



SEVEN MISTAKES EMPLOYERS MAKE WHEN THEY GET A CHARGE

EXCEL TRAINING CONFERENCE

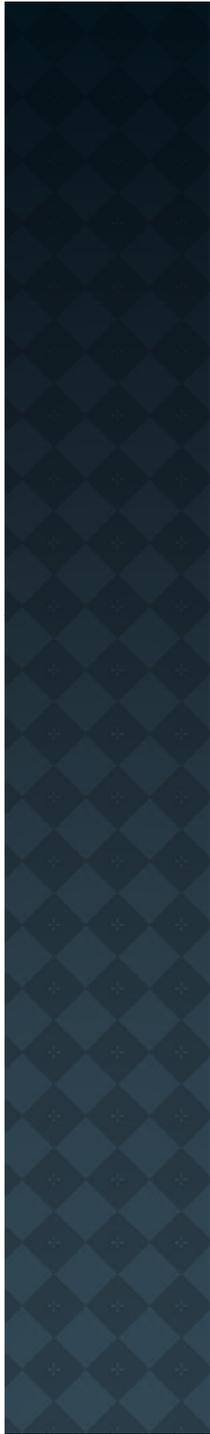
August 27 - 29, 2013

Denver, CO

EVERYTHING YOU NEED TO KNOW ABOUT HANDLING AN EEOC CHARGE

1. Just do whatever we ask, AND
2. Don't ask for extensions.

1. THEY DON'T PRESERVE RECORDS



PRESERVATION OF RECORDS - ALL LAWS

- ◉ Title VII of the Civil Rights Act of 1964, as amended
- ◉ The Equal Pay Act of 1963, as amended
- ◉ The Age Discrimination in Employment Act of 1967, as amended
- ◉ The Americans with Disabilities Act of 1990, as amended
- ◉ The Americans with Disabilities Act Amendment Act (ADAAA)
- ◉ The Genetic Non-discrimination in Employment Act (GINA)

OK OR NOT OK?

- JKL, Inc. is a large manufacturing facility that operates three shifts, 7 days a week. They employ over 1500 shift workers. They receive approximately 200 applications a week. JKL only considers an application active for 90 days, after that it is no longer considered.
- JKL destroys applications after 90 days since they are no longer active. Ok or not ok?

PRESERVATION OF RECORDS

- ⦿ EEOC's record keeping regulations require that "any personnel or employment record made or kept by an employer...shall be preserved by the employer for a period of one year from the date of the making of the record or the personnel action involved, whichever occurs later.... (Title VII, ADA and GINA
- ⦿ Similar provisions under ADEA

PRESERVE AND PROTECT

- Respondents served with a charge by the EEOC must retain all relevant records until the final disposition of the charge:
 - a. personnel records of the Charging Party and any similarly situated individuals
 - b. application forms, test papers, resumes, interview notes, etc
 - c. time cards, sign in sheets, work schedules, etc.

RECORDKEEPING REQUIREMENTS

- ❑ Covered entities must post a notice approved by the EEOC summarizing the statutes' protections

<http://www.eeoc.gov/employers/poster.cfm>



ADVERSE INFERENCE

- ◉ In a situation where the respondent knowingly destroys or knowingly fails to maintain records in anticipation of the filing of a charge, or because of EEOC's investigation, or otherwise with the intent to defeat the purposes of the statutes, the District Director may draw an adverse inference against the respondent as to the evidence sought and may use the adverse inference to establish facts relevant to a determination on the merits

2. THEY DON'T ENSURE NON-RETALIATION



THEY DON'T ENSURE NON-RETALIATION

- There is no effective anti-retaliation policy
- They do not communicate clearly that employees are free to use the policy without fear of reprisal
- They do not avoid any policy that would deter employees from reporting discrimination.
- They do not train managers/supervisors to be aware of their obligations to not retaliate.
- They do not carefully and timely record the accurate business reasons for disciplinary or performance related actions and share reasons with employee
- They do not follow up after a report has been made to ensure non retaliation

COSTS OF RETALIATION

- ◉ Reduced productivity
- ◉ Low morale
- ◉ Absenteeism
- ◉ Employee turnover
- ◉ Time & costs of internal investigations and responses to EEOC
- ◉ Negative press
- ◉ Litigation costs/damages

