

Responding to Charges of Employment Discrimination

PARTICIPANT GUIDE

SEPTEMBER 8 – OCTOBER 16, 2020

ONLINE





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Technical Problems?

Contact the Course Administrator Jenn McNally jmcnally@cwcc.org (fastest response)
202-629-5623 (weekdays 9 am – 4:30 pm ET)

Welcome

Greetings and welcome to Responding to Charges of Employment Discrimination. The Center for Workplace Compliance (CWC) designed this course for employer representatives who have direct responsibility for investigating and responding to discrimination charges filed with the Equal Employment Opportunity Commission (EEOC).

During the course, we encourage you to share your own experience and ask lots of questions. Webinars (we'll call them "Web Sessions") and discussion forums provide plenty of opportunities to learn not only from CWC's expert facilitator, but also from other participants in the course who may have valuable experience in this area as well.

Take some time to read over the next few pages of the Guide to learn about how to access the course, see a description of the course's structure and agenda/schedule, find out your responsibilities as an online participant, and learn how to get technical support and answers to your questions.

Technical Requirements

Before accessing the course, check to make sure your computer is properly configured to use the CWC learning system and Microsoft® Teams.

- Browsers: Google Chrome (latest version); Internet Explorer 8.0 or later; Firefox (latest version); Mac Safari 7 or later
- Screen resolution set to 1024 X 768
- Internet with medium to high-speed connection
- JavaScript and cookies must be enabled in the browser
- Plug-in: Flash player; the course is also HTML5 compatible (for iphone and ipad viewing)
- Plug-in: Adobe Reader
- Turn pop-up blockers off. If pop-up blocker is on, you'll be able to enter the CWC learning system but the course – which opens in a new window – will not display.

If your organization is a federal contractor, your computer may be configured to meet specific organizational security and other requirements. If you have technical issues, tell us. Please understand, however, that you may need to contact your organization's IT Support in some cases.

Technical Problems?

Contact the Course Administrator Jenn McNally jmcnally@cw.org (fastest response)
202-629-5623 (weekdays 9 am – 4:30 pm ET)

Professional Certification

Human resource professionals may receive recertification credit hours for this course.



CWC is recognized by SHRM to offer Professional Development Credits (PDCs) for the SHRM-CPSM or SHRM-SCPSM. This program is valid for 13.25 PDCs for the SHRM-CPSM or SHRM-SCPSM. For more information about certification or recertification, please visit www.shrmcertification.org. SHRM Activity ID: 20-XYGUC

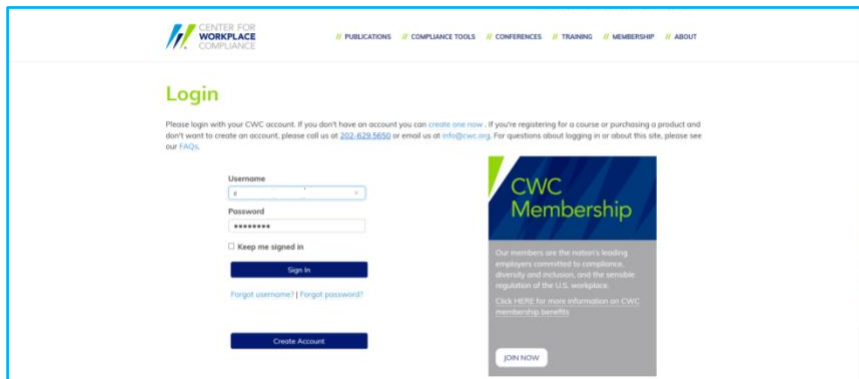


This Program, ID No. 507149, has been approved for 13.25 HR (General) recertification credit hours toward aPHR[™], PHR[®], PHRca[®], SPHR[®], GPHR[®], PHRi[™] and SPHRi[™] recertification through HR Certification Institute[®] (HRCI[®]). Please make note of the activity ID number on your recertification application form. For more information about certification or recertification, please visit the HR Certification Institute website at www.hrci.org.

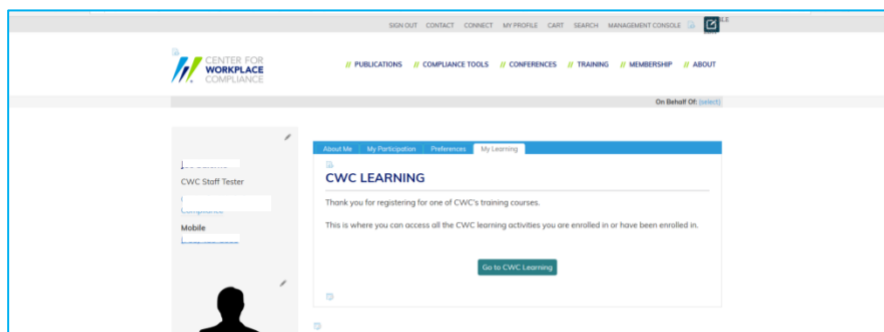
Attorneys may submit this course for credit towards mandatory continuing legal education requirements. CWC provides attorneys with a MCLE form, which they may submit to have the course considered by their state(s), in the Attachments tab of the CWC learning system.

Logging in to the Online Course

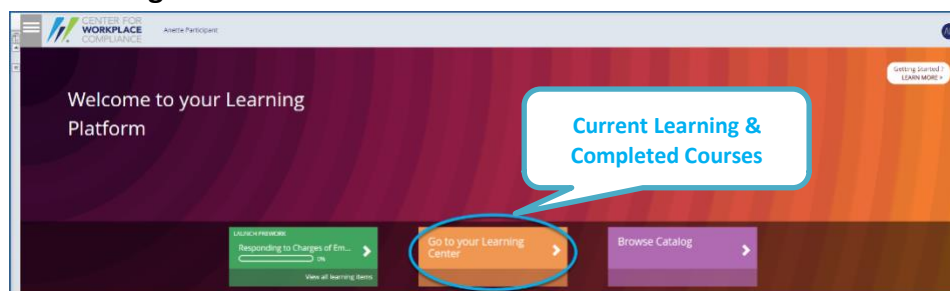
1. Enter into your browser: <https://cwc.org/MyLearning>.
2. Enter your CWC username and password. Then click **Sign In**.



3. The CWC Learning screen below displays (in your profile). Click Go to CWC Learning.



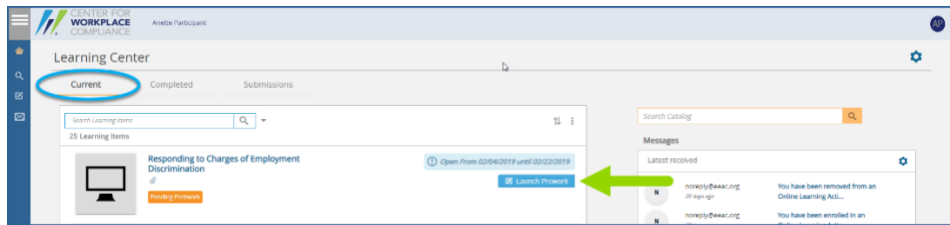
4. The CWC Learning portal opens on your **Welcome** screen. Select the orange **Go to your Learning Center** button.



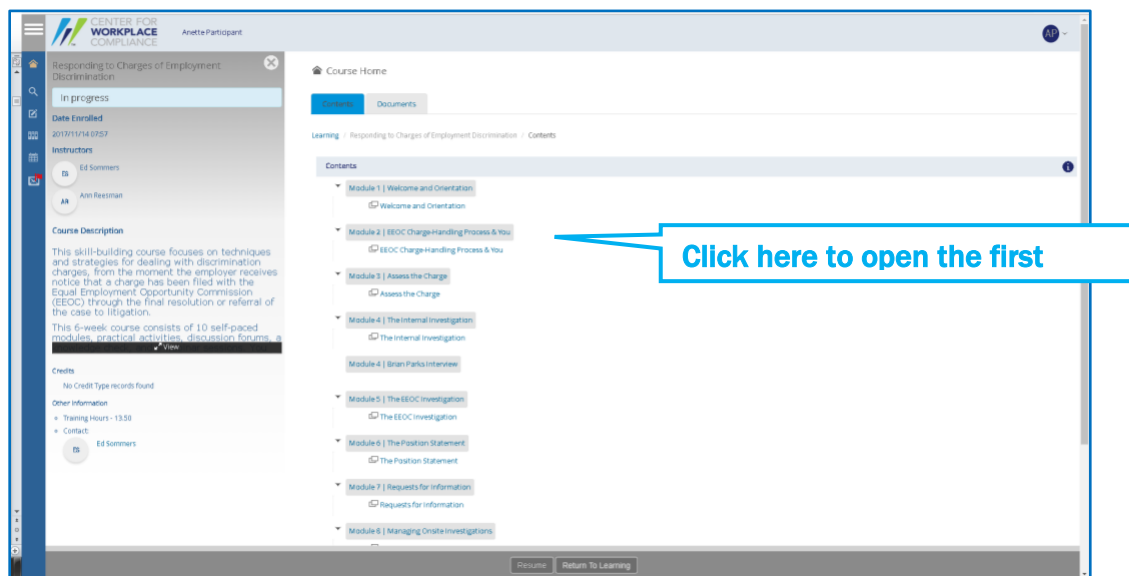
Responding to Charges of Employment Discrimination

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- At the **Learning Center** screen, locate the course under **Current** and click the **Launch** button to the right of the course name.

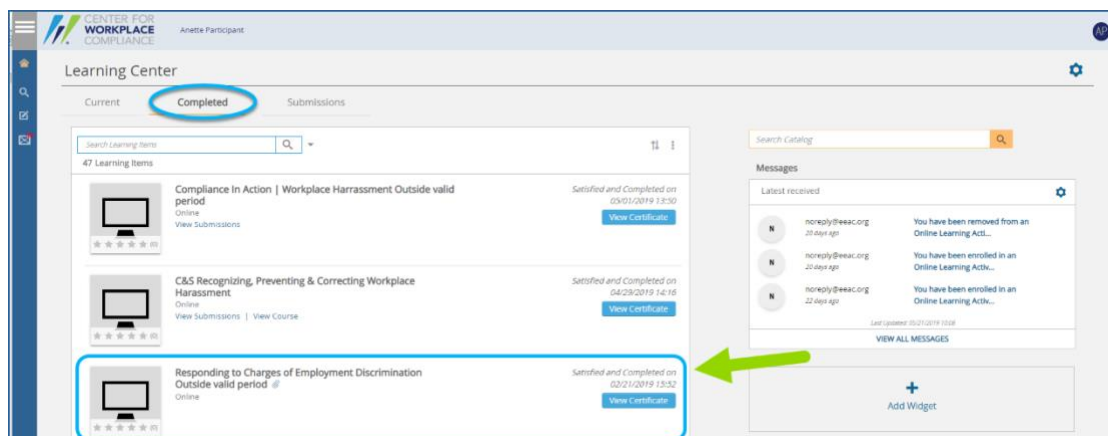


- If you select the course name in the screen above (rather than the **Launch** button), the screen below will display. That's OK. You can start the course by selecting the module name next to the icon.



Please turn to page 10 for more information about navigating the CWC Learning System and the course.

- Once you have completed the course, you can access the content from the **Completed** tab.



Web Sessions

CWC will send an email/calendar event to participants prior to each scheduled web session. The notice will include the date, time, and access information. A computer with audio/speaker and an Internet connection is required equipment to participate.

Your Key Contacts

Technical Questions?

Contact the Course Administrator

Jenn McNally jmcnally@cwcc.org 202-629-5623

Questions About the Course Topics?

Contact the Course Facilitator

Mike Bracken mbracken@cwcc.org 202-629-5608

About This Course

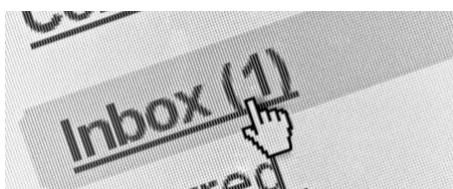
The goal of this skill-building course is to provide you with techniques and strategies for handling discrimination charges, from the moment an employer receives notice that a charge has been filed with the EEOC, through the final resolution or referral of the case to litigation.

There are 4 major components of the course:

Participant Guide	This is your source for technical information, the course schedule, instructions for activities, a transcript of the course's narration, and much more. Spend some time getting familiar with the information it contains. Print it out. Keep it handy. Jot down notes throughout the course that you can refer to on the job.	Web Session	There are 6 web sessions during the course. You'll log into Microsoft® Teams and call into the session by phone. The sessions are led by the course facilitator and the administrator and attended by the other course participants. During these sessions, the facilitator will provide you with additional information associated with the modules you just completed.
Online Modules	The self-paced modules provide you with essential skills and knowledge about responding to charges of employment discrimination. Each week you'll be assigned one or two modules to complete. The modules include activities so you can apply the skills you learned. It's important that you complete the self-paced modules at the beginning of each week.	Discussion Forum	There are two types of discussion forum. The General forum is available to you for general questions and technical issues you may be having. There are also "dedicated" forums for each module so you can complete activities or have discussions with your colleagues and facilitator about that step in the charge response process.

The course is 6 weeks in length and consists of 10 modules and a scored exam.

Week	Module Name	Assignments		
		Self-study Module(s)	Web Session	Discussion Forum
1	Module 1: Orientation	X	X	X
2	Module 2: The EEOC's Charge Handling Process & Module 3: Assess the Charge	X	X	
3	Module 4: The Internal Investigation & Module 5: The EEOC's Investigation	X	X	X
4	Module 6: The Position Statement	X	X	X
5	Module 7: Requests for Information & Module 8: Managing Onsite Investigations	X	X	X
6	Module 9: Approaching Settlement, Knowledge Check & Module 10: Summary	X	X	



In order to help you stay on track with activities and schedule, we'll send you weekly reminders with tips on what to do and timeframes for when to do them.

Course at a glance...

Week 1		
Modules	Time Commitment (varies from learner to learner)	
Welcome and Orientation	Module	10 min
	Activities	5 min
	Web Session	1 hour
	Total	1 hour 15 min
Week 2		
Modules	Time Commitment (varies from learner to learner)	
The EEOC Charge Handling Process & You Assess the Charge	Modules	65 min
	Activities	0 min
	Web Session	1 hour
	Total	2 hours 5 min
Week 3		
Modules	Time Commitment (varies from learner to learner)	
Internal Investigation The EEOC's Investigation	Modules	40 min
	Activities	55 min
	Web Session	1 hour
	Total	2 hours 35 min
Week 4		
Modules	Time Commitment (varies from learner to learner)	
The Position Statement	Module	30 min
	Activities	1 hour 35 min
	Web Session	1 hour
	Total	3 hours 5 min
Week 5		
Modules	Time Commitment (varies from learner to learner)	
Requests for Information Managing Onsite Investigations	Modules	40 min
	Activities	15 min
	Web Sessions	1.5 hour
	Total	2 hour 25 min
Week 6		
Modules	Time Commitment (varies from learner to learner)	
Approaching Settlement Course Summary, Knowledge Check, Feedback Form & Certificate of Completion	Modules	40 min
	Activities	1 hour
	Web Session	1 hour
	Total	2 hours 40 min

Navigating the Online Course

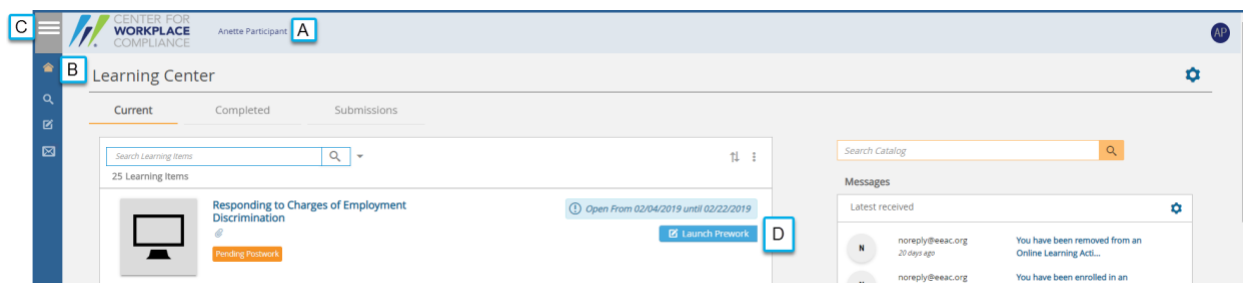
After logging in to CWC Learning System, the **Learning** screen displays.

A – LMS top banner

C – Main Menu

B – Navigation Side Menu

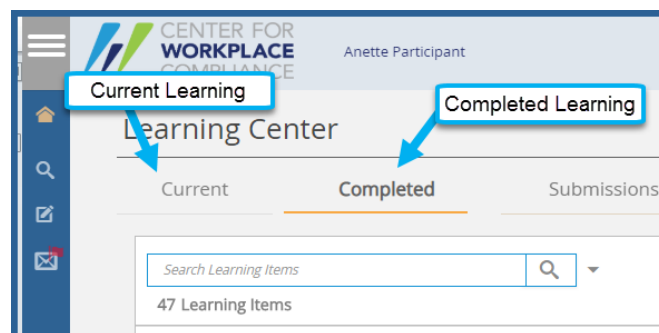
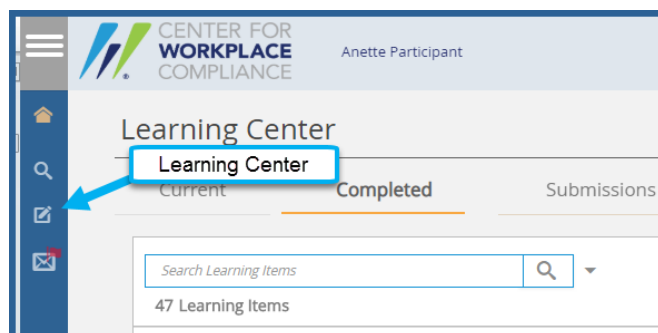
D – Course Access



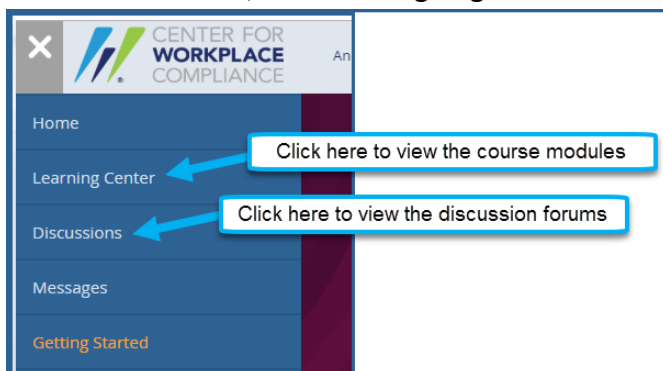
A. Your name appears in the gray banner at the top of the screen.

