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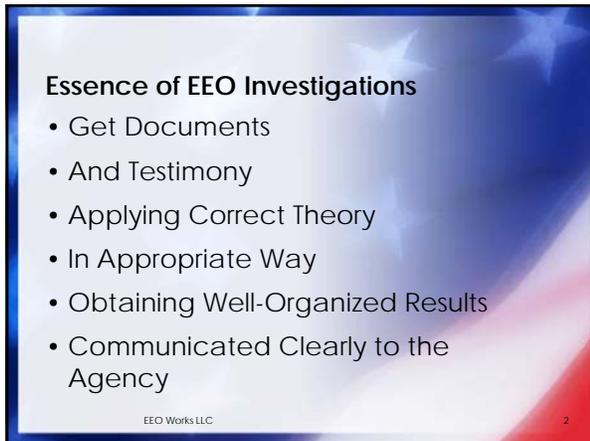
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**Essence of EEO Investigations**

- Get Documents
- And Testimony
- Applying Correct Theory
- In Appropriate Way
- Obtaining Well-Organized Results
- Communicated Clearly to the Agency

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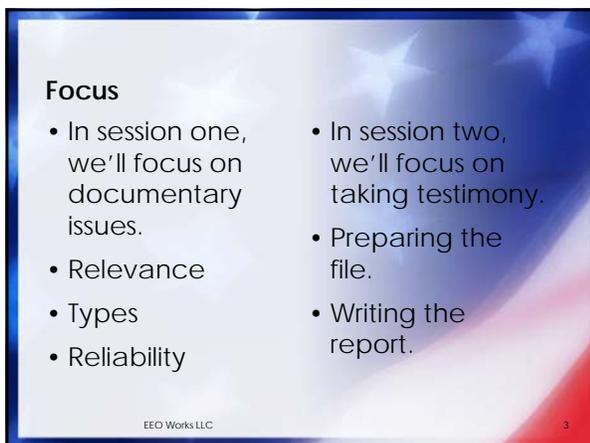
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**Focus**

- In session one, we'll focus on documentary issues.
- Relevance
- Types
- Reliability
- In session two, we'll focus on taking testimony.
- Preparing the file.
- Writing the report.

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### Federal Sector Complaints 2008

- Most frequent basis is reprisal. (45% of complaints)
- Most frequent issue is non-sexual harassment. (30%)
- #2 is promotion/non-selection. (17%)
- "Color" is fast-rising basis. From 644 in 2002 to 1,752 in 2008. High was 2,183 in 2004.

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### Promotion: Age

- Anthony (61) alleges that he was passed over in favor of a 41 year old applicant (Ted) when he sought to become a Technical Expert. He has received no explanation from his agency but, based on his extensive experience, believes there is no reasonable, non-age-based reason upon which he could be denied the job.
- He makes a timely complaint of age discrimination.

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### Building Blocks of Age Promotion Case

- There was a vacancy.
- C was 40 or older at application and met all the legitimate qualifications.
- C was not selected...
- In circumstances which reasonably suggest that his age was a factor which made a difference in his treatment.

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**Legal Background**

- Eventually, if he becomes a plaintiff, Anthony must prove that age was a “but for” factor in his treatment. (*Gross v. FBL Financial Services, Inc.*) (129 S.Ct. 2343) (2009)
- Where a case is built solely/mainly on a comparison of qualifications, the Supreme Court in *Ash, et al. v. Tyson Foods, Inc.* (126 S.Ct. 1195) (2006) set out the standard to be used by the courts citing three lower court decisions with approval....

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**Legal Background**

- *Cooper v. Southern Co.* (disparities in qualifications must be of such weight and significance that “no reasonable person” could have chosen the selectee)(11<sup>th</sup> Cir. 2004)(390 F.3d 695, 732)
- *Raad v. Fairbanks North Star Borough School District* (qualifications are “clearly superior”)(9<sup>th</sup> Cir. 2003)(323 F.3d 1185, 1194) and
- *AKA v. Washington Hospital Center* (significantly better qualified)(D.C. Cir. 1998)(156 F.3d 1284, 1294)

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**EEOC Position**

- EEOC favors the language ...
- “C’s qualifications were **observably superior** to those of the selectee.”
- But remember, in a non-age case, whatever C’s qualifications, “race” might be a motivating factor in his treatment, setting the stage for some level of relief to C. C’s level of relief would depend on whether the agency can prove it would have made the same decision regardless of C’s “race”.