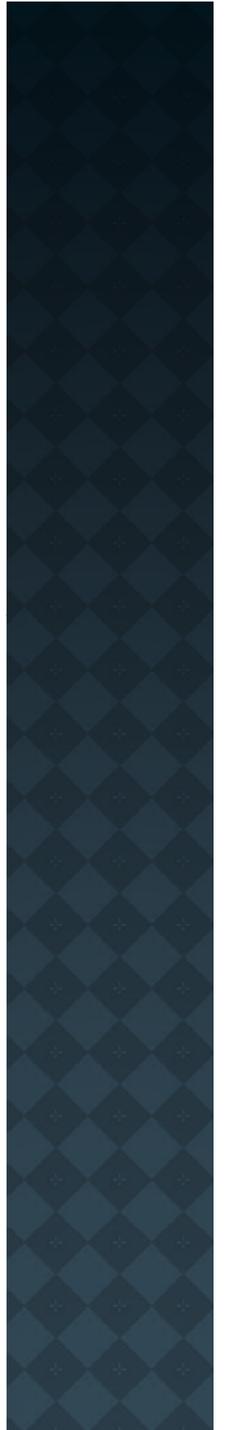


3. THEY DON'T INVESTIGATE



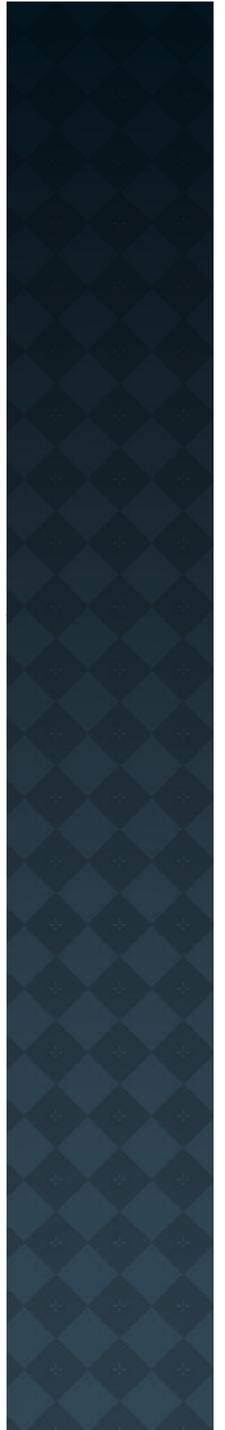
FAILURE TO CONDUCT INTERNAL INVESTIGATION

- ⦿ Key evidence may be lost
- ⦿ May allow discrimination to continue
- ⦿ Missed opportunity to correct problem
- ⦿ May give appearance of complacency to employees involved



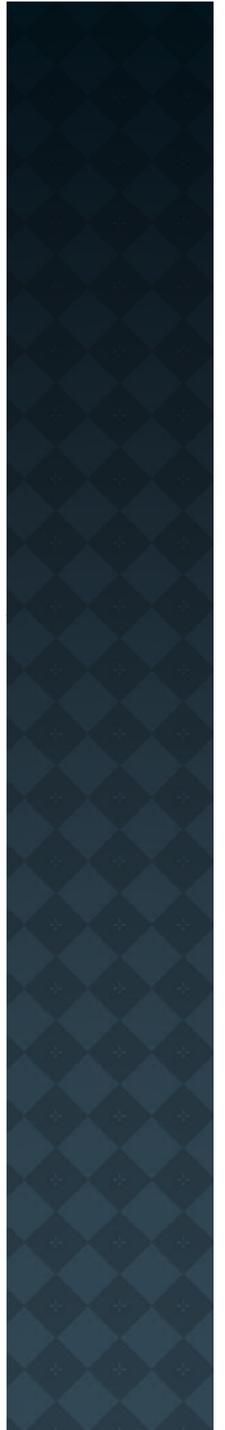
GETTING STARTED

- ⦿ Identify issues
- ⦿ Identify relevant witnesses
- ⦿ Identify any documents relevant to the issue such as time cards, memos, policies, personnel files
- ⦿ Organize list of questions
- ⦿ Conduct interviews



UPON COMPLETION OF INVESTIGATION

- ⦿ Take immediate corrective action, if necessary
- ⦿ In cases of harassment, identify the accused suspected of misconduct and stop further misconduct (consider the severity, frequency, impact on the victim & whether the accused previously engaged in misconduct)
- ⦿ Reinforce established policies