B. You can access the **Learning Center** from the navigation side menu at any time.

The tabs on the **Learning Center** screen allow you to move between the **Current Learning** screen and the **Completed Learning** screen.



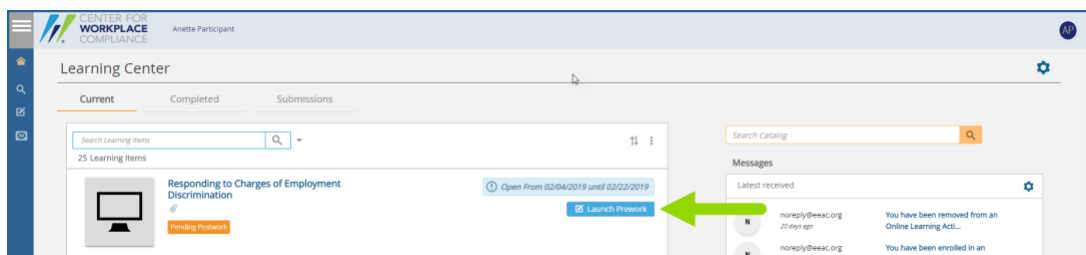
C. The **Main Menu** icon  allows you to move between the self-paced modules and the discussion forums, as well as signing out of the course.



Responding to Charges of Employment Discrimination

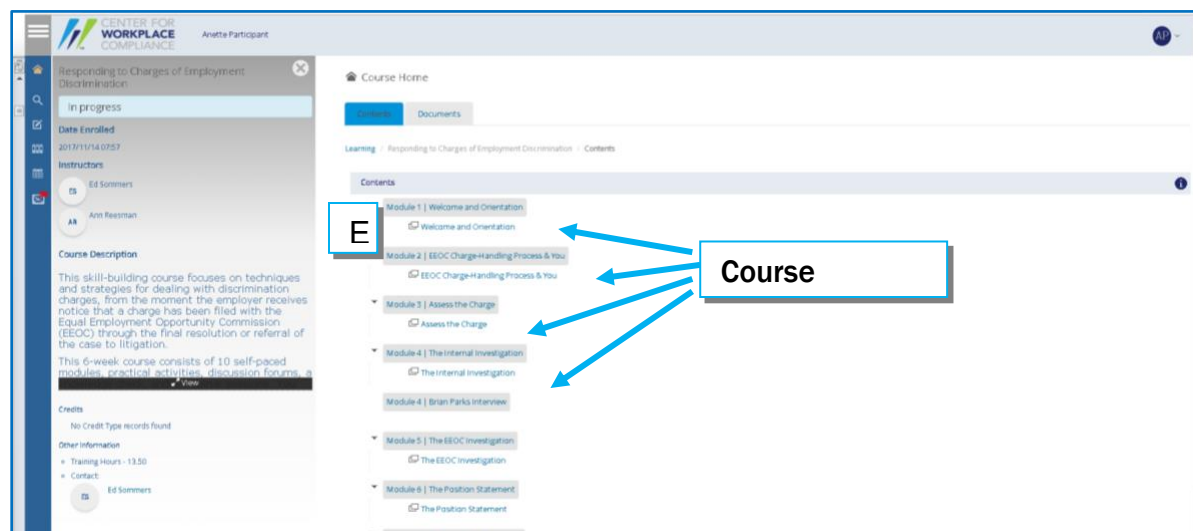
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- D. Locate the *Responding to Charges of Employment Discrimination* course in your list, and then click the **Launch** button.

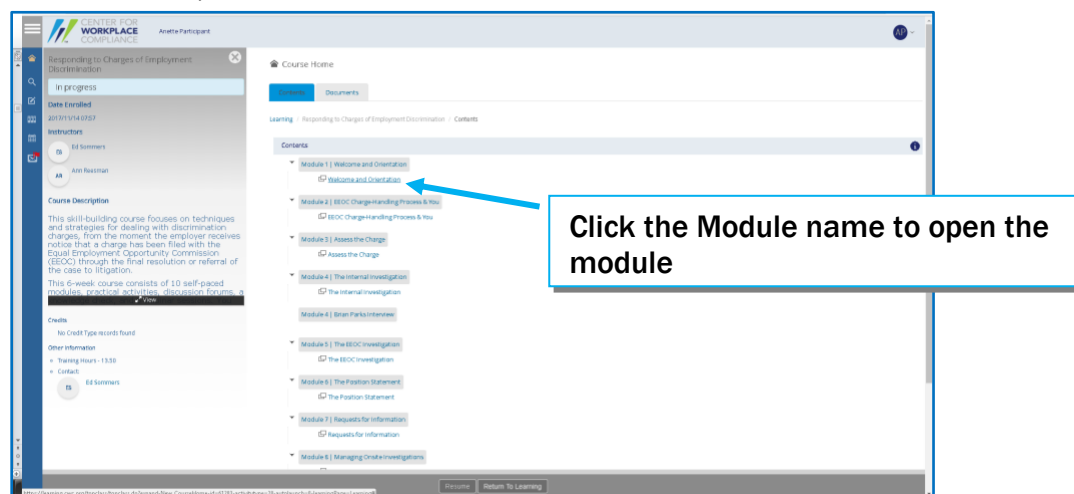


Your screen opens to the **Course Home**, which provides a list of the assigned course modules.

E – Course Contents

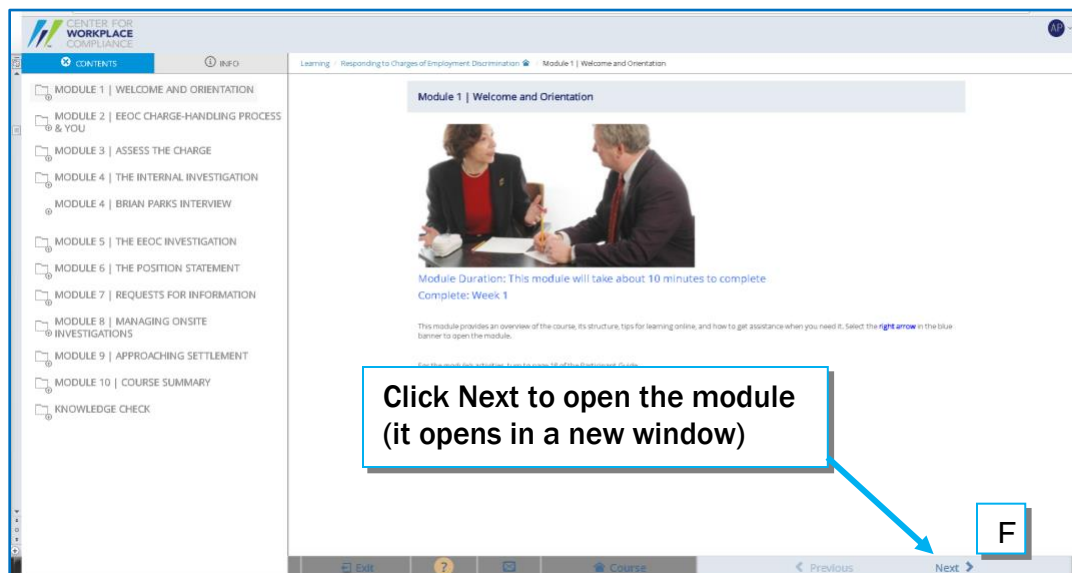


- E. To open a module, roll your cursor over the Module name. As shown below, it will become underlined, which means it's an active link. Click the Module name.



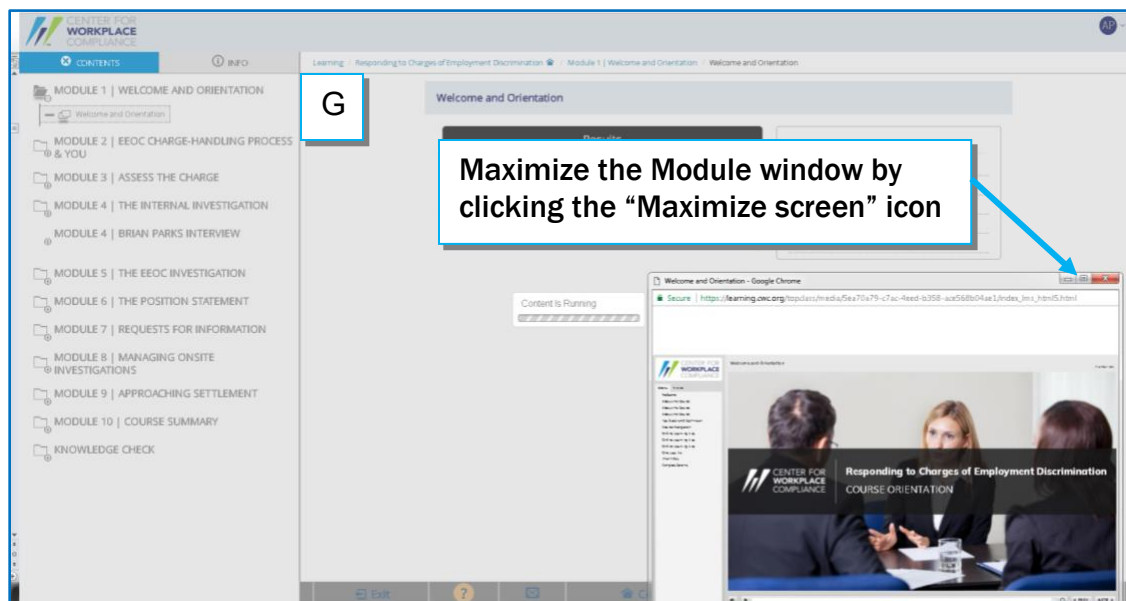
F – Course Navigation

- F. Click the Next button at the bottom of the screen to open the module. **NOTE:** If the module window does not display, turn off pop-up blockers in your settings.



G – Module Landing Screen

- G. The module landing screen opens and the module plays in a new window. The landing screen has the icon in the middle that says “Content is Running.” The Module window may open behind the landing screen, so if you cannot see the Module window but the “Content is Running” icon is active, minimize the Landing screen. Maximize the Module window to make reading the module content easier.



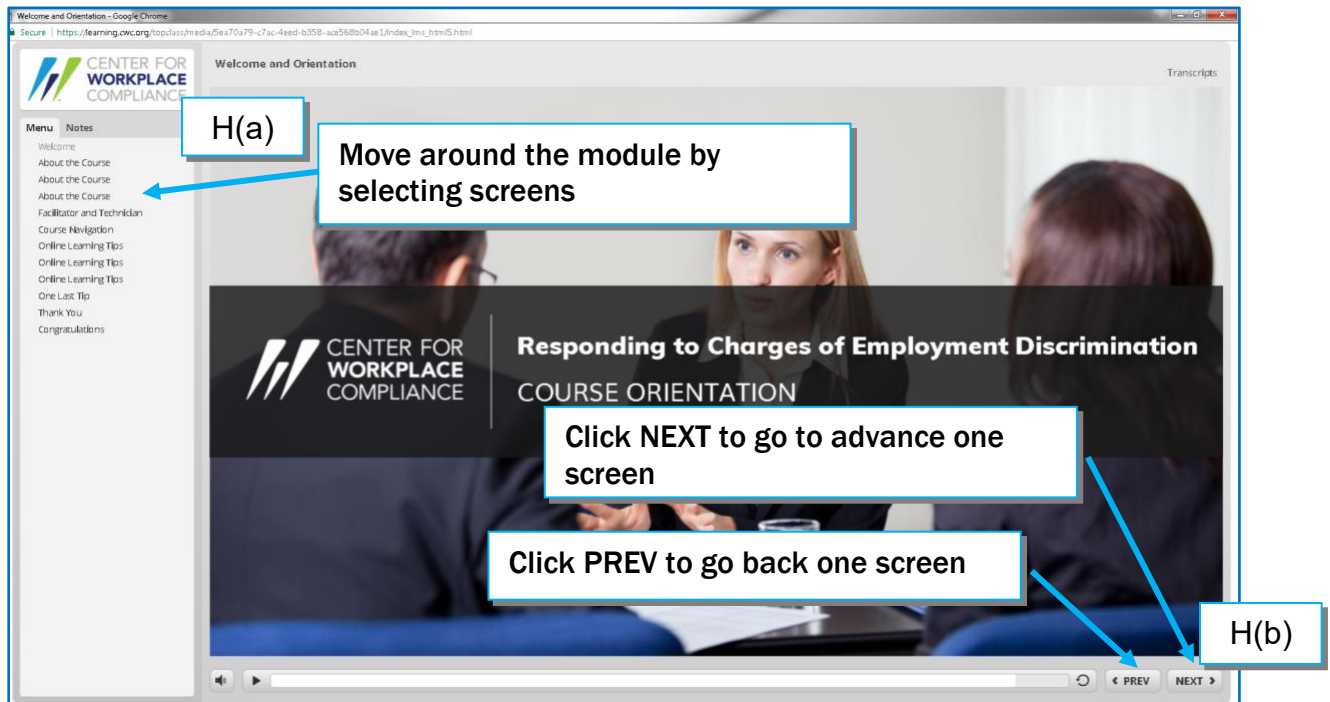
H – Module Navigation

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H.

- You may move around the module by selecting the screens in the Menu bar on the left side of the screen.
- Inside the module, you navigate from screen to screen by using the navigation buttons at the bottom of the screen.



Now that you are in the module view, you navigate through the module using the tools as described on the next page.

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- c. Now that you are in the module view, you navigate through the module using the tools as described here.

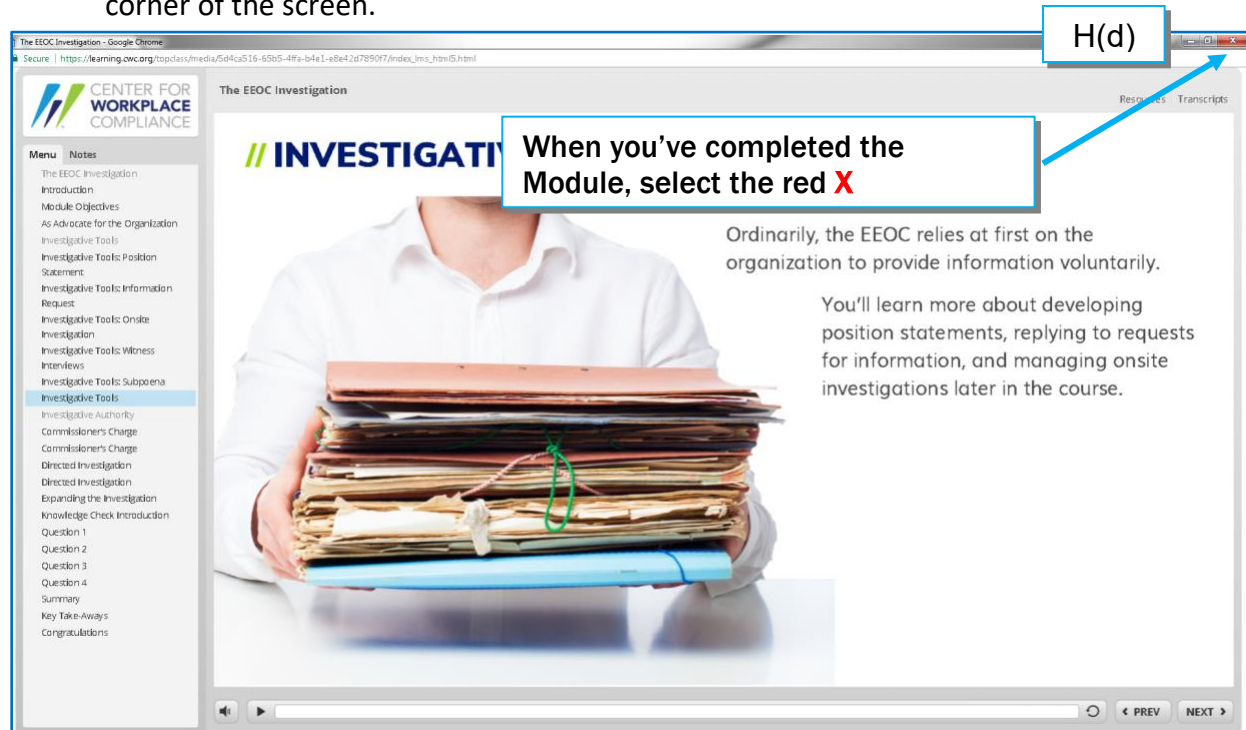


1	Menu/Notes	Select the Menu tab to view a list of the screens in the module. You can move to different screens in the module by clicking the screen name. Select the Notes tab to view the script of the screen's narration.
2	Module Name	This is the name of the module you are viewing.
3	Resources	Select Resources to view, download, and print documents associated with the module, including the module's transcript.
4	Screen Title	This is the screen's name. It coordinates with the screen name in the Menu .
5	Content Area	This section of the screen's "real estate" contains the presentation of the content. The bottom part of the screen will have instructions for onscreen activities, such as clickable items to view more information. Hyperlinked text, when selected, opens pop-up boxes or new windows.
6	Audio Control	Adjust the volume of the course's narration. Your computer also has a volume control, so you may have to adjust that before adjusting volume within the course.
7	Play/Pause	Select the arrow to play the screen. Pressing Pause (two vertical lines) pauses the course temporarily.
8	Progress Bar	Shows the progress of the screen's audio and screen action.
9	Rewind	Select this button to play the screen from the beginning.
10	Previous/Next buttons	Click the PREV button to view the previous screen. Click NEXT to view the next screen.