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What theory/theories does the case suggest?



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For a Disparate Impact Case, What Documents Do We Need?



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For a Disparate Impact Case, What Documents Do We Need?

- To identify the selection procedure(s) (SP) causing the impact.
- To measure the impact of the SP on applicants by age.
- To determine the agency's reasonable factor other than age (RFOA) for choosing to use the SP.
- Note: In *Meacham et al. v. Knolls Atomic Power Laboratory* (128 S.Ct. 2395)(2008) and in *Smith et al. v. City of Jackson, Mississippi, et al.* (544 U.S. 228)(2005) the Supreme Court made three big findings:

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### For a Disparate Impact Case, What Documents Do We Need?

- The RFOA defense does not offer Plaintiff the opportunity to demonstrate the existence of an equally effective, alternative SP with lesser impact.
- “[A]n employer is not liable under the ADEA so long as the challenged employment action, in relying on specific non-age factors, constitutes a reasonable means to the employer’s legitimate goals.”
- When asserting a RFOA defense, the defendant bears the risks of non-persuasion.

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### Impact Measurement Issues

- Do we sample or do we determine all persons made to meet the SP?
- What formal assumption underlies the use of the statistical test chosen to measure impact? (e.g., age is a continuous variable)
- In a testing case, do we measure the effective pass rate or accept the pass rate?
- Is this really a “pattern or practice of disparate treatment” case? Etc.
- Get help.

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### For a Disparate Treatment Case, What Documents Do We Need?



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**Key Decisions**

- Proof of **motive** is essential. So, we need to understand how the disputed decision was made and who will be the focus of the investigation.
- What process did the RMO utilize for C? For all others?
- Which others? That is, who is **similarly situated** to C?
- What documents did the RMO review for C? For all others?
- How many and what types of RMO decisions do we look at?

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**Key Decisions**

- What period of time do we choose to examine?
- If we receive a list, how do we know the list is reliable?
- How do we deal with jargon that appears in the documents?
- What do we make of job descriptions and policy statements?

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**Why? Each and every reason the RMO made each relevant decision.**

- It is important that you elicit "each and every" reason from the RMO.
- Because a shifting defense is often taken to be evidence of pretext and
- The evidence related to the different defense might be viewed as unreliable or even spoiled.
- Second, EEOC has many times found a violation in a disparate treatment case where "the agency failed to carry its burden to provide a basis on which complainant could frame her pretext argument." (Ozetta Thomas v. DOA)(July 11, 2008)

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### "Each and Every Reason"

- "[T]he agency failed to set forth, with sufficient clarity, the reasons for complainant's nonselection such that he was given a full and fair opportunity to show pretext." (Robert E. Johnson v. DHS)(March 19, 2009)
- The Supreme Court affirmed this approach in *Texas Department of Community Affairs v. Burdine (450 U.S. 248, 258)(1981)* when it noted "the defendant's explanation of its legitimate reasons must be clear and reasonably specific (so that) the plaintiff be afforded a full and fair opportunity to demonstrate pretext."

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### "Each and Every Reason"

- The lack of contemporaneous, behavior-based documentation forces the agency to give greater emphasis to credibility issues, and
- Place greater weight on whatever inferences can be drawn from the documents that do exist.
- For example, uncorroborated assertions about C's interview may well be trumped by a comparison of C's objective qualifications with the selectee.
- Remember to request all documentation, not just formal documentation (e.g., notes to an interview by panel members, e-mails, informal memos).

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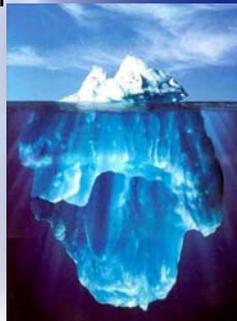
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### "Each and Every Reason"

- Remember: The frequency of unconscious discrimination means your investigation should always seek corroborating documents and testimony in order to test the apparently sincere statement of his motives by the RMO.