DISCLOSE RESULTS OF INVESTIGATION

- ⦿ Persons Key to the Investigation
- ⦿ Persons Making Decision



4. THEY DON'T MEDIATE

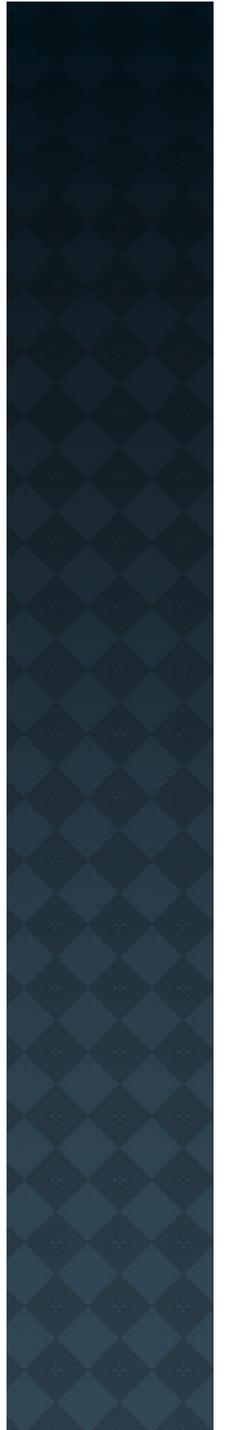


BENEFITS OF MEDIATION

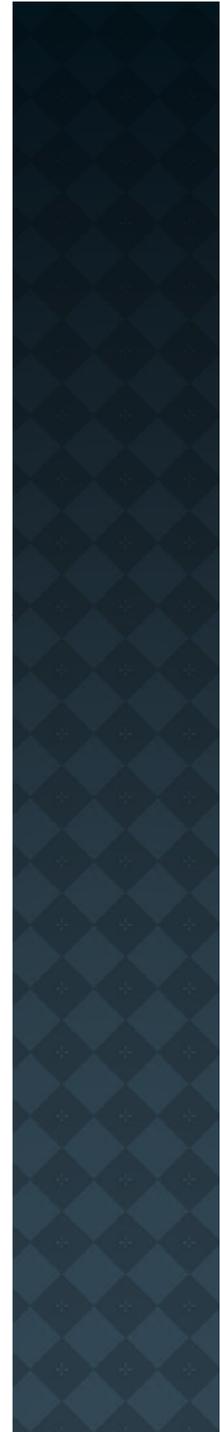
- ◉ Win/Win situation
- ◉ Speeds up the process
- ◉ Charging Party gives up right to sue in court
- ◉ Facilitates economical resolutions for the employer
- ◉ More cases are mediation-worthy than employers think

EEOC'S MEDIATION PROGRAM

- ⦿ It's free
- ⦿ It's voluntary
- ⦿ It's confidential
- ⦿ It's informal
- ⦿ Mediators are neutral
- ⦿ Investigation is suspended during mediation



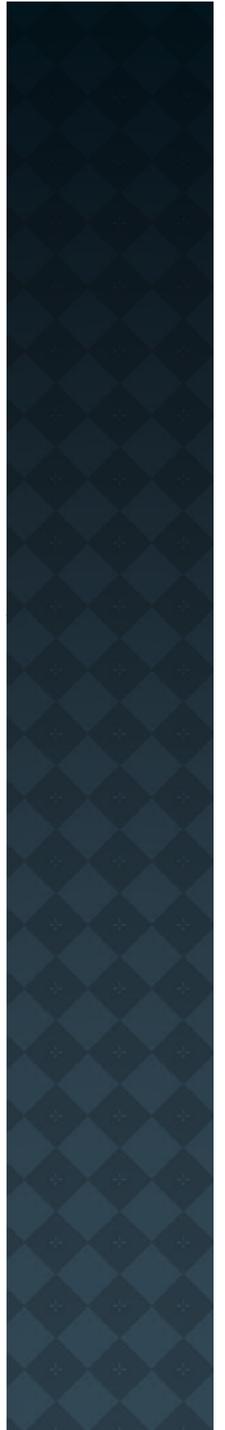
5. THEY DON'T COMMUNICATE



MAKE YOUR FIRST SHOT YOUR BEST SHOT

○ Position Statement

- Respond to the allegations in the charge
- Focus on the facts
- Be accurate
- Be complete
- Base the response on the internal investigation
- Submit evidence in support of the position statement
- Submit witness information



INCOMPLETE OR PARTIAL RESPONSE

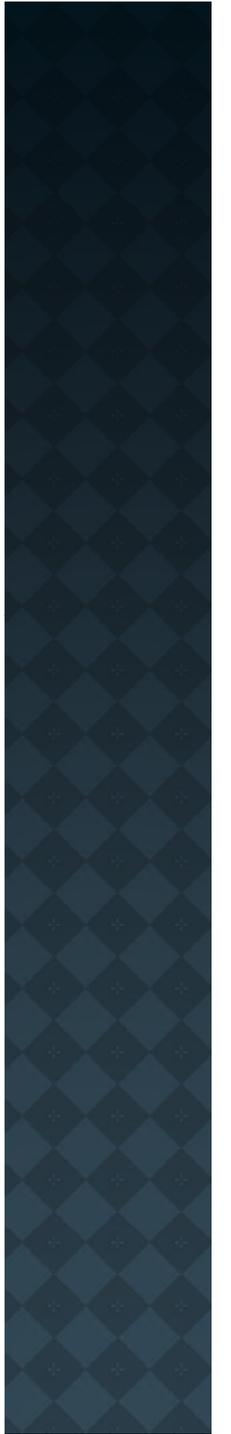
- ◉ Leads to additional letters to respondent/attorney
- ◉ Leads to additional requests for information
- ◉ Leads to on-sites (that may actually not be necessary)
- ◉ Leads to fact finding conferences (that may actually not be necessary)