Responding to Charges of Employment Discrimination

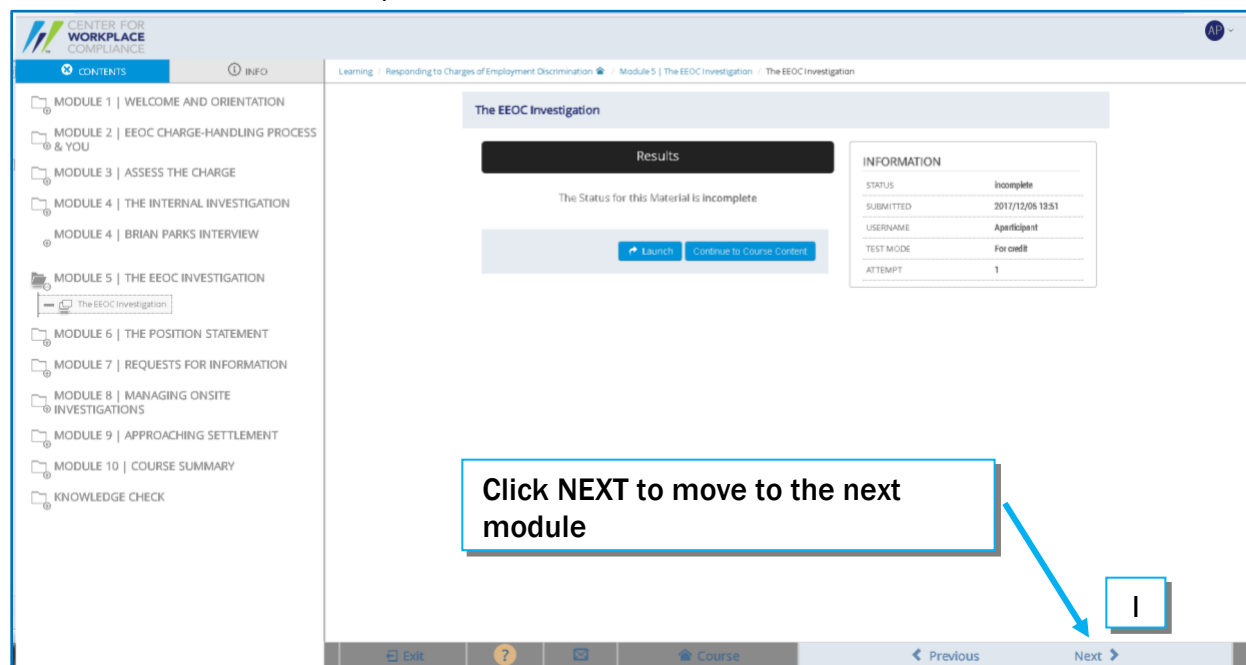
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- d. After you have completed the Module, close it by clicking the red X in the top right corner of the screen.



The new window will close and the learning system takes you back to the **Module Landing** screen which will now look something like the image below.

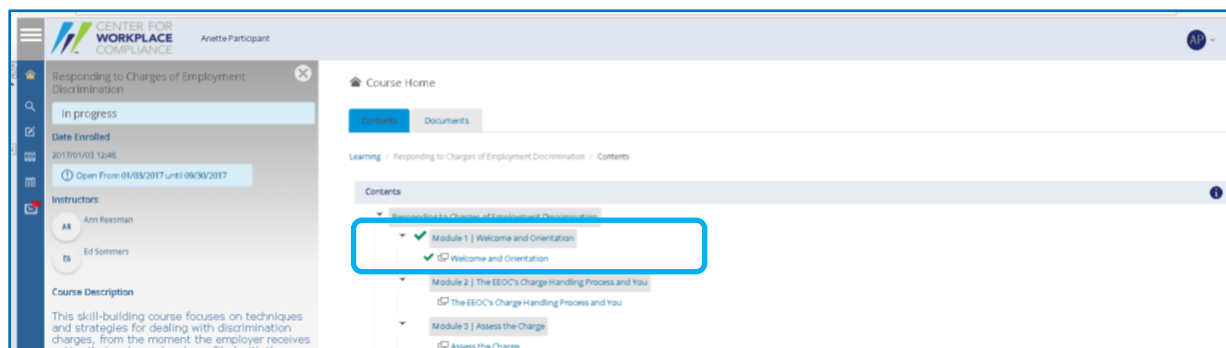
- I. Click the NEXT button to proceed to the next module in the course.



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When you complete a module, a green checkmark displays next to the module's name. See the next page for the screen image.



If you wish to leave the course or log out:

- Click the **Home** button.
- Sign out of the course by clicking the **Main Menu** in the top right corner of the screen.
- Selecting **Sign Out**.

Tips for Online Learners

- Stay on track for weekly assignments by reviewing the weekly requirements and planning enough time to complete them. Always complete the assigned self-paced modules before participating in the associated web sessions and discussion forums.
- Contact the Course Administrator (Jenn McNally jmcnally@cw.org 202-629-5623) if you have any technical issues.
- If this is your first online course, let your facilitator know. We'll give you the support you need.
- Identify your workspace and be sensitive to the individuals who work around you if you're completing the self-paced modules and participating in Web Sessions while at work.
- Tell your direct supervisor about the course, the timeframes for taking the self-paced modules and discussion forum activities, as well as the dates and times of the web sessions.
- Print your Participant Guide and keep it at hand during all portions of the course.
- Get familiar with the online course. Ask plenty of questions until you feel comfortable in the virtual classroom.
- Be respectful and courteous. You and your classmates will have different levels of experience with online learning and workplace compliance. In Web Sessions, discussion

forums, and activities, you may need to be patient with those who have less experience than you do.

- CWC’s learning system saves the last screen in a module you viewed before logging out. So, when you log back in to that module, you can quickly pick up where you left off. (This is called “bookmarking.”)

Like Reading Along with the Narrator?

This Participant Guide includes the transcripts for the self-paced modules, if you would like to read along with the narrator, or you like jotting down notes or highlighting text that’s important to you.

The transcript is also available in **Resources** at the top right corner of the module screen. Select **Resources**, and then click **Transcript** from the dropdown list. When the document opens (you’ll need Adobe Reader), print it. You may also save the transcript to your computer.

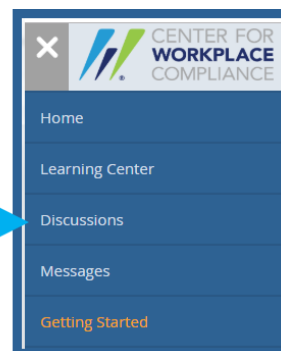
Using the Discussion Forums

The course uses discussion forums for module assignments and as a way for you to learn from your fellow classmates and the facilitator. There are two types of Discussion Forums:

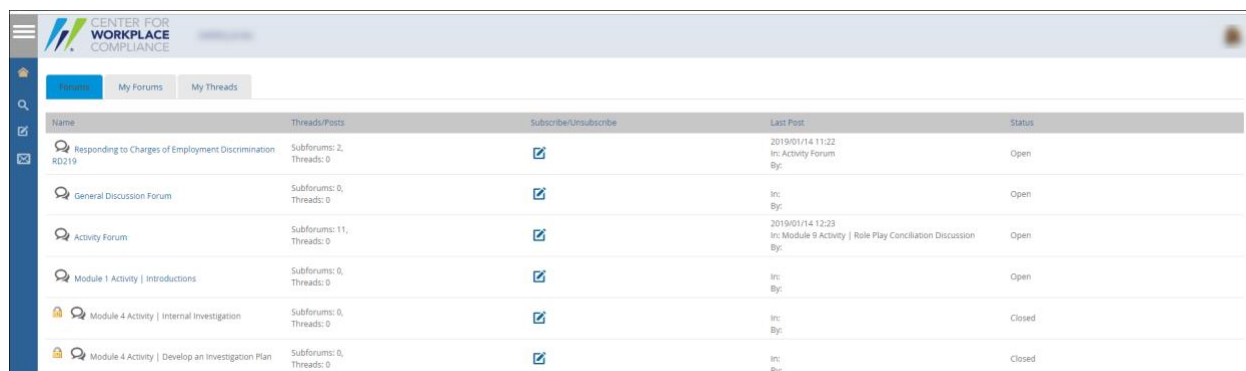
- **General Discussion** – Post any questions or technical issues here. The Course Facilitator and Administrator monitor the Forum regularly to respond to questions and comment on discussions you are having with fellow participants.
- **Module Activity Discussion** – Post assignments for each of the modules here when directed. The discussions are opened in time for you to complete assignments and close about a week after the assignments are due.

Access the Discussion Forum

1. Click **Main Menu** icon at the top left corner of the screen.
2. Select **Discussions** from the dropdown menu.
3. Then select **Forums**.



- A list of **Discussion Forums** will open in a screen similar to the one below.



Name	Threads/Posts	Subscribe/Unsubscribe	Last Post	Status
 Responding to Charges of Employment Discrimination RD219	Subforums: 2, Threads: 0		2019/01/14 11:22 In: Activity Forum By:	Open
 General Discussion Forum	Subforums: 0, Threads: 0		In: By:	Open
 Activity Forum	Subforums: 11, Threads: 0		2019/01/14 12:23 In: Module 9 Activity Role Play Conciliation Discussion By:	Open
 Module 1 Activity Introductions	Subforums: 0, Threads: 0		In: By:	Open
 Module 4 Activity Internal Investigation	Subforums: 0, Threads: 0		In: By:	Closed
 Module 4 Activity Develop an Investigation Plan	Subforums: 0, Threads: 0		In: By:	Closed

- The **General Discussion Forum** is always available to you to have discussions with the Course Facilitator and your fellow participants.
- The **Activity Forums** are locked until it's time for you to complete a module's activities.
- You will be able to tell when you have new threads to read (that is, the Facilitator, Administrator or fellow participants have added comments to the discussion).



An "open" icon means there are no new posts in that forum to read.



A "closed" icon means there are new posts for you to read.

- To close out of the Discussion Forums, simply go to the **Main Menu** and select Learning from the dropdown list. You will return to your **Learning** screen.

Netiquette

“Netiquette” refers to rules of etiquette that apply to online discussions. Follow these rules to help you sound courteous and professional in communications with participants and facilitators.

1. Participate! Check the discussion forum at least once every day if possible, to stay on track and up-to-date.
2. Be brief. No one wants to read a long post.
3. Be mindful. Read your post out loud before clicking the Send button. Think carefully about what you are writing and how it may be perceived. As they say, “you can’t un-ring the bell.”
4. Stay on topic. The space is for learning and sharing professional experience. Don’t waste your colleagues’ time by chatting about irrelevant topics.
5. Don’t type in all caps. It’s the equivalent of screaming at someone.
6. Remember to say “please” and “thank you.”
7. Respect the opinions of fellow participants. If you disagree with what someone has written, do so respectfully. Everyone has a right to their own perspectives.
8. Don’t ever badmouth anyone.
9. Check the most recent comments before you reply to an older comment.
10. Before asking a question, check to make sure someone else hasn’t already asked the same question and received a response.
11. Share your experience, but not organization-sensitive facts. Sharing your experiences about handling charges of discrimination will add greatly to the course. But be careful not to share confidential information.
12. If you reply to a question from a fellow participant, make sure your answer is 100% accurate. The course’s facilitator will be reviewing discussion forum posts as well to help make sure that the information being shared is accurate and current.
13. If you refer to a fellow participant’s/facilitator’s post or information from the self-paced modules, quote a few key lines or a summary so that everyone knows what you are referring to.
14. If you wouldn’t say it to a fellow participant’s or facilitator’s face, don’t enter it in the discussion forum.
15. Report glitches you encounter in the Discussion Forums to the Course Administrator.

CWC reserves the discussion forums for conversations about the topics and information in the course’s modules. While it is perfectly acceptable to chat with your fellow classmates, the facilitator and administrator, please try to stay on topic. It is not appropriate to sell goods or services, complain about something, or talk about subjects that are not specific to the course. The course facilitator and administrator have the right to delete any messages containing language that is derogatory, controversial or otherwise inappropriate for the course.

End-of-Course Tasks

After you finish the Summary Module at the end of the course, there are 3 steps to complete. Detailed instructions for completing these steps are on page 53.

- Complete the Post-Course Knowledge Check. The Knowledge Check tests your knowledge of the topics covered in the course. Although it is scored (a requirement of one of the recertification organizations), the information is not provided to your employer. CWC does use the information to continually enhance the course.
- Complete and submit the Participant Feedback Form. Your feedback is important to CWC because it helps us improve the course.
- Download the Certificate of Completion.



Module 1 | Welcome and Orientation

Duration: 10 minutes

This self-paced module provides a general overview of the course, its structure, tips for learning online, and how to get assistance when you need it.

Web Session

Duration: 1 hour

There is a Web Session scheduled during the first week of the course to introduce you to the Course Facilitator, the Course Administrator, and the other participants. Check the course schedule for the day and time.

Activity | Introduce yourself

Duration: 5 minutes

Take some time to re-introduce yourself in the **Discussion Forum**. Look for **ACTIVITY: Module 1 | Introductions**. Include:

- Your name
- Your title
- Your employer
- The city and state where you work
- One or two of the key things you want to learn or want to do better related to responding to discrimination charges for your organization
-

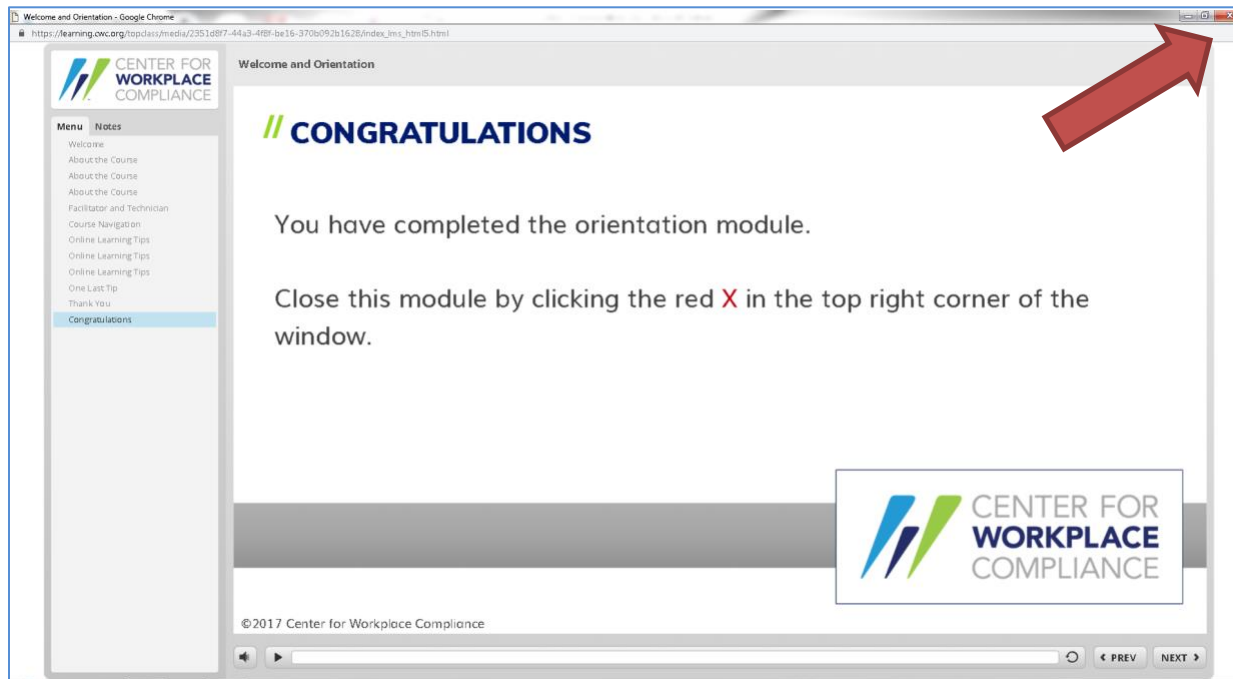
Please Read: Navigating from a module to the discussion forums

Navigating from a module to the discussion forums is a little “clunky” and not necessarily intuitive, so here’s a step-by-step explanation.

