



Conducting Thorough EEO Investigations & Preparing a Meaningful Report of Investigation

Kathy Aram & Bismarck Myrick
EXCEL CONFERENCE 2010
Orlando, Florida



FRAMEWORK FOR DEVELOPING INVESTIGATIVE PLANS

- Understand the Complainant's Theory of Liability
- Understand Elements of Claims & Defenses
- Marry Elements of Claims & Defenses with Complainant's Theory of Liability
- Ensure that Grounds for Procedural Dismissal are considered

Conducting Thorough EEO Investigations & Preparing a Meaningful Report of Investigation
Slide 2 of 16



Harassment Investigations

1. Is complainant a member of a statutorily protected class?
2. Has complainant been subjected to unwelcome conduct?
3. Is the conduct based upon his class membership?
4. Did the conduct affect a term condition or privilege of employment by either creating a hostile work environment or culminate in a tangible employment action?

Conducting Thorough EEO Investigations & Preparing a Meaningful Report of Investigation
Slide 3 of 16



Defenses Harassment by Manager

- The agency is liable even if management did not know, unless both prongs of affirmative defense are met:
 - The agency exercised reasonable care to prevent and promptly correct harassment, **and**
 - The employee unreasonably failed to take advantage of any preventative or corrective opportunities offered by the agency or to avoid harm otherwise

Conducting Thorough EEO Investigations &
Preparing a Meaningful Report of
Investigation
Slide 4 of 16



Harassment by co- worker/non-employee

Agency is liable if it knew or should have known of the harassment and failed to take immediate and appropriate corrective action

Conducting Thorough EEO Investigations &
Preparing a Meaningful Report of
Investigation
Slide 5 of 16



Exercise 1

Complainant, a prison guard, reported that on

August 5, 2005, an inmate under her supervision exposed himself to her, and on the same day exposed himself to a fellow guard. As a result, the inmate was sent to the SHU for the weekend.

January 3, 2006, the inmate followed her out of his cell and exposed himself to her while making a sexually suggestive gesture.

January 26, 2006, the inmate exposed himself to her and made sexually suggestive gestures and later that day the oily, naked inmate approached her, grabbed her hand to force her to touch him, grabbed her breast, touched her between her legs and pinned her against a window. The senior officer on duty rescued complainant for additional harm and placed handcuffs on the inmate.

Conducting Thorough EEO Investigations &
Preparing a Meaningful Report of
Investigation
Slide 6 of 16



Exercise 2

Complainant is a former Part Time Distribution Window Clerk at the post office in Dyersburg, Tennessee. When complainant was purportedly not being given enough work hours at the Dyersburg Office, she phoned several different offices in the area asking if they needed any help on a week to week basis in order to increase her work hours.

On or about September 1, 2001, she talked to the Postmaster at the Alamo Post Office (NH) about the possibility of working at Alamo. NH showed complainant around the post office, and took her out of the office to show her different areas of the town for when she carried loops. Specifically, NH showed her a mail route that he once handled by use of a bicycle, an event that merited attention from a television station that did a news story. NH then invited complainant to his apartment to watch the video of the TV story. NH also asked complainant to go to his bedroom to read a newspaper clipping about his son and his chess club posted on the bedroom wall.

Conducting Thorough EEO Investigations &
Preparing a Meaningful Report of
Investigation
Slide 7 of 16



Exercise 2, cont.

After the interview, complainant began working part-time in the Alamo Office, a few hours a week, to increase her work hours.

On Saturday, September 15, 2001, she was working as a window clerk in Alamo and being trained by NH. Complainant mentioned to him that she enrolled her son in karate classes and was interested in taking a self-defense course herself. The conversation ended with NH showing complainant martial art techniques, which resulted in him striking her in the chest and placing her in an arm lock. The following Monday morning, complainant reported to work at Dyersburg and told her supervisor that she did not wish to return to Alamo. As a result, complainant's last day at Alamo was September 15, 2001, complainant worked at Alamo over a period of approximately six partial days and one full day.

