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Investigator Skills Part 1

Preview

- Areas that trip us up!
  - Non-selection
  - Harassment
  - Constructive Discharge
  - Retaliation
- Ten tips for timeliness
- Documentary evidence

Amy's Method of Investigation:

What is the first decision you must make upon receiving a new case for investigation?

Answer:

Which legal theories apply to the case!

How do we decide the legal theories?

Look at the claims and bases:

"Whether the Complainant was discriminated against based on her sex and disability when she was not selected for a Supervisory Attorney position, GS-15, on January 8th, 2012."

Model Analyses can be found in MD 110, Appendix L:

- *http://www.eeoc.gov/federal/directives/md110/appendixl.html*

- Disparate Treatment
- Hiring/Promotion
- Discharge/Disciplinary Action
- Retaliation
- Disability – Reasonable Accommodation
- Disability- Disparate Treatment
- Religious Accommodation

Non-selection (Hiring/Promotion)

- Prima Facie Case:
  - Complainant is a member of a protected group
  - Was there a vacancy?
  - Did Complainant apply?
  - Was Complainant qualified; was Complainant rejected?
  - Was the vacancy filled? Is so, was the selectee a member of Complainant's protected group?
  - OR… Is there direct evidence that shows discriminatory intent?

Non-selection cont'

- Rebuttal (Management's legitimate, non-discriminatory response):
  - What did the agency say was the reason for rejecting Complainant?
- Pretext
  - Is there direct or circumstantial evidence that the agency's reason for rejecting Complainant is pretextual?

Areas that Trip Us Up

Non-Selection cases

Management must be **clear** and **specific** about its reason for rejecting Complainant. A lack of specificity deprives the Complainant the ability to show that the stated reason was a pretext for discrimination. *Stewart v. DOJ, 2005 WL 2492884 (EEOC); Taylor v. USPS, 1988 WL 918422 (EEOC)*

How to Keep from Tripping

- Ask management to describe the duties of the position they were filling
- Ask them to describe what skills or experience they were looking for to best fit those duties
- Ask them what skills or experience the selectee had that made them the best qualified for those duties
- Ask them why the Complainant was not considered as good of a fit

How to Keep from Tripping

- Ask management to respond to any of Complainant's specific allegations as to why they thought they were the best candidate
- If they can't recall with this much specificity, offer them the application materials or resumes that they would have reviewed when they made their selection

Areas that Trip Us Up!

Non-selection cont'

Pre-selection and irregularities in the selection process may be evidence of discriminatory animus. *Branon v. Dept. of Veterans Affairs, 2002 WL 1773812 (EEOC) citing Wilson v. Dept. of Defense, EEOC No. 01984007 (September 28, 2001) reconsideration denied.*

How to Keep from Tripping

- Ask management to describe the selection process
- Have them respond to any allegations Complainant makes that the process was irregular or this was a pre-selected candidate
- Ask them if they have used this selection procedure in the past (E.g., Do they normally conduct interviews? Do they normally call supervisors for references?)

How to Keep from Tripping

- Interview Human Resources in all non-selection cases so that they may walk us through the selection process as the technical expert
- Have Human Resources describe the normal practice or official agency procedures and whether it was followed in this case

Non-selection example

Areas that Trip Us Up!

Harassment claims

Managing the continuing violation claim

How to Keep from Tripping

- What is part of the claim and what is background/supporting evidence?
  - What is relevant to the timely claim
    - Exception: Ledbetter Fair Pay Act
    - Exception: Duty to provide a reasonable accommodation
  - Untimely discrete acts cannot be part of the claim. *See EEOC Compliance Manual Section 2: Threshold Issues*

Harassment Example

Areas that Trip Us Up!

Constructive Discharge

- Resignation in lieu of termination
- Intolerable working conditions

Amy's Pet Peeve!

There is no constructive resignation!!!

Legal Elements

Intolerable working conditions:

- A reasonable person in the Complainant's position would have found the working conditions intolerable;
- The intolerable working conditions were created by conduct that constitutes unlawful discrimination; and
- The resignation was caused by the intolerable conditions.

Intolerable conditions:

- The conditions created an unbearable or hostile work environment to such an extent that a **reasonably prudent employee** would have felt compelled to resign. A showing of something more than dissatisfaction or disappointment with one's work situation is required. This is an objective "reasonable person" standard, not the subjective perception of the employee.

Caused by discriminatory conduct

- Even if work conditions are objectively intolerable, the Complainant must also show that the conditions were created by discriminatory conduct. For example, sexually harassing the Complainant or refusing to accommodate a disabled employee. The hostile work environment analysis will be used to determine if the conduct is sufficiently severe and pervasive, etc.

Causal Connection

- The Complainant must also show that the intolerable work conditions prompted the resignation and not some other unrelated reason. For example, the Complainant's spouse was transferred, the Complainant quit to stay at home with their child, etc.

How to keep from tripping:

- It is important to always find out if the Complainant signed a written resignation.
- Investigate a claim of intolerable working conditions constructive discharge similar to a hostile work environment claim.
- If the harassing conduct stopped some time before the resignation, how long ago did it stop? Why did the Complainant wait to resign?
- Get on the record whether the Complainant is currently employed, where, their salary, etc. This will go to damages if there is a finding of discrimination.
- Consider interviewing co-workers to find out if the Complainant made previous plans to resign for reasons other than due to discrimination.

Areas that Trip Us Up!

Investigating claims of Retaliation/Reprisal

Model Analysis: Reprisal

- Prima Facie case:
  - The Complainant has engaged in protected EEO activity;
  - Management was aware of the protected EEO activity;
  - Management took some action that adversely impacted the Complainant following their protected activity;
  - Some causal connection exists

Engaging in protected activity:

- Participation in the EEO process
  - Prior involvement in the EEO process either at the informal or formal stage. You can be a Complainant, a witness, EEO Counselor, EEO Investigator, as a representative or any other capacity.
- Opposition to discrimination
  - Encompasses all forms of verbal and non-verbal opposition to discrimination. Must be lawful activity and must have reasonably and in good faith believed complaining actions were unlawful. EEOC Directive 915.003

- Participation by affiliation –
  - Thompson v. North American Stainless, LP, 132 S.Ct. 863 (2011) -

Want more info?

http://www.eeoc.gov/policy/docs/retal.html

Ten Tips for Timeliness

1. Prepare your witnesses before the interview.
2. Give everyone due dates and follow up on the exact day they are due.
3. Make early contact with Complainant to review claims accepted for investigation and ask for documents and witnesses.
4. Anticipate rebuttal in Complainant's interview.

Ten Tips for Timeliness

5. Write summary as you receive the affidavits, don't wait until they are all in.
6. Take notes during your interviews and underline or star any new information that needs follow up.
7. Be prepared with a "please cooperate" letter after missed deadlines. Include citation to 29 CFR 1614.108(c)(3).

Ten Tips for Timeliness

8. Don't overload investigators with too many cases.
9. Have a review process for Investigative Plans to catch major misses early.
10. Conduct a document review as you receive them.

Document Review

- Purpose of the documents
  - Factual Corroboration
  - Provides comparative information
  - Explains agency policy
  - Ensure protected traits are included
  - How they are sanitized/redacted

Let's take a break!