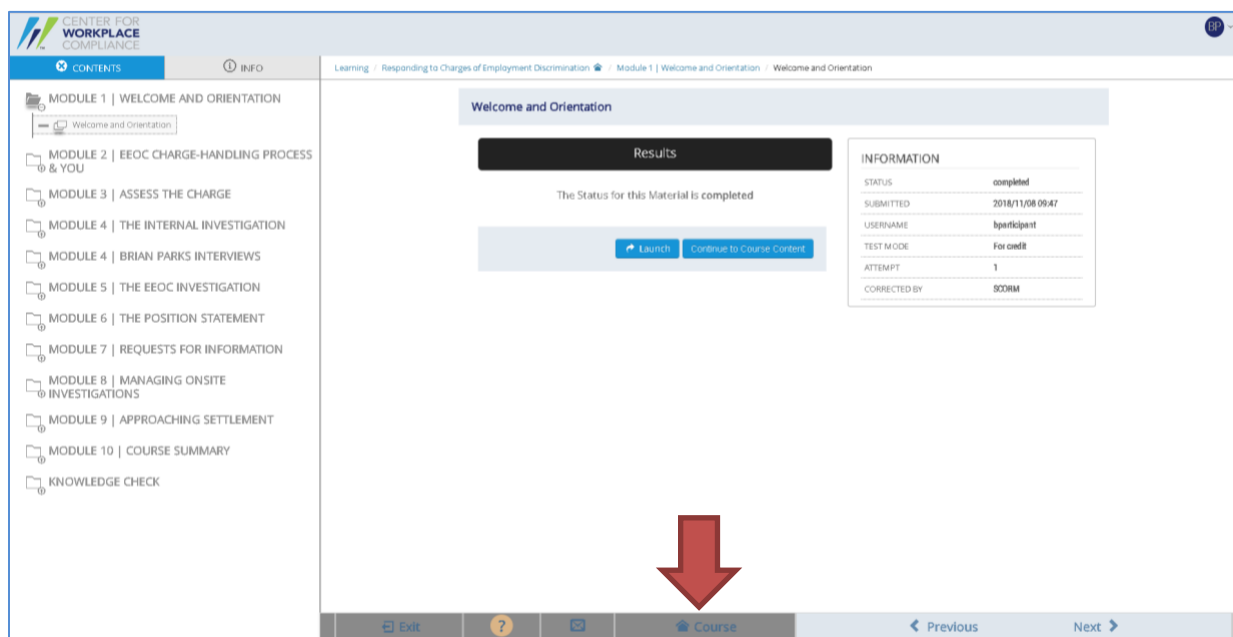
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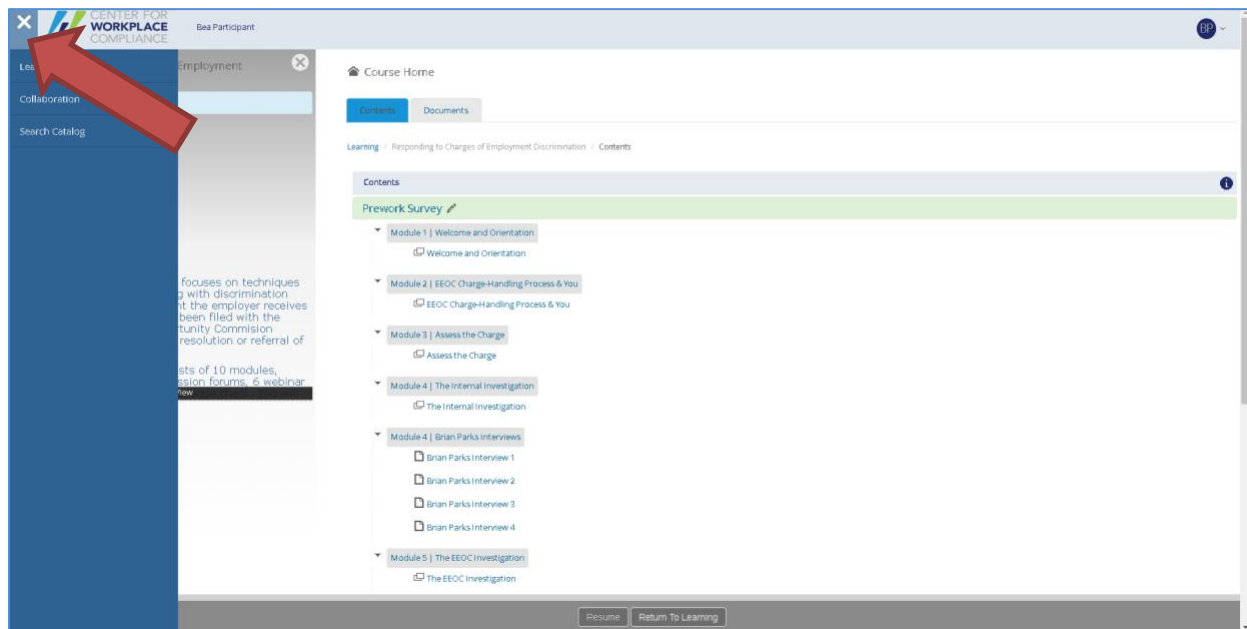
1. Unfortunately, you need to close out of the module you're in. Click the **red X** in the top right of the screen (see image on the next page). If you're in the middle of the module, it will bookmark that place in the module for you so you can return to it next time you open the module.



2. When you close the module, you'll return to the module screen in the learning system. Click the **Course** button at the bottom of the screen (see image below). This action takes you to the beginning of the course.



- At the **Course** screen, select the X in the top left corner of the screen. This will generate a dropdown menu so you can navigate to the discussion forums.



- From the dropdown menu (see image below), select **Collaboration** (1), and then **Forums** (2).



Module 2 | The EEOC's Charge Handling Process

Duration: 35 minutes

This self-paced module provides an overview of the Equal Employment Opportunity Commission's charge handling process, the concurrent process in your organization in order to respond to the charge, and the roles you play as the individual responsible for processing charges in your organization.

After completing the module, proceed to "Assess the Charge." Feel free to participate in the discussion forum.



Module 3 | Assess the Charge

Duration: 25 minutes

In this module, you learn to assess a charge of employment discrimination and the initial actions you should take in order to start the process for responding to the charge.

Activity | Where are FEPAs located?

Duration: 3 minutes

To find out whether there is a FEPA with jurisdiction over your charge:

1. Enter the EEOC.gov website displayed on screen into your browser.
2. Scroll down to the bottom of the page under the map.
3. Select the EEOC office
4. In the Office Information list on the left, select a state or local agency. You'll find contact information for each FEPA there.
5. You can then go to the FEPA's website to learn the scope of the FEPA's jurisdiction.
6. Click on the EEOC's link for the Washington Field Office
7. Click the tab on the left for State and Local Agencies.
8. Find the Fairfax County Human Rights Commission. Go to their website and take a look at the scope of their jurisdiction.

Activity | Assess the charge you received

Duration: 5 minutes

Review the charge form (located in the LMS). Now, using the checklist, answer each question by examining the charge and its accompanying notice by checking the Yes or No boxes. After you check the box, feedback about your answer will appear under the question. The answer for question 5 is provided for you because that would involve more research than time allows for this exercise.

1. Was the charge filed within applicable time limits?
2. Was the charge filed by a person with legal standing to file it?
3. Does the charge, on its face, state a valid claim?
4. Is the charge properly sworn or affirmed?
5. Is the charge barred for any other reason?

After completing the module, participate in the web session before proceeding to the next module. Feel free to participate in the discussion forums, however.

Note: The charge form from this module is referred to in upcoming modules. It is available in Resources in each module within this course.

Web Session

Duration: 1 hour

There is a Web Session scheduled during the second week of the course to answer your questions about the virtual classroom and what you've learned so far, as well as to review in more detail charge filing deadlines, the EEOC's digital charge system, and some other protected classes under federal nondiscrimination laws. Check the course schedule for the day and time.



Module 4 | The Internal Investigation

Duration: 35 minutes

Activity | Internal investigation

Duration: 20 minutes

View Pat Ames' interview of Heather Newburg in the video clip (7 minutes long).

1. Open **Module 4 | The Internal Investigation** module on the screen under the self-paced modules.
2. Click the Blue **Next >** button to begin the module.
 - a. The **Newburg Interview** video is embedded on the second screen in the module *Internal Investigation*. You can open the video by clicking the icon at the bottom of the screen



3. Complete the remainder of the module.

After viewing the interview and completing this module, go to the Discussion Forum **ACTIVITY: Module 4 | Discuss Ames' Interview of Newburg**, and post a comment identifying a few of Pat's techniques that stood out in your mind. Feel free to check the forum later to see what your fellow participants commented on and reply to them if you have something to add.

Activity | Develop an investigation plan

Duration: 15 minutes

You are the EEO Compliance Director for Rossers Department Stores, which owns and operates over 120 top-end department stores throughout the United States. One of your staff members, Pat Ames, is investigating a charge of sexual harassment filed with the EEOC.

Heather Newburg, a Rossers Sales Manager, filed the charge. She has worked for Rossers' Tyson's Corner, Virginia store for the past three years. The charge alleges that Newburg's current

supervisor, Brian Parks, made her feel “uncomfortable” by using “thinly veiled sexual innuendos.” The charge further contends that Parks refused to assign three valuable departments to her because she declined to have an affair with him.

Brian Parks is the Store Manager at Tyson’s Corner and is a long-time employee of Rossers. Newburg began reporting to Parks a little over a month ago when Newburg’s supervisor, Assistant Store Manager Arthur Trent, left the company to work for a competitor. Pat has learned that Trent had promised to allow Newburg to take over the three departments, which he himself had been managing, after his departure. Parks, however, assigned them to other sales managers.

Newburg lodged a harassment complaint through the company’s internal grievance procedure, which gave Pat Ames the opportunity to interview her. The next day, Newburg went to the EEOC and filed a charge.

Pat has had one telephone conversation with the EEOC investigator assigned to the case. Her notes from that conversation are on the next page.

CONFIDENTIAL

Attorney-Client Privilege/Attorney Work Product

To: File
From: Pat Ames, Equal Opportunity Specialist
Re: Call to EEOC Investigator – Michael Smith

Spoke to EEOC Investigator Michael Smith at 10:45 a.m. today. Told him we received the Newburg charge and are investigating. Requested he direct any inquiries to me.

According to Smith, Newburg’s “quid pro quo” harassment claim is based on Parks’ whole pattern of conduct toward her. Smith quoted from notes of the charge intake interview, in which Newburg mentioned two specific examples:

1. During a recent meeting, Park refused to reassign the valuable departments of Arthur Trent, the recently resigned Assistant Store Manager, to Newburg unless she slept with him.
2. During an elevator encounter, Newburg questioned Parks about being assigned the Trent departments, to which Parks responded that if she was “nice” to him as she had been to Trent (with whom she previously was romantically involved), he would assign the departments to her

Smith says Newburg’s “hostile environment” harassment claim is based on an incident that occurred during the week of Trent’s resignation. According to Smith, Newburg claims that another male sales manager, in Parks’ presence, joked that Heather uses her body to close sales. Parks responded, “How do you think she got to be number 1?”

Smith said he will be coming onsite to investigate the charge sometime within the next few weeks. Will call back in a few days to set date. He will definitely want to interview Parks and all women working under his supervision. Not sure yet whether he will want to interview anyone else.

Your Assignment

Work with your fellow participants in the Discussion Forum **ACTIVITY: Module 4 | Develop an Internal Investigation Plan** to develop a general plan for investigating the Heather Newburg charge. Reply to these questions to guide your planning:

1. Which witnesses should Pat interview?
2. What other sources of evidence should Pat look for?
3. How would you have handled the telephone conversation with the EEOC investigator?

Activity | Review Brian Parks' interview

Duration: 40 minutes

Note: Pat Ames' interview of Brian Parks is about 35 minutes in length and is in 4 parts.

Ames interviewed Parks as part of her internal investigation before Newburg filed her EEOC charge. View the Parks interview and take note of the narrator's reference to the techniques you learned about in the self-paced module. Then go to the discussion forum **ACTIVITY: Module 4 | Evaluate Ames Interview of Brian Parks** and post a comment on any techniques or strategies she used that you thought were particularly well-executed or otherwise caught your attention.



Module 5 | The EEOC Investigation

Duration: 20 minutes

There are no activities for this module.

After completing the module, participate in the web session before proceeding to the next module. Feel free to participate in the discussion forum, however.



Module 6 | The Position Statement

Duration: 30 minutes

Activity | Review first draft

Duration: 15 minutes

Pat has given you her investigative file and a draft Position Statement for the Newburg charge. She would like your feedback.

Review the investigative file on pages 29-34. Then critique her draft on pages 35-36, and jot down next steps you would like her to take. Enter your list of recommendations for Pat in the discussion forum named **ACTIVITY: Module 6 | Review First Draft**.

Check the forum a couple of times and read the recommendations of your fellow participants. Feel free to comment on the similarities and differences among the recommendations and ask any questions you have.

INVESTIGATIVE FILE: Heather Newburg v. Rossers Department Stores (6 documents)

Document 1 of 6

CONFIDENTIAL

Attorney-Client Privilege/Attorney Work Product

To: File

From: Pat Ames, Equal Opportunity Specialist

Re: Interview with Heather Newburg

Heather Newburg has been a Sales Manager for Rossers for three years. This is the first time Newburg has ever used the company's grievance procedure to report discrimination or any other concern. She was given a copy of Rossers' employee manual, which includes Rossers' EEO policies and procedures, her first week on the job, like all new employees. She also has attended yearly sexual harassment training since joining Rossers. The most recent training she attended was six months ago. So far, Newburg appears to have performed well in the role of Sales Manager. In the last quarter, she had the highest production of any manager on the sales team.

I asked her to describe the situation with the departments, and this is what she told me:

"The day after Art Trent left the company, Parks called me into his office and told me he would not approve the reassignment of Art's departments to me. I asked why and urged him to honor the commitment Art made. He just smirked and said, 'Look, honey, we all know what you did to get those departments. I don't have to keep any promise Art made to you in bed.'"

"I was shocked that he would say something like that to me, and I told him that Art's promise had nothing to do with our personal relationship. Art promised me those departments because of my hard work and superior performance. I had the best sales record in the department at that time.

"Parks just shrugged and said, 'Anyway, Art's gone now, sweetheart. I'm the one making the decisions, but I'll tell you what: If the departments mean that much to you, I'm willing to let you work with me the same way you did with him.'

"I asked him what he meant by that, and he said, 'Come on, sugar. You had a good thing going when Art was here. Now it can be even better. You know how to play the game. Art's out of the lineup now, but I'm giving you a chance to move up to the big leagues. And I can do more for you than Art ever could.'

"All of Art's departments were assigned to other Sales Managers, and I didn't get any of them. A couple of weeks later, I ran into Parks on the elevator. When the doors closed and we were alone, he said to me, 'Heather, you're paying a high price for being stubborn. All you have to do is be nice to me like you were to him.'

"I was just furious and said, 'Look, what you're doing is not only unfair, it's against the law.' He just laughed and said, 'Come on, Heather. Get off it. You made it with a married man. Now don't tell me you're all hung up on morality.'"

Heather also mentioned that Parks had made "thinly-veiled sexual innuendos" to her. She told me the following: "I have had to put up with vicious gossip ever since my relationship with Art began. I think my success at the company – especially being so new – has made some of the other sales managers jealous – especially the men. I have overheard jokes and comments in the office implying that I used sex to get ahead. One day, for example, one of the sales managers said to Parks 'Heather really knows how to use her body to get ahead.' Parks joined in and said, 'Well how do you think her department got to number one?' That whole exchange really bothered me."

Document 2 of 6

CONFIDENTIAL

Attorney-Client Privilege/Attorney Work Product

To: File

From: Pat Ames, Equal Opportunity Specialist

Re: Interview with Brian Parks

Brian Parks, Store Manager, has worked for Rossers for 28 years. The company's senior leadership considers him to be a highly valuable member of the management team. Rossers has never received a complaint of harassment or sexual harassment involving Parks. Nor has Parks ever been the subject of an EEOC investigation. I also checked our training files and found that Parks has attended sexual harassment and EEO training every year since 1993, when the company first began its formal training program.

When asked about the conversation that Heather said took place in his office, Parks flatly denied it. I asked him to explain the situation with the departments, and he told me the following:

"I talked to Art before he left Rossers, and he was very unhappy. He said he had to leave the company because his affair with Heather had gotten out of control, and his wife was catching on. Then he told me that he was going to give his departments, which were worth more than \$140K, to Heather.

"I said, 'Now, wait a minute! It's going to look like special treatment if you do that!' For one thing, she was the newest manager in the store. Now if she got all those departments, the others were going to be screaming mad. I also figured he was setting us up for a sex harassment charge from the other women in

the department. I mean, it would send them a message: If you want to get ahead, get in bed. I saw the sex harassment video you guys sent around, and we have to be sensitive to this stuff.

“So I said, ‘No way. I can’t let her have those departments.’ The next day I called her into my office. I told her that I knew Art made some promises, but I couldn’t approve them. She asked why, so I told her that I had to give them to more experienced people. I probably also said something like ‘Art promised you those departments in bed.’ She wasn’t happy, but I really didn’t feel there was anything else I could do.”

I asked Parks whether he had a conversation with Heather in the elevator at any time. He said yes and gave the following account:

“She cornered me on the elevator coming down from the cafeteria and she starts going on about those departments again. She says to me, ‘You know, Brian, I could make big trouble for this company.’ I asked her what she was talking about, and she said, ‘I could say that Art was sexually harassing me. I could say he promised me special treatment and then threatened to cut it off if I stopped giving in to him. You know, I could be looking at a big payday here.’

“I couldn’t believe it. Now I’ll be honest with you. I was seriously thinking about caving in. I thought I would just give her some of the departments to keep her quiet. But in the end, I just assigned the departments to the best people like I always would.” I asked Parks whether he had ever said anything of a sexual nature to Heather, even joking. He gave the following answer:

“No, I never tell sexual jokes at work, but if she said I did, I think I know the incident she is referring to. You see, one day I was meeting with some of the sales managers when Heather walked by in a short, tight skirt. One of the managers said, ‘Boy, with a body like that, I could really get ahead.’ So I said, ‘Why do you think Heather’s departments are number one?’ Now, keep in mind, her departments were leading the store in sales at the time, and I figured I was paying her a compliment.

“Heather chuckled and said, ‘Well, Brian, you’re always telling us to do whatever it takes.’ She got a bigger laugh than I did.”

In accordance with company policy, I reviewed the company’s sexual harassment policy with him and cautioned him against making any statements that might be construed as violating the policy. I also counseled him on our company’s non-retaliation policy.

Document 3 of 6

CONFIDENTIAL

Attorney-Client Privilege/Attorney Work Product

To: File

From: Pat Ames, Equal Opportunity Specialist

Re: Interview with Jack Ross

Jack Ross has been a sales representative with Rossers for six years and has progressed during that time to the level of senior Sales Manager. His sales volume has been good over the years, and recently his commissions increased substantially when he was assigned some of Art Trent’s departments.

Ross said that he heard a rumor that Art Trent promised Newburg that she would get all of his departments when he left, but also said that is not how it works at Rossers when someone leaves the company. According to Ross, the departing employee’s departments are reassigned among the Sales Managers, and he thought it went by seniority.

When asked about Heather Newburg, Ross said he doesn’t know her very well, but she seems nice. He said she has a “reputation” among the sales force, though, and he heard that she had an affair with Trent.

Ross said he has felt sorry for her on occasion because of some of the ribbing and teasing that goes on at sales meetings, which he says gets a little crude and inappropriate. But Heather usually just goes along with it and doesn't seem to mind.