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**Importance of Timing**

- Especially in non-selection cases, the timing of the action exposes its lack of relevance.
- In *Hawkins v. SSA* (July 7, 2006), EEOC noted that C's alleged backlog and performance problems did not take place until several months after the selection decision disputed in the charge.
- Sometimes C. is interviewed but not until **after** the selection was already made.
- In *Carver v. DOJ* (August 8, 2005), the RMO attacked C's interview but EEOC noted that the RMO told a coworker **prior** to interviewing C that she would not rehire him.

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**Importance of Timing**

- Sometimes a thing is factually true (e.g., that the selectee had received a certain award) but the RMO was not aware of the fact at the time the selection decision was made.
- Be sure to ascertain **when** a given thing was done, known or considered where the RMO asserts its relevance to his decision.

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**The Status of the Vacancy**

- Be aware that some RMO's have no problem with women, blacks and so forth at one level in the organization but bias enters the picture when the job to be filled is in management or carries with it a certain level of power or visibility.
- For example, receptionist jobs or public contact jobs can bring subtle factors into play (like the interaction between age and sex or customer preference for white males). Hekman, D.R. *et al.*, "An Examination of Whether and How Racial and Gender Biases Influence Customer Satisfaction," *The Academy of Management Journal* (Vol. 53, No.2) (2010)

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### “Three Dimensional” Analysis

- The status of the vacancy is an example of a 3D analysis.
- Other examples are looking not only at the number of disciplinary actions initiated by the RMO in a discipline case but examining the severity of the disciplines separately and
- Looking at attendance data from a number of viewpoints --- quantity, number of occasions, effects on organization, Friday-Monday pattern.

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### Non-Sexual Harassment: Color

- Cynthia is a light-skinned African American who prefers to dress in business suits and maintain a “professional” appearance. She dyes her hair blonde. As an attorney, she works closely with her mentor, a white supervisory attorney, Brad. Based on a series of events, she believes she is being undermined by three dark-skinned co-workers.
- She files a timely complaint of harassment based on color.

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### Building Blocks of Harassment Case

- Certain things were said or done
- Which were motivated by an illegal **motive** and
- Which were **severe** enough to create an abusive work environment, altering the terms and conditions of complainant’s employment.



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## Building Blocks of Harassment Case

- Where a member of management initiates the behavior or participates in/condones the behavior, the agency will likely be liable. (because affirmative defense will not be available as C would have made a complaint)
- Who is a member of management?
- Where non-managers initiate the behavior, the agency will not be liable unless it knew of the behavior (or should have known of it) and failed to take prompt and effective action.

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## Legal Background

- Sexual harassment has been extensively studied but we can apply some of this literature to all forms of harassment.
- Here are four studies:



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Perry, E.L. *et al.*, (2004) "The Reasonable Woman Standard: Effects on Sexual Harassment Court Decisions," *Law and Human Behavior*, Vol. 28, No. 1, 9-27.

Blumenthal, J.A., (1998) "The Reasonable Woman Standard: A Meta-Analytic Review of Gender Differences in Perception of Sexual Harassment," *Law and Human Behavior*, Vol. 22, No. 1, 33-57.

Rotundo, M. *et al.*, (2001) "A Meta-Analytic Review of Gender Differences in Perceptions of Sexual Harassment," *Journal of Applied Psychology*, Vol. 86, 914-922.

York, K.M., (1989) "Defining Sexual Harassment in Workplaces: A policy-Capturing Approach," *Academy of Management Journal*, Vol. 32, No.4, 830-850.

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### Factors Affecting Verdicts in SH Cases

- Frequency
- Severity --- especially physical touching
- Status Difference of Harasser
- Job Consequences
- Witnesses
- Documents
- Business Reasons (defense for any actions taken)
- Internal complaint by C
- Organizational response to complaint

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### Factors Affecting Verdicts in SH Cases

- Response of C showing behavior clearly unwelcome.
- **These factors are present along a continuum. As the facts in the case approach the extreme ends of each continuum, the power of the factor to influence the outcome increases.**

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So, how do we proceed?



