters and distribute widely throughout facility
- Establish as a collateral duty an EEO Point of Contact (POC), located at each of the agency's facilities

Keeping Employees Informed (cont'd)

- Send letters *via* postal mail to employees' addresses of record when there is a change of policy or changes in the law
- Use monthly divisional town hall meetings and/or staff meetings to remind employees about their rights
- Ensure that the agency's newsletter includes information concerning employees' EEO rights, 45-day timeframe and contact information for EEO Counselors

Keeping Employees Informed (cont'd)

- Ensure that responsible supervisors communicate EEO information orally and by hard copy delivery and postings at the work site
- Provide mandatory EEO training to everyone
- Conduct brown bag lunches focusing on various EEO topics; live stream webcasts and record for later viewing
- Post EEO information regarding how to initiate an EEO complaint and contact information on employees' pay stubs and/or on the agency's payroll web site



LUNCH BREAK



**RELEVANT EEO
REGULATIONS
&
LAWS**

Pregnancy and Disability

- New Enforcement Guidance on Pregnancy Discrimination and Related Issues
- EEOC regulations distinguish between “normal” pregnancies and those with complications.
- Under ADAAA/Rehab Act expanded rules of construction and definitions, many more pregnancy-related conditions may qualify as “physical impairments” supporting “actual” and “record of” disability claims.

Pregnancy Discrimination Act

- “Sex” in Title VII includes “*pregnancy, childbirth, or related medical conditions.*”
- “[W]omen affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes... as other persons not so affected but *similar in their ability or inability to work...*”

Light Duty & Leave

- Employer must provide light duty for a pregnant worker if it provides light duty for employees who are not pregnant, but who are similar in their ability or inability to work.
- Pregnancy-Related Medical Leave:
 - No forced leave
 - No increased restrictions on pregnancy-related medical leave
- Parental Leave:
 - Must be provided to mothers and fathers on the same terms

Common Accommodations (PDA)

- Modification of job duties, such as provision of “light duty” or redistribution of marginal functions
- Modification of work hours
- Relocation to a different work area
- More frequent breaks
- Modification of policies – permission to use a stool while on duty or to drink from a water bottle
- Additional leave

Broad Definition of Religion

- Theistic beliefs or non-theistic moral or ethical beliefs as to what is right or wrong that are sincerely held with the strength of traditional religious views.
- Belief or practice can be "religious" under Title VII even if it is not followed by others in same religion.

Religious Observances & Practices

- Attending worship services
- Praying
- Wearing religious garb or symbols, displaying religious objects
- Adhering to certain dietary rules
- Proselytizing or other forms of religious expression
- Refraining from certain activities

Prohibited Employment Practices

- Decisions based on customer preference or employer “image”
- Strict application of uniform/dress/grooming codes without showing of undue hardship
 - Safety exceptions
- Retaliation for requesting a religious accommodation
- Harassment

Commission Position (“but for”)

- *Petitioner v. Department of the Interior (National Park Service, NPS)*, EEOC Petition No. 0320110050 (July 16, 2014)
 - The “but for” standard from *Nassar* does not apply to retaliation claims by federal sector claimants.
 - The relevant statutory language under Title VII or the ADEA does not employ the “because of” language on which the Supreme Court based its holdings in *Nassar* and *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167 (2009) (requiring “but for” causation for ADEA claims brought under 29 U.S.C. § 623).

NPS case (cont'd)

- EEOC rejected higher “convincing mosaic” standard used by MSPB and reiterated that complainants can show discrimination through ambiguous statements, suspicious timing, discrimination against other employees, and other pieces of evidence none conclusive in itself but together composing a convincing mosaic of discrimination.

Gender Discrimination

- *Price Waterhouse v. Hopkins* – Sex-based stereotyping a form of sex discrimination.
- Title VII – “because of sex.”
- EEOC cases on gender-based stereotyping:
 - *Ball v. USPS*, 110 LRP 55736, EEOC Appeal No. 0120102678 (Sept. 10, 2010).
 - *Veretto v. USPS*, 111 LRP 46728, EEOC Appeal No. 0120110873 (July 1, 2011).
 - *Castello v. USPS*, 112 LRP 1086, EEOC Request No. 0520110649 (December 20, 2011).