When I asked Ross about the "with a body like that I could really get ahead" statement, he blushed and said, "I really don't remember saying exactly that. There's a lot of joking that goes on."

Document 4 of 6

CONFIDENTIAL

Attorney-Client Privilege/Attorney Work Product

To: File

From: Pat Ames, Equal Opportunity Specialist

Re: Account Assignments

According to the "Rossers Department Stores Sales Handbook," any existing account that must be reassigned should be reassigned according to seniority. (See page 41 of the Handbook.) Decisions concerning account reassignments are made by the Assistant Store Manager, with the approval of the Store Manager. If the position of the Assistant Store Manager is vacant, the Store Manager makes the reassignments.

A review of past account assignment activity at the Tyson's Corner location shows that, over the past fifteen years, all reassigned accounts have been offered to one or more of the most senior Sales managers in the Sales Department. (See attached list of the account assignments by year.) The company has no record of how accounts were reassigned prior to this. The Tyson's Corner Sales Department currently employs ten Sales Managers. Their names and approximate years of service, as of today, are listed below:

- Eric Anderson (5)
- Kristin Ashland (4)
- John Barolli (10)
- Jen Chung (5)
- Julie Fitzpatrick (4)
- Jeff Manzano (12)
- Heather Newburg (3)
- Edward Presti (5)
- Jack Ross (6)
- Barry Waters (5)

Our records also show that Art Trent's accounts were assigned to the following Sales Managers: Jeff Manzano, Jack Ross, and John Barolli.

Document 5 of 6

CONFIDENTIAL

Attorney-Client Privilege/Attorney Work Product

To: File
From: Pat Ames, Equal Opportunity Specialist
Re: Summary of Additional Witness Interviews

I interviewed each of the other Sales Managers individually: the women (Kristin Ashland, Jen Chung, Julie Fitzpatrick) as well as the men (Eric Anderson, John Barolli, Jeff Manzano, Edward Presti, Barry Waters). Each of them confirmed that there is a fair amount of joking and teasing that goes on in the department, but none of them felt that it was “over the top.” It’s more of a “camaraderie thing.” Presti said that if anyone pushed the boundaries a little, it was Newburg, who he described as “a bit of an instigator,” someone who likes to “stir things up.” Ashland said that she never feels quite comfortable with Newburg – that Newburg always seems like she’s trying to “one-up” somebody.

Kristin Ashland, Jen Chung and Julie Fitzpatrick all said that the joking and teasing is rarely of a sexual nature. Julie recalled the “with a body like that” comment, but not who said it, and she wasn’t offended – just thought it was “typical Newburg.” Kristin and Jen did not recall the exchange.

All three women knew about the Trent/Newburg affair but didn’t think it was any of their business, as it wasn’t affecting their jobs or their work environment in any way. When they heard through the grapevine that Newburg was claiming Trent’s departments because he had promised them to her, though, they all thought about being upset, but decided to wait and see how it played out. And as it turned out, Parks assigned Trent’s departments to the more senior sales managers according to company policy, and some of the departments the more senior managers had were then handed down to less senior managers, including them. So it all worked out.

All three women were adamant that Parks had never said or done anything to them, or in front of them, or that they’d heard of, that could be construed as a sexual advance. The male managers agreed, saying that Parks is “a family guy, not a player.”

The witnesses all described Parks in favorable terms, as a ‘good leader,’ “fair,” “always has your back,” and “doesn’t play favorites.” Kristin Ashland said she hopes that Art Trent’s replacement is more like Parks than Trent.

Document 6 of 6

CONFIDENTIAL

Attorney-Client Privilege/Attorney Work Product

To: File

From: Pat Ames, Equal Opportunity Specialist

Re: Elevator Visit

I rode the elevator that Mr. Parks mentioned in his interview. The elevator is rather old and slow, and it is possible to have a conversation between floors. In addition, once the door opens on a floor, a person can hold the door open apparently indefinitely to finish a conversation. After a while, a beeper begins to sound, and the doors try to close, but can still be held open.

NOT TO BE USED AS A FORM

Draft 1 Position Statement

Mr. Michael Smith
Investigator
Equal Employment Opportunity Commission
1801 L Street, N.W.
Washington, DC 20507

RE: Heather Newburg v. Rossers Department Stores
Charge No. 180-990X234

Dear Mr. Smith:

This letter responds to your request for a statement of position in the above-referenced matter. As more fully set forth below, we believe Heather's claims are completely without merit, are frivolous, and are libelous. You should know that we intend to file an action against her in the Federal District Court for the Eastern District of Virginia, not only to cover the costs of defending the discrimination charge, but also to seek relief for her defamatory statements. I would encourage you to find out whether Heather has done this type of thing before, because it says a lot about her loyalty and credibility.

As detailed below, we conducted an investigation that shows clearly that Rossers did not violate the law. To the contrary, our investigation reveals that Heather fabricated the alleged incidents to extort benefits out of the company. Accordingly, Heather has no right to claim discrimination, especially since Rossers was totally unaware of her allegations until one day before she filed her charge.

Background

Rossers owns and operates over 120 top-end department stores throughout the United States. Rossers employs a staff of Sales Managers who specialize in servicing major clients. Heather has worked as a Sales Manager at the Rossers Tyson's Corner, Virginia location for the past three years. While she recently posted high production numbers, she is the most junior member of the sales team and still has much to learn. Her most recent written performance appraisal indicates that her work is generally satisfactory, but that she still needed to develop her communication and sales marketing skills to match her more experienced co-workers.

At the outset, it is important to note that Rossers first became aware of Heather's allegations when she filed an internal complaint shortly before filing her formal discrimination charge. Pursuant to Rossers policy strictly prohibiting harassment and our internal complaint procedure, the company conducted a prompt and thorough investigation, which included interviews with Heather and, the accused, Mr. Brian Parks. Our investigation did not reveal the existence of any evidence substantiating Heather's discrimination allegations.

In addition, while it is undisputed that Heather was well versed in her legal rights, she waited until the 296th day after the most recent alleged incident to file a formal charge of discrimination. Thus, although her charge is just barely within the Title VII filing period, the credibility and substance of Heather's

allegations must be assessed in light of her unexplained failure to present them in a more timely fashion.

The Charges

Heather claims Mr. Parks made sexual advances and used sexual innuendo in talking to her. Mr. Parks categorically denies her characterization of what he said and states affirmatively that Heather threatened to make a false claim of sexual harassment if he did not roll over and give her the departments of her former boss and lover, Art Trent.

The evidence indicates that Mr. Parks tried to maintain friendly, informal working relations with all the employees under his supervision. That is his style of management. Further, there is no evidence that Heather ever gave any prior indication that she considered any of Mr. Parks' statements or actions unwelcome or offensive. Even assuming that all of the statements and actions alleged by Heather occurred, they do not make a case of unlawful sexual harassment.

Additional information relating to this matter is attached.

Respectfully submitted,

Pat Ames
Equal Opportunity Specialist
Rossers Department Stores

END OF ACTIVITY "REVIEW FIRST DRAFT"

Activity | Write the introduction

Duration: 15 minutes

Pat needs some assistance developing an introduction for the Position Statement. Draft a “model” introduction for her to use based on these tips:

- Keep it short
- Say who you are and why you are writing
- Establish the theme
 - Clearly and concisely stated reason that the charge is without merit
 - Capitalizes on the evidence in the case that is most favorable and minimizes effect of damaging evidence
 - Resolve as many conflicts in the evidence as possible.

Post your introduction to the Discussion Forum **ACTIVITY: Module 6 | Write the Introduction** and feel free to comment on the introductions your fellow participants post. Feel free to post questions to the facilitator.

Activity | Write the background

Duration: 15 minutes

Pat also needs help developing a background section for the Position Statement. Draft a “model” background section for her to use based on what you’ve learned so far.

Post your introduction to the Discussion Forum **ACTIVITY: Module 6 | Write the Background** and feel free to comment on the backgrounds your fellow participants post. Feel free to post questions to the Facilitator.

Activity | Plan your defense

Duration: 30 minutes

This activity requires you to work in small groups. Check the Discussion Forum **ACTIVITY: Module 6 | Plan Your Defense** and look for the posting from the Facilitator or Administrator to see who you are working with. Your group can use whatever form of communication is most convenient for you - discussion forum, email, or telephone – in order to collaborate on the plan.

Prima Facie

A *prima facie* case is one that meets the presumption of discrimination. The elements of a *prima facie* case for a typical hiring discrimination case are:

- The individual is a member of a protected group;

- The individual was qualified for the position held or sought;
- The individual wasn't selected; and
- Others outside the group were treated differently.

For a claim of sexual harassment involving a tangible employment action by a supervisor, the elements of the prima facie case are:

- The conduct was unwelcome;
- The conduct was because of sex;
- The conduct resulted in a tangible employment action, such as firing or demotion.

Example 1: The employee was denied several lucrative accounts because she refused to have sex with her supervisor.

If the employee can successfully prove all the elements of a “tangible employment action” harassment claim, then the employer has no defense. Of course, the employer still can challenge the employee’s evidence by claiming that the conduct was not unwelcome, was not because of sex, or did not directly result in a tangible employment action.

“Hostile environment” sexual harassment occurs when unwelcome conduct inflicted on an employee because of his or her membership in a protected class creates a hostile work atmosphere so severe or pervasive that it unreasonably affects the employee’s working conditions. Harassment can be verbal, physical, or even visual. A prima facie case of “hostile environment” sexual harassment contains these elements:

- The conduct was unwelcome;
- The conduct was because of sex;
- The conduct was so severe or pervasive that it unreasonably interfered with the employee’s work performance or created a work environment that a reasonable person would find hostile or abusive.

Example 2: A supervisor or coworker makes repeated sex-based slurs and insults about an employee.

If the employee can show a prima facie case of hostile environment harassment, she will win the case unless the employer shows:

- It had a policy against harassment and an effective complaint procedure that was communicated to employees; and
- The employee unreasonably failed to use the policy or otherwise prevent harm

Example 3: The company's anti-harassment policy was distributed to all employees and was part of their handbooks, but the employee never complained about the slurs and insults.

Activity

In your group, answer the following four questions and post them to the Discussion Forum.

1. What is the prima facie case that Newburg must establish?
2. What are some possible defenses the company could assert?
3. Evaluate the strengths and weaknesses of the company's case.
4. Are there questions Pat should investigate further?

Feel free to check out the posts from the other teams and comment on them. And as always, feel free to post questions to the facilitator.

Activity | Review second draft

Duration: 10 minutes

Pat has revised her Position Statement and asked you to take another look at it. You see improvement, but there are still problems. Review the second draft (pages 40-42) and prepare a list of points to discuss with her concerning what works and what doesn't. Enter your recommendations in the Discussion Forum **ACTIVITY: Module 6 | Review Second Draft**.

As with past activities, review the recommendations from other participants and comment on them.

**FOR CLASS DISCUSSION PURPOSES ONLY
NOT TO BE USED AS A FORM**

Draft 2 Position Statement

Mr. Michael Smith
Investigator
Equal Employment Opportunity Commission
1801 L Street, N.W.
Washington, DC 20507

RE: Heather Newburg v. Rossers Department Stores
Charge No. 180-990X234

Dear Mr. Smith:

This letter responds to the above-referenced charge of discrimination alleging sexual harassment. Rossers Department Stores denies that the charging party in this case was subjected to any form of unlawful sexual harassment. Moreover, Rossers assigned the sales accounts mentioned in paragraph two of the charge to other, more senior employees than the charging party for legitimate, non-discriminatory business reasons.

This position statement and accompanying documentation constitute the initial position of Rossers, and we reserve the right to file additional statements and/or documentation as the investigation proceeds. All information provided here is confidential, proprietary information and may not be disclosed without written permission.

Background

Rossers owns and operates over 120 top-end department stores throughout the United States, and these stores employ a staff of Sales Managers who specialize in servicing major clients. The charging party works as a Sales Manager at our Tyson's Corner, Virginia store. She has worked for Rossers for the past three years and is the most junior Sales Manager at Tyson's Corner.

The charging party currently reports directly to Store Manager Brian Parks. Previously, the charging party worked for Assistant Store Manager Arthur Trent, who left the company one month ago. Mr. Parks has been a member of Rossers' senior management team for almost 30 years. He has never before been the subject of either an EEOC investigation or an informal discrimination investigation.

Rossers is steadfastly committed to equal employment opportunity for all of our employees. We have a strict policy against discrimination, including all forms of unlawful harassment. This policy encourages employees to report all instances of harassment promptly to their supervisor or any member of Rossers' Human Resources staff. The policy also makes clear that all complaints will be investigated promptly and thoroughly, and appropriate disciplinary action will be taken if a violation of the policy is discovered. The policy is set forth in Rossers' Employee Manual, which is given to all employees when they are hired, and is prominently posted on our Intranet site.

Rossers also has a formal EEO training program, which has been in place since 1993. This program includes awareness training on sexual harassment for managers and supervisors. Mr. Parks has attended these trainings every year since the program first started. The charging party has also attended the sexual harassment training sessions, including the most recent training session held six months ago.

The Allegations of “Hostile Environment” Sexual Harassment

We understand that Ms. Newburg bases her complaint of “hostile environment” harassment on certain alleged conduct and statements of Mr. Parks and/or other male sales representatives. Specifically, we understand that she claims he used and/or allowed sexual innuendo in talking to her. Our investigation reveals a substantial factual dispute about what Mr. Parks actually said and did. Furthermore, Mr. Parks categorically denies that he made any sexual or otherwise improper comments.

As you know, the burden is on a party complaining of sexual harassment to establish that the conduct complained of was sexual in nature and that it was unwelcome. A “reasonable person” standard is then applied to determine whether the conduct created a hostile environment. Measured by these standards, the evidence in this case falls far short of supporting the Charging Party’s claims.

First, there is no claim that Mr. Parks ever previously made a direct sexual advance or overtly sexual statement to Ms. Newburg or to any other employee. Rather, Ms. Newburg apparently claims that, on a single, isolated occasion in the presence of other employees, he used nonverbal conduct and innuendo to imply sexual meanings. Yet the statements and actions she ascribed to him during this incident are susceptible to completely innocent interpretations having nothing to do with sex.

Mr. Parks credibly explains that he was merely trying to recognize Mr. Newburg’s recent sales performance and zeal for meeting client needs, and that he hoped his remarks would encourage the other sales managers to be more aggressive in performance of their jobs. The evidence indicates that he tried to maintain friendly, informal working relations with all the employees under his supervision. That is his style of management. Thus, his treatment of Ms. Newburg was consistent with his treatment of other employees of both sexes.

Further, there is no evidence that Ms. Newburg considered any of Mr. Parks’ statements unwelcome or offensive at the time they allegedly occurred. Indeed, the evidence shows that Ms. Newburg laughed in response to Mr. Parks’ remark and even engaged in friendly banter with him. Ms. Newburg did not complain that she found the remark offensive until after Mr. Parks refused to assign her the departments left by her former supervisor, Arthur Trent, when he unexpectedly resigned. Mr. Parks testified that Ms. Newburg threatened to take such action if the Trent departments were refused her and, as the instant charge confirms, she made good on her threat.

At worst, the statements and actions of which Ms. Newburg now complains were ambiguous and left Mr. Parks’ intentions unclear. Yet, without objecting or even questioning his intentions at the time, she now claims they were sexually oriented and harassing.

The Allegation of “Quid Pro Quo” Harassment

We understand that Ms. Newburg bases her allegation of “quid pro quo” sexual harassment on (1) a conversation Mr. Parks had with her in his office immediately following Mr. Trent’s resignation; and (2) a subsequent, alleged elevator ride. She claims that Mr. Parks sexually propositioned her and suggested that a sexual relationship would benefit her career, to wit, would enable him to offer her the Trent departments and thus increase substantially her potential earnings from sales commissions.

Again, this allegation is based entirely on Ms. Newburg’s word alone. It is undisputed that no one witnessed the events and, significantly, that Ms. Newburg did not complain about them until she was certain she would not be assigned the Trent departments. Mr. Parks – who in his 30-year employment history with Rossers has *never* been accused of such conduct – vehemently denies the allegations, and there is no evidence supporting Ms. Newburg’s contrary intention.

As with the other incidents of which she now complains, Ms. Newburg gave no indication at the time to Mr. Parks, to the personnel office, or to anyone else in management that she regarded Mr. Parks’ conduct as improper, or that she interpreted it as a sexual advance. The fact that she waited until the last minute to complain about this alleged “egregious” conduct on the part of Mr. Parks lends credibility to his claim that Ms. Newburg threatened to file false charges of discrimination if she was not assigned the Trent departments.

Moreover, Ms. Newburg has never once challenged Rossers’ contention that Mr. Trent – with whom Ms. Newburg was romantically involved until the time of his resignation – did not have the authority, actual or apparent, to assign his departments to Ms. Newburg. Rather, it is undisputed that only Mr. Parks could make that decision, which he declined to do because of Ms. Newburg’s relative lack of seniority compared to the other sales representatives. Furthermore, none of the other female representatives – some of whom were assigned part of the Trent departments – have stated that Mr. Parks propositioned them or otherwise behaved in an inappropriate manner.

Thus, the evidence also fails to support the allegation of “quid pro quo” sexual harassment. Accordingly, a finding of no cause should be issued with respect to that allegation, as well.

Conclusion

For all of the reasons set forth above, the charging party’s claim of sexual harassment is without merit. Therefore, Rossers respectfully asks the Commission to issue a finding of no reasonable cause in this case.

Respectfully Submitted,

Pat Ames
Equal Opportunity Specialist
Rossers Department Stores

Attachments

END OF ACTIVITY “REVIEW SECOND DRAFT”

Activity | Review third draft

Duration: 15 minutes

Pat has revised her Position Statement a third time for your review. Read through it (pages 43-46) before the Web Session for this week and be ready to discuss it and ask any questions you have.