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**Witnesses**

- Who do we attempt to interview?
- Face-to-face? By phone?
- Budget constraints an ethical problem?
- How do we record the interviews? (Sworn statements from everybody?)
- How do we attempt to corroborate what the witnesses say?

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**Determining Motive in a Harassment Case**

- Content of the behavior many times shows the motive for the behavior.
- How do we develop motive evidence where the behavior is not clear in its motivation?
- For example, scratching C's car in the lot, locking down C's computer when she steps away from her desk, throwing away material she has printed on a common printer etc.

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**"Each and Every Behavior"**

- You will ordinarily not have to investigate every instance of alleged harassment but it is important to get every allegation on the record.
- Why? Because C has one shot at proving **severity**. The agency will assess severity based on your record, with the assumption that your record contains all that is being alleged.
- This requires that you establish rapport with C, especially where C may have done something of which she is ashamed or vaguely unsettled by and which may be inhibiting her from broaching certain topics.

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### **“Each and Every Behavior”**

- You must be careful to avoid any appearance that you are judging C’s reaction to any alleged behavior.
- Studies show that people consistently imagine that they will deal effectively with given behavior while actual events show people often “freeze” or even go along with the aggressor.
- Thus, you might be tempted to look down on C for her reaction, imagining you would have done much better. C senses this and shuts down the flow of information.

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### **Eliciting the Defense**

- Where the alleged harasser is a member of management and cites to C’s performance as a basis for any action taken against her,
- Document C’s performance but weigh the effect of any harassment on her performance.
- See if she is similar in performance to any others reporting to the alleged harasser in order to compare her treatment to theirs.
- See if her poor performance went undisciplined until she refused to accept the harassing behavior. (a timing issue again)

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### **Other Harassment Issues**

- Initial willingness or consent on C’s part.
- Can an “eggshell” complainant still be a “reasonable woman”?
- If religious harassment is alleged, remember to consider the “free exercise” and “establishment of religion” dimensions to the complaint.
- If C is a recipient of harassing behavior, is she the only one?
- If witnesses are reluctant to talk, is there a systemic problem the agency needs to address?

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### Reprisal: Terms and Conditions

- Caroline, a nurse in the Specialty Clinic, lodged a complaint of sexual harassment against her supervisor. As a result of its internal investigation, the agency demoted and suspended the supervisor. The supervisor's friends at her facility have stopped speaking to her. She is no longer sent group e-mails that pass around jokes, recipes and other, sometimes job-related info. Her Nurse Manager abruptly reassigned her to the Primary Care Clinic a week after the supervisor's demotion.
- Caroline files a timely complaint alleging retaliation.

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### Building Blocks of a Retaliation Case

- C must have opposed a practice made illegal by Title VII, the ADEA, the ADA/Rehab Act or EPA, made an EEO complaint, participated in an EEO proceeding or be perceived as having done so.
- At some later time, C must have experienced a harmful change in her employment situation...
- **Because of** her opposition, complaint or involvement.

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### Legal Background

- Prior to the Supreme Court's 2006 decision in **Burlington Northern and Santa Fe Railroad Company v. White (126 S.Ct. 2405)**, the lower courts wrestled with how material a change in C's work conditions had to have occurred for the change(s) to be an actionable harm.
- In the Federal Sector especially, complaints were received alleging apparently minor changes in C's post-complaint situation.
- In **White**, the Court made the following points:

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**The "Burlington Northern" Standard**

- "Title VII's substantive provision and its anti-retaliation provision are not coterminous. The scope of the anti-retaliation provision extends beyond workplace-related or employment-related acts and harm." (at 2414)
- The complained of action must rise to the level of material harm as a means of separating out mere annoyances from harms severe enough to dissuade employees from seeking remedy.
- "Material" is that which "might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.'" (at 2415)

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**The "Burlington Northern" Standard**

- There is an obvious catch 22 here. Anyone who alleges retaliation has not been dissuaded from filing a claim. So, logically, only those actually dissuaded from filing would be able to file but, by filing, would prove they were not dissuaded.
- The lower courts have generally ignored this logical trap.
- Compare *Johnson v. McGraw-Hill Companies* (451 F.Supp. 2d. 681, 711)(W.D. Pa. 2006)("It is not necessary for Johnson to establish that he was actually dissuaded from seeking legal recourse (which he obviously was not)...." with