Transgender Claims

- *Schroer v. Billington*, 108 LRP 53915, 577 F.Supp.2d 293 (D.D.C. 2008).
 - Gender-based stereotyping and direct evidence of decisions based on sex
- *Macy v. Dept. of Justice*, 112 LRP 20796, EEOC Appeal No. 0120120821 (April 20, 2012).
 - Complainant expresses gender in a non-stereotypical fashion
 - Employer uncomfortable with fact that person has transitioned or is in the process of transitioning
 - Employer does not like fact that person identifies as transgender
 - Employer applies gender stereotypes

Lusardi v. Army

- EEOC Appeal No. 0120133395 (April 1, 2015)
- Title VII covers transgender status as a form of sex discrimination.
- C identified as transgender woman denied access to the women's restroom and subjected to harassment
- OSC also investigated
- OPM's Transgender Guidance

Sexual Orientation Claims

- *Baker v. Social Security Administration*, EEOC Appeal No. 0120110008 (January 11, 2013)
 - As long as allegations state a viable claim of sex discrimination, fact that Complainant characterized basis as sexual orientation will not defeat an otherwise valid sex claim.
- *Culp v. Dep't of Homeland Security*, EEOC Appeal No. 0720130012 (May 7, 2013)
 - EEOC found it had jurisdiction because Complainant subjected to gender stereotyping; ultimately found for agency.

Interesting Decisions

- *Juergensen v. Department of Commerce*, EEOC No. 0120101504 (EEOC OFO 2013).
 - EEOC remands case to hearing, finding that rehiring former employee who had hung a noose in the workplace years before should have been considered by AJ as to whether this created a hostile work environment.

Special Panel Decision

- *Alvara v. DHS*, Spec. Panel, EEOC No. 0320110053 (July 10, 2014)
- What is an essential function of a position?
 - Agency deemed night shift to be essential function. MSPB found C was not qualified, because he could not work night shifts.
 - EEOC disagreed with MSPB, and determined that essential functions are the duties to be performed or the outcomes to be achieved, NOT attendance or timing of the functions.
 - EEOC: need to avoid result that if attendance or timing essential functions, any individual with a disability who needed leave or a modified schedule as an accommodation would never be found qualified.
 - Special Panel affirmed EEOC's decision.

RETALIATION CLAIMS

- *University of Texas Southwestern Medical Center v. Nassar*, 133 S. Ct. 2517 (U.S. 2013).
- Supreme Court ruled that a “mixed motives” analysis is not available in a Title VII retaliation case, and that the controlling standard is “but for.”
 - “But for” its retaliatory motive, the employer would not have taken the adverse action, meaning that the retaliatory motive made a difference in the outcome.
- The term “but for” does not mean “sole cause,” but precludes a “mixed motives” analysis.

“Cat’s Paw” Theory Used to Prove Retaliation

- *Complainant v. Department of Veterans Affairs, EEOC No. 0120110544 (EEOC OFO 2013)*
- EEOC finds retaliation in non-selection, notwithstanding selecting official’s lack of knowledge of complainant’s protected EEO activity, imputing retaliatory *animus* of complainant’s supervisor to selecting official using “cat’s paw” theory.

“Per Se” Retaliation

- *Complainant v. DOJ (FBI)*, EEOC No. 0120123111 (EEOC OFO 2014)
 - Supervisor’s comments about EEO activity, threat to disband unit, & required return of car.
- *King v. International Boundary and Water Commission*, EEOC No. 0120112384 (EEOC OFO 2013)
 - Supervisor informed co-workers of complaint
- *Complainant v. Department of Defense*, EEOC No. 0120132212 (EEOC OFO 2013)
 - Supervisor said “EEOs are crap,” “EEO people are crazy” and “Don’t be afraid of EEOs, they’ll go away.”
- *Beckham v. Department of the Treasury (U.S. Mint)*, EEOC No. 0120112323 (EEOC OFO 2013).
 - Supervisor says she will start documenting discussion; trust concerns.
- *Gordon v. Department of the Army*, EEOC No. 0720120040 (EEOC OFO 2013).
 - Supervisor said C must use annual leave to file EEO complaint.