FOR CLASS DISCUSSION PURPOSES ONLY NOT TO BE USED AS A FORM

Draft 3 Position Statement

Mr. Michael Smith
Investigator
Equal Employment Opportunity Commission
1801 L Street, N.W.
Washington, DC 20507

RE: Heather Newburg v. Rossers Department Stores
Charge No. 180-990X234

Dear Mr. Smith:

This letter responds to the above-referenced charge of discrimination alleging sexual harassment. Rossers Department Stores denies that the charging party in this case was subjected to any form of unlawful sexual harassment. Moreover, Rossers assigned the sales accounts mentioned in paragraph two of the charge to other, more senior employees than the charging party for legitimate, non-discriminatory business reasons.

This position statement and accompanying documentation constitute the initial position of Rossers, and we reserve the right to file additional statements and/or documentation as the investigation proceeds. All information provided here is confidential, proprietary information and may not be disclosed without written permission.

Background

Rossers owns and operates over 120 top-end department stores throughout the United States, and these stores employ a staff of Sales Managers who specialize in servicing major clients. The charging party works as a Sales Manager at our Tyson's Corner, Virginia store. She has worked for Rossers for the past three years and is the most junior Sales Manager at Tyson's Corner.

The charging party currently reports directly to Store Manager Brian Parks. Previously, the charging party worked for Assistant Store Manager Arthur Trent, who left the company one month ago. Mr. Parks has been a member of Rossers' senior management team for almost 30 years. He has never before been the subject of either an EEOC investigation or an informal discrimination investigation.

Rossers is steadfastly committed to equal employment opportunity for all of our employees. We have a strict policy against discrimination, including all forms of unlawful harassment. This policy encourages employees to report all instances of harassment promptly to their supervisor or any member of Rossers' Human Resources staff. The policy also makes clear that all complaints will be investigated promptly and thoroughly, and appropriate disciplinary action will be taken if a violation of the policy is discovered. The policy is set forth in Rossers' Employee Manual, which is given to all employees when they are hired, and is prominently posted on our Intranet site.

Rossers also has a formal EEO training program, which has been in place since 1993. This program includes awareness training on sexual harassment for managers and supervisors. Mr. Parks has attended these trainings every year since the program first started. The charging party has also attended the sexual harassment training sessions, including the most recent training session held six months ago.

The Charging Party Lacked the Seniority Needed to Acquire the Departments She Sought

The charging party alleges in her charge that Mr. Parks refused to assign to her several departments belonging to her former supervisor, Arthur Trent. Mr. Trent recently left the company to work for a competitor, and we understand the charging party now claims that Mr. Trent promised her that Rossers would reassign his sales departments to her for reasons related to her performance. The charging party further claims in her charge that, after Mr. Trent left, Mr. Parks refused to give her the departments because she would not become involved in a romantic relationship with him.

It is true that Rossers did not assign Mr. Trent's sales departments to the charging party, but not for the reason she alleges in her charge. Rossers has a long-standing policy of reassigning existing customer departments according to seniority. This policy is published in the Rossers Department Stores Sales Handbook, which is given to every new Sales Manager in their first week of employment with the company.

According to the policy, when a Sales Manager leaves the company, the Assistant Store Manager will reassign the person's existing customer departments to one or more of the most senior Sales Managers. This decision must then be approved by the Store Manager.

At the time Mr. Parks made the decision to reassign the Trent departments, Rossers' Tyson's Corner Sales Department had ten Sales Managers on staff. The charging party began working for Rossers just three years ago and is the newest member of the sales department. Mr. Parks, in accordance with Rossers' policy, assigned the departments to the three Sales Managers in the department with the most seniority.

There is absolutely no credible evidence to suggest that Mr. Parks' decision concerning the Trent departments was based on any improper motive. Mr. Parks' categorically denies the allegation that he sexually propositioned the charging party or promised her the departments if she became romantically involved with him. The charging party's allegations in this regard are based on her word alone. Moreover, it is undisputed that Mr. Parks – who is his 30-year employment history with Rossers has never been accused of sexual harassment – based his decision on the charging party's lack of seniority compared to the other Sales Managers – a decision that fully comports with long-standing company policy.

The Charging Party Does Not Allege Conduct That Would Constitute Hostile Work Environment

The charging party also alleges in her charge that Mr. Parks subjected her to inappropriate “thinly-veiled sexual innuendo” when talking to her. We assume from this allegation that the charging party is also claiming that Mr. Parks subjected her to a sexually hostile work environment.

As an initial matter, it is important to point out that the charging party first notified the company of Mr. Parks’ alleged use of “sexual innuendo” just one day before she filed her EEOC charge. At that time, Ms. Newburg told us that, on a single, isolated occasion, Mr. Parks used innuendo to imply sexual meanings. Although our investigation revealed a substantial factual dispute about what was actually said, and even though the incident the charging party ascribed to Mr. Parks was susceptible to completely innocent interpretations having nothing to do with sex, Rossers nevertheless cautioned Mr. Parks against engaging in similar discussions in the future. We have received no further complaints from the charging party since this time.

As you know, the burden is on a party complaining of hostile environment sexual harassment to establish that the conduct complained of was unwelcome, sexual in nature, and sufficiently “severe or pervasive” to alter the conditions of the person’s employment. In determining whether unwelcome sexual conduct rises to the level of an actionable hostile work environment, the central question is whether the conduct unreasonably interferes with an individual’s work performance or creates an intimidating, hostile, or offensive working environment.

This agency has said that “sexual flirtation or innuendo, even vulgar language that is trivial or merely annoying, would probably not establish a hostile environment.” Also, “a single incident or isolated incidents of offensive sexual conduct or remarks generally do not create an abusive environment.” See EEOC Policy Guidance on Current Issues of Sexual Harassment (March 19, 1990).

Measured by these standards, the evidence in this case falls far short of supporting the charging party’s claims. The conduct the charging party contends Mr. Parks engaged in was neither severe nor pervasive. Instead, she reported a single, isolated remark that arguably could be construed as having nothing to do with sex. Accordingly, the charging party’s hostile environment claim must fail.

Rossers Has an “Affirmative Defense” In This Case

Even assuming the charging party could show credibly that Mr. Parks engaged in severe or pervasive conduct of a sexual nature, the evidence clearly shows that Rossers may successfully advance the Faragher/Ellerth “affirmative defense” in this case. Under the Supreme Court’s Faragher and Ellerth decisions, an employer may not be liable for a supervisor’s sexually hostile work environment if it can show that:

- It exercised reasonable care to prevent and promptly correct any harassing behavior; and
- The employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm.

See EEOC Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors (June 18, 1999).

As noted earlier in this letter, Rossers is steadfastly committed to equal employment opportunity for all of our employees. We have a strict policy prohibiting discrimination, as well as a reporting procedure that employees may use to report possible violations of the policy. All reports are promptly investigated by Rossers' Human Resources staff and appropriate disciplinary action taken where a violation is found. Rossers also conducts training, including sexual harassment training, for both management and non-management employees on a yearly basis. Accordingly, Rossers routinely exercises reasonable care to prevent and promptly correct any harassing behavior.

At the same time, the charging party in this case unreasonably failed to take advantage of the "preventative" and "corrective" opportunities available at Rossers. The charging party gave no indication at the time to Mr. Parks, to the human resources department, or to anyone else in management that she regarded Mr. Parks' remarks as improper. Although she was well aware of Rossers' policy and complaint procedures, she unreasonably delayed reporting any problems until just one day prior to filing her EEOC charge.

Notwithstanding charging party's unreasonable delay in reporting, Rossers continued to exercise "reasonable care" by launching a prompt investigation and taking effective action to address the charging party's concerns. Significantly, the charging party has had no complaints concerning Mr. Parks since that time.

Conclusion

For all of the reasons set forth above, the charging party's claim of sexual harassment is simply without merit. Accordingly, Rossers respectfully asks the Commission to issue a finding of no reasonable cause in this case.

Respectfully submitted,

Pat Ames
Equal Opportunity Specialist
Rossers Department Stores

Attachments

END OF ACTIVITY "REVIEW THIRD DRAFT"

After completing the module, participate in the web session before proceeding to the next module. Feel free to participate in the discussion forum, however.



Module 7 | Requests for Information

Duration: 20 minutes

Activity | Respond to a request

Duration: 15 minutes

Review the EEOC's Request for Information below, and start to develop a plan for responding to the request. In the Discussion Forum **ACTIVITY: Module 7 | Respond to the Request for Information**, post your answers to these two questions:

- Should you provide all of the information requested by the EEOC? Some of it? None of it?
- If you decide not to provide some of the items requested, on what grounds will you base your refusal?

As usual, check the Discussion Forum to see how your answers compare to those of your fellow participants. Comment on some of their responses.

The EEOC's REQUEST FOR INFORMATION

1. With respect to each person currently or formerly employed by Respondent under the supervision of Mr. Brian Parks, please provide the following information:
 - a. Name, race, sex and date of birth
 - b. Current residence address
 - c. Date of hire
 - d. Position currently held, if still employed by Respondent
 - e. Dates worked under Mr. Parks' supervision
 - f. Date and nature of separation, if no longer employed by Respondent
 - g. If discharged or laid off, state reason
 - h. Starting rate of pay and pay rate progressions
 - i. A copy of the individual's personnel file
2. With respect to each complaint of sexual harassment that has been made against Respondent within the past two years by any of its employees based on alleged statements and/or conduct of Mr. Brian Parks or any of Respondent's other officials, managers, supervisors, and/or employees, please provide the following information:

- a. Name, race, sex, date of birth, position with the Respondent, and current mailing address of the person(s) who made the complaint
 - b. Name, race, sex, date of birth, and position with the Respondent of each person alleged to have committed, participated in, or knowingly condoned such harassment
 - c. Nature of the alleged harassment
 - d. Nature and extent of any investigation of the complaint conducted by Respondent
 - e. Current status and resolution, if any, of the complaint
3. Does Respondent maintain a written policy against sexual harassment? If so, please submit a copy of said policy and provide the following information:
 - a. How are employees informed of the policy?
 - b. How are managers and supervisors informed of the policy?
 - c. How is the policy enforced?
 - d. What are the penalties for violations of the policy?
4. Does Respondent provide employees with an internal complaint procedure for presenting complaints of sexual harassment? If so, please describe the procedure in detail.
5. What specific steps, if any, has Respondent taken to inform Mr. Brian Parks concerning his obligations not to engage in sexual harassment in the workplace.
6. Provide a detailed description of how sales accounts are assigned at your company, and state whether any procedures are available to employees in writing.
7. Provide copies of all records in Rossers' possession that reflect how accounts have been assigned to Sales Managers during the period of Mr. Brian Parks' employment.
8. Does Respondent have any position for sales representatives other than those working under the supervision of Mr. Brian Parks? If so, describe those positions in full, including the duties, location, supervision, and applicable pay schedules.
9. Supply a copy of the most recently filed EEO-1 report for the organizational unit or facility named in the charge. If your organization (or this unit or facility) is not subject to filing requirements, please explain.



Module 8 | Managing Onsite Investigations

Duration: 20 minutes

There are no activities for this module.

Preparation for Module 9 Activity

In order to prepare you for the course's capstone activity in Module 9, there is a brief web session scheduled for you. During the session, the facilitator will provide you with guidance and additional information that you'll need to complete the activity.



Module 9 | Approaching Settlement

Duration: 20 minutes

Activity | Role Play: Conciliation discussion

Duration: 30 minutes

This capstone activity requires you to work in small groups. Check the Discussion Forum

ACTIVITY: Module 9 | Conciliation Discussion and look for the posting from the Facilitator or Administrator to see who you are working with, the role you will play, and additional instructions.

The Players (in each group):

- The Rossers Representative
 - An Equal Opportunity Specialist with Rossers Department Stores
- The Agency Representative
 - EEOC Field Investigator Michael Smith

The Play

EEOC has now completed its investigation of Heather Newburg's charge and has issued a determination letter finding reasonable cause to believe that Rossers violated Title VII. The

letter indicates that the Commission found sufficient evidence to support both the "quid pro quo" and "hostile environment" allegations of sexual harassment.

A few days after the determination letter was sent, EEOC investigator Michael Smith sent the Company's representative a proposed conciliation agreement (see Attachment I (below) = a summary of the terms of the proposed conciliation agreement). Mr. Smith and the Company's representative are now sitting down at a meeting to discuss the conciliation proposal.

Improvise your discussion and see if you can reach a settlement agreement. Feel free to be creative. Afterwards, post your results on the discussion board, and look to see how other groups fared.

ATTACHMENT I

Summary of Terms of Conciliation Agreement Proposed by EEOC:

1. Within 10 days of execution of this Agreement, the Company will offer Heather Newburg all of the accounts promised to her by her former supervisor, Arthur Trent.
2. The Company will make Ms. Newburg whole for any loss of income she has suffered as a result of its refusal to assign the Trent accounts in a timely manner.
3. Within 10 days of execution of this Agreement, the Company will remove Brian Parks from his position as Store Manager of the Tyson's Corner, Virginia store, and will not assign Ms. Newburg to any position under his supervision or authority for at least three (3) years.
4. The Company will institute a series of training programs, to be approved by the EEOC District Director, to increase its managers' and supervisors' awareness of Title VII's prohibition against sexual harassment and of the consequences of violation.
5. The Company will pay Ms. Newburg the sum of \$150,000 in compensatory damages for the pain, anguish and humiliation she suffered as a result of the unlawful harassment.
6. The Company will pay Ms. Newburg the sum of \$150,000 in punitive damages as a result of its reckless indifference to Ms. Newburg's federally protected rights.

The Company will sign and post in conspicuous places throughout its workplace notices advising its employees of their rights under Title VII and assuring them that Rossers will not engage in sexual harassment of employees or applicants for employment.

Conciliation Activity Notes

In the table below, take notes of each group's discussion. Reflect on the mechanics, focus, and contents of the other negotiations and yours, and note any comments the individuals made that may have changed the outcome or flow of your negotiation.

Group	How did the negotiation go?	What was the outcome?



Module 10 | Approaching Settlement

Duration: 15 minutes

Please complete the Post-Course Knowledge Check and the online Participant Feedback Form in order to receive the course's Certificate of Completion.

To access, complete, and submit the Post-Course Knowledge Check

1. At the **Activity Overview** screen, look for the Knowledge Check module.
2. Open the module; at the title screen, click the **Next** button.
3. Review the instructions at the top of the screen.
4. For each question, select the best answer and then click the Submit button.
5. Respond to each question, which is based on a mini-scenario.
6. After responding to all the questions, you will receive a score (percent correct).

To access, complete, and send the Participant Feedback Form

7. At the **Learning** screen, look for the course name.
8. Select **Launch Postwork**; the Participant Feedback Screen displays.
9. Complete the Feedback Form by rating each statement and entering comments where indicated.
10. Click the **Submit** button at the end of the questions.

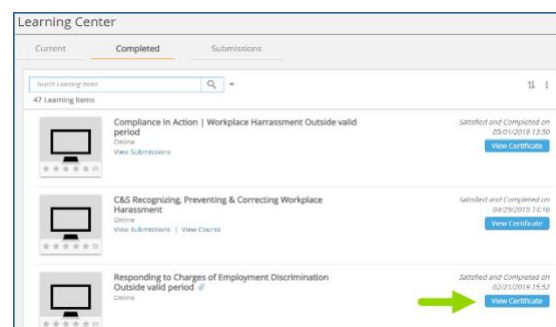
To print your Certificate of Completion

After you have submitted your feedback, the learning system will make the Certificate of Completion available to you.

- a. Go to the course on the **Completed** section in the **Learning Center**
- b. Find the course name and

Select **View Certificate**

- The certificate opens in a new window
- Right-click your mouse and select **Print**



Transcripts by Module

Italic text indicates information presented onscreen, often via pop-up text, that is not narrated.

Module 1 | Welcome and Orientation

Welcome to “Responding to Charges of Employment Discrimination” This is the Orientation module.

We’re glad to have you in the course and look forward to making this an exceptional learning experience for you.

Before getting into the primary reason you’re here – to learn how to respond to a charge of employment discrimination – this module provides general information about the course design and what you’ll be doing the next few weeks.

Select the NEXT button to proceed.

The goal of this skill-building course is to give you strategies and techniques for handling discrimination charges, from the moment an employer receives notice that a charge has been filed with the EEOC, through the final resolution or referral of the case to litigation. The Center for Workplace Compliance (CWC) has been offering this course, and many others, for many years.

If you don’t know about CWC or if your employer isn’t a member, select the CWC logo to learn a little more about the association.

About CWC: CWC is an employer association dedicated to helping its members understand and manage their workplace compliance requirements and risks. CWC’s membership includes businesses and organizations of all sizes and from every major economic sector. These member employers are represented in CWC by their senior-level human resources executives, in-house employment counsel, workplace compliance practitioners, diversity and inclusion leaders, talent acquisition professionals, and compensation principals.

Disclaimer: The Center for Workplace Compliance is a nonprofit association of private sector employers dedicated to promoting the common interests of its members and of the public in the development and implementation of sound workplace compliance policies, procedures, practices, and rules.

The materials developed for this program and the discussions based upon them are designed to provide accurate and authoritative information regarding the subject matter covered. They are provided with the understanding that CWC is not engaged in rendering legal, accounting, or other professional services.

For legal advice or other expert assistance, the services of a competent attorney or other professional should be sought.

Select the NEXT button to proceed.

There are four major components of the course: The Participant Guide, the self-paced online training modules, web sessions, and discussion forums. Select each component to view a description.

Participant Guide: Your Participant Guide is your source for technical information, the course schedule, instructions for activities, a transcript of the course's narration, and much more. Spend some time getting familiar with the information it contains. Print it out. Keep it handy. Jot down notes throughout the course that you can refer to on the job.

Online Modules: The self-paced modules provide you with essential skills and knowledge about how to respond to charges of employment discrimination. Each week you'll be assigned one or two modules to complete. The modules include activities designed to check your knowledge or apply the skills you just learned. It's important that you complete the self-paced modules at the beginning of each week so that you can get the most benefit out of the facilitated web session and discussion forum connected with the module.