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**The "Burlington Northern" Standard**

- *Sykes v. Pa. State Police* (2007 WL 141064)(W.D.Pa. Jan. 17, 2007) ("The Supreme Court held in *Burlington* that conduct does not amount to an adverse employment action absent a likelihood that the action was significant enough to deter future complaints.... Sykes's own aggressive response to what she identified as instances of discrimination belies any argument she might make that a reasonable person confronted with the 'adverse employment actions' that she describes would have been dissuaded from voicing additional allegations of discrimination.")

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**The "Reasonable Worker" Standard**

- In determining whether the Plaintiff is reasonably construing the complained of actions as retaliatory and as a material harm, "**context matters**".
- It is necessary to consider the context of P's employment. An action normally minor in scope or effect might be actionable in the context of P's employment.
- The Court gave two examples:

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**The "Reasonable Worker" Standard**

- "A schedule change in an employee's work schedule may make little difference to many workers, but may matter enormously to a young mother with school-aged children." (at 2415-16)
- "A supervisor's refusal to invite an employee to lunch is normally trivial, a nonactionable petty slight. But to retaliate by excluding an employee from a weekly training lunch that contributes significantly to the employee's professional advancement might well deter a reasonable employee from complaining about discrimination." (ibid.)

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**Implications For Your Investigation**

- Again, you must elicit each and every aspect of C's employment context in order to portray properly her argument that (s)he has suffered a **material harm**.
- Second, assuming that such a harm is alleged, your investigation has to enable the agency to determine whether:
- Those who harmed C. were **aware** of her opposition, complaint or participation and whether the one **caused** the other.

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### 3D Analysis: Importance of Timing

- Generally, a close connection in time between gaining knowledge of C's complaint and the alleged harm(s) supports the inference of a cause and effect relationship between the two.
- However, there can be other triggers that support the same inference.
- For example, the issuance of an agency decision or, as in our scenario, the suspension of the accused are changes in the context that might revive the resentment felt at the time of the initial complaint.

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### 3D Analysis: Admission Against Interest

- Some persons readily accept one's right to file an EEO complaint but they create a mental reservation that excludes the right to make a frivolous complaint or an especially unfounded complaint.
- Such persons may be quite open about their retaliatory motives because they do not see what C did as protected activity.
- Or they may feel they can speak with whom they want to or work only minimally with C. No law can require them to do more than the minimum.

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### Addressing the Defense

- Reprisal cases are a subset of disparate treatment cases. Your investigative file should still give the agency enough evidence to decide whether C was treated differently and why.
- Thus, the RMO will articulate each and every reason for his treatment of C, and
- Your investigation will explore whether those under the RMO's scope of authority who did not complain or participate were held to the same standards as C.

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## Addressing the Defense

- Thus, though C's original complaint might have been based upon race, the comparisons you will make in C's retaliation complaint will be between those who complained/participated (whatever their race) and those who did not (whatever their race).
- If the RMO asserts a lack of knowledge, you should explore the normal procedure followed by the agency when a complaint is filed in order to assess how likely it is that the RMO was not aware of C's earlier complaint. Determine the actual procedure when C's complaint was received.

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## The Rehab Act

- The retaliation provisions of the ADA include a prohibition against **intimidation** as well as reprisal and retaliation.
- Intimidation occurs when an agency employee attempts to interfere with any individual in the exercise of or in the aiding or encouraging any other person in the exercise of any right under the ADA.
- For example, a staff nurse who encourages a worker returning from sick leave to file a request for reasonable accommodation.

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## Final Note

- Just as in a harassment case, you may find that the RMO tolerated performance deficiencies in C's behavior until C made an EEO complaint.
- Unless the RMO was already on record with respect to these deficiencies and his actions amount to a continuation of a process he had already initiated, the abrupt change in the way he responded to C's deficiencies might well indicate a retaliatory motive.

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Let's Take a break! See you in 30  
Minutes.



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