On September 24, 2001, complainant filed an assault warrant against NH at the Crockett County Jail in Alamo, Tennessee.

Conducting Thorough EEO Investigations &
Preparing a Meaningful Report of
Investigation
Slide 8 of 16



Disability Investigations

Does the individual have a substantially limiting impairment; or does the individual have a record of a substantially limiting impairment; or is the individual regarded as having a substantially limiting impairment?

Conducting Thorough EEO Investigations &
Preparing a Meaningful Report of
Investigation
Slide 9 of 16



“Qualified”

Can the individual perform the essential functions of the position held or desired with or without reasonable accommodation?

Conducting Thorough EEO Investigations & Preparing a Meaningful Report of Investigation
Slide 10 of 16



Reasonable Accommodation & Disparate Treatment

- Disparate Treatment Question: Was complainant treated differently from similarly situated employees?
- Reasonable Accommodation Question: Did the agency reasonably accommodate complainant?

Conducting Thorough EEO Investigations & Preparing a Meaningful Report of Investigation
Slide 11 of 16



Defenses

- Undue Hardship,
- Direct Threat, and
- “Other Federal Laws”

Conducting Thorough EEO Investigations & Preparing a Meaningful Report of Investigation
Slide 12 of 16



Exercise 4

- Complainant, who has a very rare congenital condition called “exstrophy of the cloaca,” applied for an overseas position with the Department of State.
- Complainant’s internist, (Dr. I) reported that complainant’s ileostomy is “easily managed and stable.” Her “mild proteinuria and pyuria is in normal chronic stable condition, and does not pose a problem to her health.” He indicated complainant could participate in all activities, that “no follow up is needed” and that complainant would require only the usual preventative therapies for infectious disease.

Conducting Thorough EEO Investigations & Preparing a Meaningful Report of Investigation
Slide 13 of 16



Exercise 4, cont.

- Complainant’s neurosurgeon, (Dr. N), reported that she had recovered from her surgery, has no restrictions, and could participate in all activities.
- State’s Nurse questioned complainant about her condition. Complainant told the Nurse that she was not more susceptible to infectious diseases, and that the only major implication of her condition is that “she goes to the bathroom” differently than most.
- State’s clinical director reviewed her file and denied her a Class 1 Medical Clearance because she was not worldwide available.

Conducting Thorough EEO Investigations & Preparing a Meaningful Report of Investigation
Slide 14 of 16



Exercise 5

- On October 26, 2007, petitioner, an air traffic controller, filed a mixed case appeal with the MSPB, alleging that the agency discriminated against her on the bases of race (African-American) and disability (knee injuries and cancer) when it removed her from Federal employment effective October 13, 2007, citing “unavailability for duty.”
- In 1995, Petitioner injured both knees. Ten years later, she re-injured her knees while climbing stairs at work and was placed on leave without pay and later under an OWCP claim.
- On February 8, 2006, petitioner returned to work. Around that time, she informed her manager (S1) that she planned to take a lengthy absence for knee surgery. S1 suspended petitioner’s training until after her surgery so as not to require repetitive training and petitioner performed admin duties.
- On February 27, 2006, petitioner began a medical leave of absence for arthroscopic surgery on her left knee.

Conducting Thorough EEO Investigations & Preparing a Meaningful Report of Investigation
Slide 15 of 16



Exercise 5, *cont.*

- On April 24, 2006, petitioner was diagnosed with breast cancer. Petitioner had breast cancer surgery on May 15, 2006.
- On May 30, 2006, petitioner had the surgery on her right knee. While preparing for further treatment for her cancer, petitioner learned that she was pregnant. Petitioner stated that she had pregnancy complications due to gestational diabetes, her age, and the cancer.
- On February 26, 2007, petitioner gave birth. Several months after her delivery, on June 1, 2007, petitioner began chemotherapy, but discontinued it after an adverse reaction. Petitioner had to receive other treatments to address her adverse reaction.

Conducting Thorough EEO Investigations &
Preparing a Meaningful Report of
Investigation
Slide 16 of 16