Web Sessions: There are 6 web sessions planned during the course. You'll log into Microsoft Teams Meeting using login information the technical assistant provides. The sessions are led by the course facilitator and technical assistant, and attended by the other course participants. During these sessions, the facilitator will provide you with additional information associated with the modules you just completed. But there's also time built in so that you can ask questions, get clarification on points that were a little unclear to you, or find out how your colleagues in class handle a particular step in the process at their organization. All sessions are recorded.

Discussion Forum: There are 2 types of discussion forum. The General forum is available to you for questions, technical issues you may be having, and general discussions related to the course materials. There are also "dedicated" forums for each module so you can complete an activity or have discussions with your colleagues and facilitator about that step in the charge response process. Please take a few minutes before entering a forum for the first time to read the "netiquette."

The course is 6 weeks long and consists of 10 modules. The first column is the name of the self-paced module. You are assigned one or two modules per week. The self-paced modules vary in length and include activities to help reinforce key concepts. There is a web session or discussion forum following the completion of most self-paced modules. Your Participant Guide has a lot more information about the weekly schedule.

In order to help you stay on track with activities and schedule, we'll send you weekly reminders with tips on what to do and timeframes for when to do them.

You'll get to know two individuals from CWC pretty well during the course. One is the facilitator and one is the administrator.

The facilitator is an expert in equal employment opportunity law and is available throughout the length of the course. Contact the facilitator if you have questions about the self-paced modules' topics and information. Your Participant Guide has more information about your facilitator, as well as contact information.

The administrator is an expert in e-learning and is also available throughout the duration of the course. Contact the administrator if you encounter technical difficulties with the course, have questions regarding the schedule, or need to let CWC know if your schedule prevents you from completing an assignment.

Navigating the course is relatively easy. Select the highlighted areas on the screen to learn more about the navigation feature. The description appears on the right.

Module Name: This is the name of the module you are viewing.

Menu/Notes: Select the Menu tab to view a list of the screens in the module. You can move to different screens in the module by clicking the screen name. Select the Notes tab to view the script of the screen's narration.

Resources: Select Resources to view and download documents associated with the module.

Screen Title: This is the screen's title. It coordinates with the screen name in the Menu.

Content Area: This section of the screen's "real estate" contains the presentation of the content. The bottom part of the screen typically has instructions for onscreen activities, such as clickable items to view more information. Hyperlinked text, when selected, opens pop-up boxes or new windows.

Audio Control: Adjust the volume of the course's narration. Your computer also has a volume control, so you may have to adjust that before adjusting volume within the course.

Play/Pause: Select the arrow to play the screen. Pressing Pause (two vertical lines) pauses the course temporarily.

Progress Bar: Shows the progress of the screen's audio and screen action.

Rewind: Select this button to play the screen from the beginning.

Previous/Next buttons: Click the PREV button to view the previous screen. Click NEXT to view the next screen.

If you have taken courses online before, you will likely become comfortable with the format and features pretty quickly. If this is your first experience with an online course, you may feel a little uneasy at first.

Online learning is convenient and provides you with a lot of flexibility. With this comes responsibility, however.

Participants in online learning sometimes become frustrated with technical issues, feel isolated from classmates and facilitators, and find it more difficult to communicate with each other.

You can tackle these issues by identifying where to go to get technical help, reach out to the facilitator and classmates using email, the discussion forum, and even the phone, and frequently interacting online. There are a number of activities built into the design of the course to encourage interactions. So take advantage of them.

If this is your first online course, let your facilitator know. We'll give you the support you need to become comfortable, open up opportunities to interact with the facilitator and classmates, and help you to get the most out of the course.

Here are a few other tips to make your online learning experience more successful. Select each tip to view the description.

Identify your workspace: It's especially important if you are doing most of the course work at your workplace that you identify a space that will not distract from your learning. Tell your direct supervisor about the course, the timeframes for taking the self-paced modules and discussion forum activities, as well as the dates and times of the web sessions. Make sure that you can listen to the module narration using earphones or are in a location where the audio won't disrupt your co-workers. For web sessions, find a place with a phone and internet access that will allow you to view the sessions and listen to and speak with the facilitator and classmates.

Print your Participant Guide: Print out your Participant Guide and keep it handy during all portions of the course. It contains valuable technical information, instructions for activities, a transcript of each module and much more. Look through it before starting the course and become familiar with it. You may even want to add tabs to mark the sections and put the guide in a binder.

Get familiar with the online course: The course is offered to participants via a learning platform that allows you to run the modules, access job tools and other resources, and interact with classmates and the facilitator in discussion forums. Take some time to become familiar with the online environment.

Stay on schedule: We provide you with a schedule to help you plan your time. The schedule includes estimates for how long modules may take to complete and timeframes for completing them. These are estimates only; your experience may be slightly different. Web sessions are always associated with the information you learned in the modules you completed for that week, so be sure to complete the modules before attending the web sessions.

Be courteous and respectful: You and your classmates will have different levels of experience with online learning and workplace compliance. In web sessions, discussion forums, and activities, always be courteous and respectful. Also abide by the discussion forum “netiquette” guidelines in your Participant Guide.

One last tip: Always keep the contact information for technical assistance readily available.

Again, thank you for taking the course. We hope it’s a rewarding learning experience. Please let your facilitator and technician know if there’s anything we can do to make the course successful for you.

You have completed the Orientation module. You may now close this module by clicking the red X in the top right corner of the window.

Module 2 | The EEOC's Charge Handling Process

Welcome to “Responding to Charges of Employment Discrimination” This module is “The EEOC’s Charge Handling Process and You”

The filing of a charge with an equal employment opportunity law enforcement agency accusing an employer of discrimination sets off a process that can lead to complicated administrative proceedings and ultimately litigation in court.

The processing of a charge is a 3-way affair. Representatives of the employer, the enforcement agency, and the complaining party all participate, each performing a distinct role.

The employer’s prospect of a favorable outcome depends in no small measure on how effectively its representatives carry out their part in the charge-handling process.

In this module you’ll become acquainted with the Equal Employment Opportunity Commission’s charge-handling process so your organization will be in the best possible position to defend its rights effectively.

At the end of this module, you will be able to:

- Differentiate between your 4 roles as the individual managing your organization’s internal charge handling process.
- Describe the EEOC’s function, authority and jurisdiction related to charges of employment discrimination.
- State the purpose of each of the 5 stages in the Equal Employment Opportunity Commission’s charge processing procedure.
- Identify your responsibilities during the 5 stages of the charge handling procedure.

The main focus of this module is on the EEOC’s charge handling process. However, it’s important to recognize that there are actually two charge handling processes going on concurrently: the EEOC’s and your organization’s.

The EEOC will assign an investigator, who will be your organization’s contact for any issues associated with the charge. And your organization should identify a single point of contact. For purposes of this course, that person is you.

You are responsible for the internal processing of charges in your organization, and therefore, you will play a variety of roles depending on where you are in the charge handling process. Click each role to view the description.

Impartial Investigator: When you make an initial assessment of the charge and gather all of the relevant facts, you should try to be an impartial investigator. Of course, you never lose sight of

the fact that you represent the organization. But until you have a full grasp of the facts, you need to be as objective as possible and not allow personal loyalties to shape your thinking about the case.

Confidential Advisor: After your investigation is complete, your role shifts slightly. At this stage you function more as a confidential advisor to the organization. You make judgements about the strengths and weaknesses of the case, including credibility of the witnesses for and against the organization. Based on those judgements and other factors, you make recommendations about how the organization should proceed. Your focus is on how the organization's interests can best be served, both in the immediate term and the long term.

Advocate for the Organization: After you and others in management have reached a decision on what position to take, your primary role becomes that of an advocate for the organization in presenting facts and the organization's position to the EEOC or the enforcement agency officials. In this role, your objective is to present the organization's case as persuasively and credibly as possible.

Proactive Consultant: At various points in the charge process, you may find it appropriate to serve as a proactive consultant to the organization, providing advice and recommendations that may help the organization minimize any adverse effects of the charge or avoid similar charges in the future. Your principle concern is with how to implement (and maybe even improve) the organization's policies and practices to ensure that the fundamental EEO and affirmative action commitments of the organization are realized.

These roles are not mutually exclusive. You will find yourself switching back and forth frequently between the roles. It's also important to be conscious of the specific role you are playing at any given moment and to keep the objectives associated with each role clearly in mind.

The EEOC enforces federal laws that make it illegal to discriminate against a job applicant or an employee because of the person's:

- Race
- Color
- Religion
- Sex - including pregnancy
- National origin
- Age - 40 and over
- Disability

- Genetic information

It is also illegal to discriminate against a person because the person complained about discrimination, filed a charge of discrimination or participated in an employment discrimination investigation or lawsuit.

Most employers with at least 15 employees are covered by EEO laws (20 employees in age discrimination cases). Most labor unions and employment agencies are also covered.

The laws apply to work situations, including hiring, firing, promotions, training, wages, and benefits, and include harassment and retaliation.

The EEOC carries out its work through its headquarters office in Washington DC, 15 district offices, and 53 field offices serving every part of the country.

To view a map of the district offices and their associated states, click the EEOC web link. When you are done viewing the website, close the window by clicking the X in the new window's top right corner.

The EEOC's primary role is investigation and conciliation of charges of discrimination. Its role in an investigation is to fairly and accurately assess the allegations in the charge and then make a finding.

Litigation is another EEOC function. That is, the EEOC sues companies to enforce the law.

The Agency develops policy, including regulations, a compliance manual, enforcement guidance, and fact sheets.

The EEOC also works to prevent discrimination before it occurs through outreach, education and technical assistance programs.

There are four possible legal theories in discrimination cases.

Disparate Treatment: An employee was treated differently than other employees who were similarly situated, and the difference was based on a protected characteristic.

Failure to Reasonably Accommodate: The failure of an employer to reasonably accommodate an employee's disability or religious practice.

Retaliation: An employment action such as firing, demoting, harassing, or otherwise "retaliating" against an applicant or employee because s/he filed a charge of discrimination, complained or otherwise opposed discrimination on the job, or participated in an employment discrimination enforcement proceeding.

Disparate Impact: Practices in employment (unintentional) that are discriminatory and illegal because they have a disproportionate “adverse Impact” on persons in a protected class and are not job-related and consistent with business necessity.

Roll your cursor over each theory to read a definition.

The EEOC has jurisdiction to enforce these laws:

- Title VII of the Civil Rights Act of 1964
[link: <https://www.eeoc.gov/laws/statutes/titlevii.cfm>]
- Equal Pay Act of 1963 [link: <https://www.eeoc.gov/laws/statutes/epa.cfm>]
- Age Discrimination in Employment Act of 1967
[link: <https://www.eeoc.gov/laws/statutes/adea.cfm>]
- Americans with Disabilities Act of 1990
[link: <https://www.eeoc.gov/laws/statutes/ada.cfm>]
- Genetic Information Nondiscrimination Act of 2008
[link: <https://www.eeoc.gov/laws/statutes/gina.cfm>]

The agency concentrates on cases that appear to be the strongest, legally the most significant, or of the greatest practical importance.

In addition, the agency in 2012 adopted the Strategic Enforcement Plan. The purpose is to focus and coordinate the EEOC’s programs to have a sustainable impact in reducing and deterring discriminatory practices in the workplace.

Select each priority to view the description.

Eliminate systemic barriers in recruitment and hiring: The EEOC will target class-based recruitment and hiring practices that discriminate against racial, ethnic, and religious groups, older workers, women, and people with disabilities.

Protect immigrant, migrant and other vulnerable workers: The EEOC will target disparate pay, job segregation, harassment, trafficking and discriminatory policies affecting vulnerable workers who may be unaware of their rights under the equal employment laws, or reluctant or unable to exercise them.

Address emerging and developing issues: The EEOC will target emerging issues in equal employment law, including issues associated with significant events, demographic changes, developing theories, new legislation, judicial decisions and administrative interpretations.

Preserve access to the legal system: The EEOC will target policies and practices that discourage or prohibit individuals from exercising their rights under employment discrimination statutes, or that impede the EEOC's investigative or enforcement efforts.

Prevent harassment through systemic enforcement and targeted outreach: The EEOC will pursue systemic investigations and litigation and conduct targeted outreach campaigns to deter harassment in the workplace.

Enforce equal pay laws: The EEOC will target compensation systems and practices that discriminate based on gender.

The EEOC gives its field personnel flexibility and discretion in order to decide how to handle particular cases. It's important to understand:

- The agency's charge handling process
- The stages that make up the process and how they fit together
- That there is some flexibility in each stage

The EEOC's charge handling procedure consists of 5 stages: Intake, Investigation, Determination, Conciliation and Litigation.

Concurrent to the EEOC's charge handling process is your organization's process.

At the end of the EEOC's intake phase, it sends notification to your organization. You then complete an initial assessment of the charge to determine the actions you need to take in order to respond.

As the EEOC conducts its investigation, your organization conducts an internal investigation, develops a position statement, responds to any requests from the EEOC for information, and manages contacts with EEOC.

After the EEOC makes its determination, your organization participates in any settlement or conciliation efforts.

In this module we'll focus on the EEOC's process.

The first phase of the EEOC's charge handling process is Intake.

Charges filed with the EEOC must be in writing. If filed under Title VII, the Americans with Disabilities Act, or the Genetics Information Nondiscrimination Act, the charge must be under oath or affirmation.

A charge may be filed by:

- A person claiming to be aggrieved
- Someone acting on behalf of a person (for example, an attorney or labor union)

- A member of the EEOC (called a Commissioner's charge)

Most EEOC charges are submitted in person by individuals who go to one of the agency's field offices and speak with an EEOC field office representative or by phone (800 number).

The agency also accepts charges by mail.

Under the ADEA and the EPA, the EEOC has the authority to conduct "directed investigations." The agency can conduct an investigation without anyone having filed a charge.

This is different from Title VII, the ADA, and GINA. Under these laws the EEOC has to have a live charge in order to conduct an investigation, which is why the law allows for commissioner's charges where there is no individual charging party.

Individuals sometimes file the same charge with both the EEOC and a state or local Fair Employment Practice Agency. Even if they don't file both places, the EEOC and the FEPAs typically cross-file charges with each other.

As a result, any charge filed in a state or locality that has a FEPA typically will be filed with both the federal EEOC and the state or local agency. The two agencies then decide, generally in accordance with a "Work Sharing Agreement," which agency will take the lead in processing the charge.

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Under most Work Sharing Agreements, there are a number of provisions a FEPA and the EEOC agree on. The combined effect of these provisions is that the EEOC has jurisdiction immediately. A charge filed with a FEPA is "filed" at the same time with the EEOC. Usually the agreement says that the agency that receives the charge first will take the lead in processing it.

A charging party may have 180 days or 300 days from the date of the alleged unlawful employment action occurred to file a charge with the EEOC. If the alleged discrimination occurred in a jurisdiction where there **is not** a state or local FEPA with the authority to grant relief for the type of discrimination alleged, then to be timely, the charge must have been received by the EEOC within 180 days of the alleged violation.

If, however, the alleged discrimination occurred in a jurisdiction where there **is** a state or local FEPA with the authority to grant relief for the type of discrimination alleged, then the charge

ordinarily is considered timely if it's filed with the EEOC within 300 days from the alleged violation.

There are a couple of exceptions related to ADEA and EPA.

ADEA: Under the ADEA, the 300-day period applies only if there is a state FEPA with jurisdiction; local FEPAs don't count. But a late ADEA charge probably will not prevent the EEOC from processing the charge since the ADEA allows the agency to conduct directed investigations even if no one filed a charge.

EPA: Under the EPA, individuals have the choice not to file a charge with the EEOC at all – they can go straight to federal court.

Charge filing deadlines can be rather tricky.

You'll learn more about it during the web session following the "Assess the Charge" module.

When a charging party calls or goes into an EEOC field office or completes and sends in an online questionnaire, the representative's job is to get all the information that's needed for the preparation of a valid charge, as well as enough other relevant information to permit an initial assessment of the case.

The initial assessment determines whether the EEOC will give the case high priority, do a routine investigation, or dismiss the charge immediately.

Select each role to view an explanation.

Information Gathering: The EEOC representative may use a charge (sometimes called "Intake") Questionnaire to gather information, request an affidavit from the charging party and witnesses, may require a statement about the harm the charging party suffered, and may call the charging party's employer to gather information or explore settlement.

Advising the Charging Party: The EEOC representative is responsible for making sure the would-be charging party knows what to expect during the processing of the charge. The representative assists the charging party in making an informed decision about whether or how to proceed without discouraging him/her from filing the charge.

Assisting in Charge Drafting: When a person wishes to file a charge, the EEOC representative may give the person advice and assistance in completing the charge form and may actually write the charge.

As soon as possible after receiving a charge, the EEOC field office classifies the charge that determines the priority the office will give to the charge's handling. Under the *Priority Charge Processing Procedures*, charges filed with the EEOC are assigned one of three "triage" categories.

Click each category to view an explanation.

Category A – Highest Priority: The EEOC assigns this category when the charge:

- *Alleges discrimination that the agency designates for priority in a national or local enforcement plan;*
- *Indicates a strong likelihood that the investigation will find reasonable cause that the alleged discrimination occurred (i.e., a “cause” finding); or*
- *Indicates that irreparable harm will result unless processing of the case is expedited.*

Category B – Requires More Information: The information indicates that the charge may have some merit, but additional evidence is needed before the field office can determine whether further investigation will result in a “cause” finding.

Category C – Charges Suitable for Dismissal: There’s enough information to conclude that further investigation will not result in a “cause” finding.

The EEOC refers to the employer, labor union, or employment agency accused in a charge of illegal discrimination as the “respondent.”

The agency must send the respondent a notice of the charge within 10 days. Nothing in the notice tells you whether the EEOC has prioritized the charge as A, B, or C.

You will learn more about the respondent’s notification process in the web session after this module.

The EEOC’s current policy is to encourage settlement of cases at all stages of the process. This can help save resources by persuading parties to settle before the EEOC starts an investigation.

If the charging party has agreed and the charge is not Priority A, then the EEOC may invite the respondent to engage in mediation. Mediation is the use of a third-party neutral to assist the parties in reaching an early settlement.

Whether mediation is available or not, EEOC field office representatives may serve as a go-between for settlement negotiations.