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ANY QUESTIONS - CALL EEOC

- ⦿ We don't know what you know, and you don't know what we have
- ⦿ If there is a question, **talk with your investigator** (it may save you time and effort)

COMMUNICATE WITH THE INVESTIGATOR

- ◉ Neutral
- ◉ Must gather facts
- ◉ Must assess credibility
- ◉ Must determine whether other individuals have been affected

6. THEY DELAY THE PROCESS



STATUTORY OBLIGATION TO INVESTIGATE

⦿ EEOC has authority:

- to investigate
- to subpoena evidence
- to expand investigations
- to seek relief even if Charging Party has agreed to arbitrate
- to litigate

DELAY TACTICS

- ⦿ Once a charge is filed, the statute of limitations stops running until final disposition
- ⦿ Accrual of back pay and benefits does not stop
- ⦿ The more you delay, the more it could cost you

WHAT IS OVERLY BURDENSOME?

- ⦿ Respondent objects to the request on the grounds that it is overly broad, unduly burdensome, and seeks information outside the scope of the issues raised in the charge of discrimination and that it is not limited as to time, scope, specific employee and location
- ⦿ Respondent objects to the request on the grounds that it seeks personal, private information of third parties

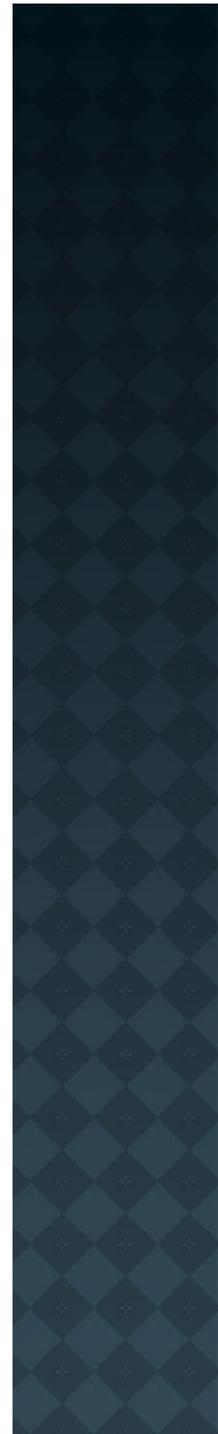
ON-SITES

- ◉ Can enhance probability of discovering or preserving relevant evidence
- ◉ Can help verify or clarify information received in response to a request for information or to resolve inconsistencies in evidence obtained from witnesses or other parties
- ◉ Can help the investigator understand the situation better (plant or work area tour)
- ◉ Can lead to quicker resolution
- ◉ EEOC has authority to enter and inspect respondent facilities, to examine and copy records and conduct interviews

FACT FINDING CONFERENCES

- ◉ Informal investigative forum intended to further define the issues, determine what is undisputed, clarify disputed issues and determine what other evidence is needed
- ◉ Not a hearing or an adversarial proceeding
- ◉ Opportunity to hear/present each party's side
- ◉ Key tool for expediting charge processing within the Priority Charge Handling Procedures (PCHP)
- ◉ EEOC has statutory authority to require persons to appear, produce evidence and testify

7. THEY EQUIVOCATE



EQUIVOCATE?

- ⦿ Only a small number of employers will do this
 - Attempt to conceal evidence or witnesses
 - Falsify documents
 - Threaten witnesses with discipline or discharge
 - Lie to EEOC

BEST PRACTICES TO SAIL THROUGH THE CHARGE PROCESS

- ◉ Conduct internal investigation
- ◉ If discrimination occurred, correct it
- ◉ Attend mediation
- ◉ Prepare accurate, timely response to EEOC charge
- ◉ Don't seek unnecessary extensions as a tactic
- ◉ Remind all involved on non-retaliation policy
- ◉ Cooperate and communicate with Investigator
- ◉ Consider settlement, if appropriate



EXCEL CONFERENCE

EXAMINING CONFLICTS IN EMPLOYMENT LAW

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