DISCUSSION



Discussion

Bob, Cathy's supervisor, subjected her to sexual advances, remarks, and gestures. For example, on a work-related trip, Bob made comments about her breasts, told her to "loosen up," and warned, "you know, Cathy, I can make your life very hard or very easy here." When Bob interviewed Cathy for a promotion, he expressed reservations because Cathy was not "loose enough," and then rubbed her knee. Even though Cathy refused the advance, Bob granted the promotion. Cathy was not aware of the BGD policy against sexual harassment and procedures for employees to report harassment. Cathy did not inform anyone in higher management about Bob's conduct until she decided to file an EEO complaint.



Complaint

- ✓ Cathy will win her EEO case because Bob's comments and actions constitute a hostile work environment and BGD did not exercise reasonable care to stop the harassment.
- ✓ Cathy will win her EEO case because Bob's actions were scandalous and BGD could not avoid liability in any circumstances.
- ✓ Cathy will lose her EEO case because she got the promotion, and therefore she did not suffer any harm or injury.
- ✓ Cathy will lose her EEO case because she failed to report Bob's conduct through the appropriate channels.

What would you do?

An employee comes to you for counseling about a proposed two-week suspension. She informs you that she has been to her union and is pursuing a grievance against management. She wants to know whether she can also file an EEO complaint of discrimination. What are her options, and what do you need to know to answer her?



What would you say?

A contract employee has come to you with a claim of discrimination. The agency attorney gives you a copy of the contract where it specifically states that civil servants will not control the means and manner of the contract employee. Therefore there is no jurisdiction in EEO. She strongly recommends that you stop counseling. How would you respond?

How would you respond?

A complainant comes with a claim of discrimination based on national origin. He provides emails and other documents from beginning in 1991 when he began working and continued up to this date. He states that he has been underpaid for 10 years. He asks you if he has a case. What do you do to counsel him?

Discussion

During your investigation of the complaint of discrimination and sexual harassment, the Complainant, a college intern, informs you that her mother was contacted at home by the responsible official who solicited her verbally, stating that he wanted to be intimate with mother and daughter.

If the contact occurred after the internship ended, what should you do?



COMMON INVESTIGATION CHALLENGES

SHARE YOUR THOUGHTS

A complainant brings a packet of documents that is at least 500 pages. It mostly contains redundant email streams. The complainant insists that this be made part of the record. What do you do? Why?

SHARE YOUR THOUGHTS

A complainant raises new claims of harassment that occurred since the investigation, and therefore were not processed by the Agency. . What would you do? Why?

SHARE YOUR THOUGHTS

A complainant delays meeting with you because she claims to have been stricken by the Corona Virus. It is not clear to you that the Complainant is at all ill. How would you handle the investigation of the case?



Wrap-Up

- Revisit challenges and best practices
- Final questions and answers

Presenter Contact Info:

- **Delia L. Johnson**
- **EEO/Diversity Expert & Consultant**
- **deliaj1219@yahoo.com**

- **Donald S. Johnson, Sr., Esq.**
- **DS Johnson & Associates**
- **mylawyerjohnson@yahoo.com**



Upcoming: We Shall Overcome This Too - How to Ensure Ongoing Belonging & Instill Resilience Through Difficult Times

May 13, 2025 / 1:30-3:30 pm EST (90 minutes)

Free to AAAED members / \$150 for non-members

Registration link in the chat box (<https://attendee.gototraining.com/r/2474600896557595906>)

Please join us as Dr. Damion Jones, Senior Consultant at CMA Global, Inc leads a discussion on how best to continue instilling a sense of belonging and impact for everyone in your organization despite the current sociopolitical landscape. This will be an interactive session that will include breakout rooms to discuss challenges and coping mechanisms.

This presentation will highlight: Tracking current EO's and their relative impact, the value of institutionalizing best practices, what some companies are doing to continue ensuring best practice culture and talent management work, healthy coping strategies for your employees to manage stress, what does the research say about cultivating grit or managing resilience in self, and others-organizationally.



Contact Information

The American Association for Access, Equity & Diversity

1701 Pennsylvania Ave., NW, Suite 200
Washington, D.C. 20006

(202) 349-9855

866-562-2233

contact@aaaed.org / AAAED.org