EEOC field offices are authorized to accept settlements providing “substantial” or “appropriate” relief when the evidence indicates a violation at an early stage of an investigation.

If a respondent offers a settlement that would afford “full relief” and the charging party rejects the offer, the EEOC office may dismiss the charge without proceeding further.

Sometimes, the EEOC’s preliminary investigation of a charge may show that some type of special emergency action is necessary – that is, a court order directing an employer to discontinue a practice or to reinstate a discharged employee pending the outcome of the case.

In these situations, EEOC field offices may ask a federal district judge for an order granting temporary relief. These are unusual situations and temporary relief remains in effect until the case is resolved through settlement, conciliation, or litigation.

Strictly speaking, the law requires the EEOC to “make an investigation” for every charge filed alleging a violation of Title VII, the ADA, GINA or the ADEA. However, the law also gives the EEOC wide discretion to decide in each case just what kind and how much of an investigation is necessary.

The EEOC’s *Priority Charge Handling Procedures* state that an “appropriate investigation is one that produces just enough information to permit an informed decision as to whether it is more likely than not that a violation of the statute may be found.”

The *Procedures* also caution field offices to “avoid misapplying resources by over-investigating charges that could be resolved with less information, or by pursuing cases that are facially non-meritorious. “

When the EEOC decides that it needs information from an employer to complete a charge investigation, it has a variety of tools it can use.

- Written requests for information
- Subpoenas
- On-site visits
- Witness interviews
- Other investigative methods

The EEOC is entitled to access at reasonable times, for the purpose of examination and the right to copy, any document or other evidence that is relevant to the issues raised by the charge.

Title VII forbids the EEOC and its employees from disclosing employment discrimination charges or information relating to them to the public prior to a lawsuit. However, the EEOC may share this information with the parties to the case and their attorneys during the investigation.

Field offices may share information provided by the charging party and the respondent with the opposing party, in the interest of narrowing the issues and resolving disputed facts. This may include giving the charging party a copy of the respondent’s position statement and responses to requests for information.

The next step for the EEOC field office is to determine whether or not “reasonable cause” exists to believe that a violation of the law has occurred. In making the “cause”/“no cause” determination, the EEOC applies a “more likely than not” standard.

The “more likely than not” standard applied by the EEOC asks whether, on the basis of all the evidence, it is more likely than not that the alleged violation occurred.

If the answer is yes, the EEOC issues a “cause” determination and proceeds to the next step of the process.

If it is no, the agency issues a “no cause” determination and a Dismissal and Notice of Rights. The Dismissal and Notice of Rights – also called a “Right to Sue” letter – notifies the charging party that he or she has the right to file a lawsuit under Title VII, the ADEA, the ADA, or GINA within 90 days of the receipt. If a lawsuit isn’t filed within 90 days, the right to sue is lost. If the charge was filed under the EPA, the Right to Sue letter notifies the charging party that the time limit is two years, or 3 years for willful violations. In cases where the EEOC issues a “cause” determination, it sends a substantive letter of determination explaining the basis for the agency’s findings and conclusions.

When the EEOC issues a “no cause” determination, it will simply notify the parties by a short-form notice that the investigation failed to disclose a violation.

After the EEOC makes a determination that “reasonable cause” exists to believe discrimination occurred in violation of Title VII, the ADA, GINA, and/or ADEA, the agency must take steps to try to eliminate the unlawful employment practices through “informal methods of conference, conciliation, and persuasion.” The requirement doesn’t apply under the Equal Pay Act.

This process is known as “conciliation.”

Conciliation may consist of little more than a brief contact by an EEOC field office representative, or it may involve extended negotiations between the EEOC, the respondent, and the charging party.

Generally, there are four steps in the process. Select each step to view a description.

Inquire About Participation: An EEOC conciliator contacts both parties to inquire whether they are interested in participating in conciliation. If both parties are willing, the conciliator gathers information and prepares a conciliation proposal.

Contact Respondent About Remedy: The conciliator contacts the respondent and explains that the agency is seeking a written agreement that will remedy the violation, provide relief to the charging party, and eliminate the prospects of a lawsuit. If an agreement is reached, the conciliator explains that no admission of violation will be presumed in the agreement.

Engage in Negotiation: The conciliator and respondent may negotiate and exchange proposals or they may schedule meetings. The charging party may or may not be included in the negotiations.

Request Charging Party Signature: If the EEOC and the respondent reach an agreement, the document is presented to the charging party for signature. If the charging party objects to the

agreement, the EEOC and the respondent can settle the case without the charging party's approval. If that happens, the charging party will receive a "right to sue" letter.

Field offices are allowed to settle cases for less, but the agency's conciliation proposal is likely to call for "full" relief or something close to it. Full relief, according to the EEOC, generally includes "remedial, corrective, and preventive" measures, the nature of which will depend on the circumstances of the case.

If the parties are not able to reach agreement, the EEOC notifies them that conciliation efforts have failed. The agency then may file suit on the charge or issue a "Notice of Right to Sue" to the charging party. It's a "Notice of Dismissal or Termination" for ADEA cases. This sets the stage for a private lawsuit.

The EEOC may sue an employer under Title VII, the ADA, GINA, and/or the ADEA whenever it has found reasonable cause that a violation has occurred and conciliation has been unsuccessful.

Under the Equal Pay Act, the EEOC may launch a lawsuit any time after it has found reasonable cause.

EEOC-filed lawsuits are brought in federal court, generally in the judicial district in which the discrimination is alleged to have occurred.

Because of limited resources, the EEOC must limit the number of cases it wishes to litigate. Factors the agency may consider in deciding whether to litigate are:

- Whether the case is likely to be litigated by private counsel if the EEOC doesn't pursue it
- Seriousness and extent of the alleged violation
- Importance of any legal issues involved
- Likelihood that litigation by the EEOC will lead to increased public awareness that will promote compliance with the law

After the EEOC has decided to file a lawsuit, any settlement generally must take the form of a court-approved consent decree, rather than a simple conciliation agreement.

In addition to charges filed by individuals, issues of alleged employment discrimination may be brought before the EEOC by way of "Commissioner's charges" under Title VII, the ADA, and GINA, and "directed investigations" under the ADEA and the EPA. These types of charges tend to arise when there are potentially serious violations of law and/or significant legal issues.

A Commissioner's charge proceeding or directed investigation can happen because an EEOC field office learned of some information suggesting that an employer may be engaging in widespread or serious discriminatory practices – but no one has actually filed a charge.

If you receive a notice of a Commissioner's charge or directed investigation, alert your organization's attorneys immediately. You can reasonably assume that the EEOC already classified the matter as a Category A case. The notice might also include a detailed request for information and documents.

Select the best response to each statement that follows, then click the Submit button to see how you did.

Knowledge Check: You are most likely to play the role of the Impartial Investigator during which phase of the charge handling process?

- ☐ After the internal organization's internal investigation is complete
- ☐ When the organization has decided on its position in response to the charge
- ☐ During the organization's internal assessment of the charge
- ☐ None of the above

Knowledge Check: Which of the EEOC's functions are primary?

- ☐ Conciliation and litigation
- ☐ Policy development and outreach
- ☐ Investigation and litigation
- ☐ Investigation and conciliation

Knowledge Check: The EEOC field office determines whether or not "reasonable cause" exists to believe that a violation of the law has occurred.

- ☐ True
- ☐ False

Knowledge Check: At what point in the charge handling process may the EEOC encourage a settlement of the complaint?

- ☐ Right after notifying the respondent
- ☐ During the investigation
- ☐ After it makes a determination
- ☐ At any point in the process

The purpose of the EEOC's charge processing procedures is to resolve charges of employment discrimination – preferably through voluntary settlement or conciliation – but if necessary through litigation.

The agency has broad investigatory powers. However, with limited resources, the EEOC is able to fully investigate only a fraction of the cases that come before it. The main focus is on cases classified as Category A. This may result in earlier issuance of dismissals and "right to sue" letters in many other cases.

Employers must be aware that the EEOC is likely to be somewhat more aggressive in the cases it decides to pursue itself, but that it will be seeking to turn more cases over to private counsel if it cannot resolve them at an early stage.

Your key take-aways from this module are:

- Be clear of the role you are playing during the charge processing cycle.
- Knowing the 5 phases of charge processing helps you plan your organization's next steps more effectively and produce a better result.

While the EEOC is processing the charge, your organization has its own charge handling process, which includes the initial assessment, internal investigation, response to the charge, and participation in the conciliation stage.

Good job! You have successfully completed this module. To close it, click the X in the top right corner of the screen. You may proceed to the next module, "Assess the Charge."

Module 3 | Assess the Charge

Welcome to "Responding to Charges of Employment Discrimination" This module is "Assess the Charge."

You are the compliance officer for Rosser's Department Stores. You have just received a notice from the Equal Employment Opportunity Commission. The notice says that a charge of discrimination was filed against the organization by an employee, and provides a web link, a charge number, and a password.

You take a deep breath and another sip of coffee. You go to the web link. Once you enter the Respondent Portal, you can see the Notice of Charge Discrimination – Form 131 – as well as the Charge of Discrimination – Form 5.

You recognize the name of the employee, Heather Newburg. You've never met her, but an employee pointed her out to you at a meeting about a year ago.

Oh, and you notice on the form that the type of charge is "sex." Yeah, this is a great start to your day. You take another deep breath and think to yourself, "What is my next step?"

When you receive a notice that a charge of employment discrimination has been filed with the EEOC or a state or local fair employment agency, you should immediately do an initial assessment to determine:

- If the charge is valid, and
- The seriousness of the allegation

This assessment can not only direct future action as the charge processing proceeds, it may result in grounds for a dismissal of the charge or may identify a defect in the charge at the start of the proceedings.

At the end of this module, you will be able to:

- Assess a charge of employment discrimination by answering 5 initial questions.
- Identify whom you need to notify about the charge within the organization.
- Take steps to secure confidentiality and legal privileges.
- Weigh the pros and cons of contacting the Equal Employment Opportunity Commission investigator early on.

The 5 questions are part of the Charge Assessment Checklist. They are:

- 1) Is the charge timely? That is, was it filed within the proper period of time?
- 2) Does the charging party have standing? Can this person file a charge?
- 3) Does the charge state a valid claim? Is this a charge that is covered under a law that the agency can enforce?
- 4) Is it properly sworn or affirmed? In other words, was the charge made under oath?
- 5) Finally, is the charge otherwise barred? You'll learn more about this shortly.

Remember, using these 5 questions as a guide to assess the charge can not only direct future action as the charge processing proceeds, but it may result in grounds for a dismissal of the charge or may identify a defect in the charge at the start of the proceedings.

Is the charge timely? What does that mean?

Well, if the charge was filed too late, this may be a ground for dismissal without investigation. It may also be a defense to a subsequent lawsuit.

Under Title VII of the Civil Rights Act, the Americans with Disabilities Act, and the Genetic Information Nondiscrimination Act, charges not filed within the applicable time limit are subject to immediate dismissal.

Title VII of the Civil Rights Act: The federal law that prohibits organizations from making any employment decisions based on race, color, religion, sex, or national origin.

ADA: The federal law that prohibits discrimination based on disability.

GINA: The federal law enacted in 2008 that prohibits discrimination on the basis of genetic information.

Under the Age Discrimination in Employment Act, late filing of a charge will not prevent the EEOC from proceeding with an investigation. Under ADEA, EEOC has authority to conduct independent investigations even in the absence of a charge. Timeliness under ADEA may still be important, however, because a party who hasn't filed a timely charge with the EEOC cannot later bring a lawsuit under ADEA.

ADEA: The federal law that prohibits discrimination based on age.

Under the Equal Pay Act (EPA), there is no requirement that a charge be filed with the EEOC at all. EEOC can conduct independent investigations.

EPA: The federal law that requires equal pay for equal work.

Now you know what timely means with regard to the charge, now here's what you should check for when assessing the charge.

For Title VII, ADA, GINA, and ADEA, you must first determine what time limit applies. There are two time limits – 180 days and 300 days.

EEOC must have received the charge within 180 days of the alleged violation if it occurred where there is not a state or local Fair Employment Practices Agency with authority to grant relief for the type of discrimination alleged.

Fair Employment Practices Agency: State or local EEO agency that maintains a cooperative relationship with the EEOC for processing discrimination charges.

EEOC must have received the charge within 300 days of the alleged violation if it occurred where there is a FEPA with authority to grant relief for the type of discrimination alleged.

To find out whether there is a FEPA with jurisdiction over your charge, go to the EEOC.gov website displayed here. Scroll down to the bottom of the page under the map, select the EEOC office and then in the Office Information list on the left, select a state or local agency. You'll find contact information for each FEPA there. You can then go to the FEPA's website to learn the scope of the FEPA's jurisdiction. Click on the EEOC's link for the Washington Field Office, and then the tab on the left for State and Local Agencies. Find the Fairfax County Human Rights Commission and take a look at the scope of their jurisdiction.

OK, back to what you need to do when checking for the charge's timeliness.

After you determine what time limit applies, you will need to identify if the charge was filed within the time limit period.

First, identify the date on which the alleged violation occurred.

Then, treating the first day after the occurrence day as "day #1," count forward all calendar days to and including the date the charge was filed.

If the total number of days is more than 180 or 300 (whichever is applicable), then the charge is untimely. Contact the EEOC or FEPA Investigator and make them aware of the fact. The charge may be dismissed.

Be aware that sometimes questions arise about when the alleged discrimination occurred.

Discrete employment actions are usually identified as the day when the charging party received notice of the employer's decision to take action. Examples include the date of termination, demotion, or the day the charging party was not hired.

Continuing conduct or practices are computed from the last date on which the practice was applied. This can be a tricky legal question, so have attorneys check case law before challenging a charge's timeliness.

For example, a male coworker began making lewd and offensive remarks to a female employee two years ago and is still doing so.

Pay Discrimination Cases under Title VII, the ADA, the ADEA, and GINA use the "paycheck rule" – the time period starts over every time the person receives a paycheck that is tainted by a past discriminatory action, even if that action was years ago.

Now let's move to question number two on the assessment. The second question is, "Does the charging party have standing?"

What does that mean? A charge of discrimination may be filed by an "aggrieved person" – someone claiming to have been harmed by an alleged act of discrimination.

The aggrieved person can also be represented by another person, an agency, or an organization. Examples include an attorney, labor unions, and civil rights organizations.

Ordinarily, the EEOC will notify the employer of the identity of the person who filed the charge, but it can style charges under a pseudonym to protect the identity of the charging party. An example where the EEOC may do this is when the charging party could be subjected to harassment or retaliation.

What should you do to verify the charging party's standing? Always check to make sure the charging party is, in fact, an employee of your organization. If it is clear that the charging party is not an employee, you may be able to get the charge dismissed.

Be careful! Your organization could be a joint employer or co-employer of the charging party, even if the person is on another firm's payroll. It's also possible for an organization to be liable under a "third-party interference" theory for discrimination against persons who are not its employees.

Check with the organization's attorneys in these cases.

The third question in your assessment of the charge is “Does it state a valid claim?”

Here’s the explanation: Often, the EEOC receives charges which, even if true, fail to state valid claims under any of the laws it is authorized to enforce. An example would be a charge alleging treatment that could be perceived as unfair but not as discriminatory. Field offices try to catch these problems during intake, but occasionally some slip through that are not valid claims.

What should you do to verify the validity of the claim? Assume momentarily that all the allegations contained in the charge are true. Apply your basic knowledge of the law and ask yourself whether the facts, if proved, would amount to a violation of one of the laws EEOC enforces. Some examples will help here. Click each law to view more information about and examples of requirements for a valid claim.

Title VII: A valid claim under Title VII would allege disparate treatment or disparate impact on the basis of race, color, religion, sex (including pregnancy, childbirth, and related medical conditions), or national origin.

ADA: The charge must allege the employer discriminated against:

- *A “qualified individual with a disability” because of that disability, or because of an individual’s perceived disability or record of a disability (including failure to make a reasonable accommodation);*
- *An individual because of his or her relationship or association with an individual with a disability; or*
- *An individual in retaliation for opposing an act that is illegal under ADA, or for filing or assisting with an ADA charge.*

ADEA: The charge must allege employment discrimination on the basis of age against one or more persons age 40 and over. Charges that fail to allege that the victims of discrimination are at least 40 may be subject to dismissal.

EPA: Because EPA does not require filing a charge, the absence of a valid charge will not affect proceedings under that law.

GINA: A valid charge under GINA would allege the use of genetic information in making employment decisions, unlawfully requesting, requiring, or purchasing genetic information, or unlawful disclosure of genetic information.

Harassment: Harassment is a form of employment discrimination. Harassment is unwelcome conduct based on a characteristic protected under Title VII, the ADEA, the ADA, or GINA. It becomes unlawful where:

- *Enduring the offensive conduct becomes a condition of continued employment, or*

- *The conduct is severe or pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile, or abusive.*

Retaliation: All five laws prohibit retaliation against an employee or applicant because that person opposed unlawful discrimination, filed a charge, gave testimony, or assisted in an investigation of a charge.

The fourth question in the initial assessment of a charge is, “Is it properly sworn or affirmed?”

This means that charges made under Title VII, the ADA, and GINA must be sworn to or affirmed by the charging party. This requirement is designed to prevent harassment of employers with charges that have no merit.

The way to verify this is to check to see that the charge contains a statement affirming the charge under oath, and that the charging party has signed this statement.

The last question in the initial assessment is “Is the charge otherwise barred?” What does that mean? Simply put, the charge may already have been disposed of in some other manner. If the charge you received – or one involving the same parties and events – already has been the subject of a prior court decision, consent decree, conciliation agreement or other settlement agreement, it may be barred.

If you suspect that the charge may fall into this category, check with your organization’s attorneys.

It’s time to apply what you just learned. You did a little research and found that Ms. Newburg has been an employee for 3 years as a sales manager. Now, using the checklist, answer each question by examining the charge and its accompanying notice by checking the Yes or No boxes. After you check the box, feedback about your answer will appear under the question. The answer for question 5 is provided for you because that would involve more research than time allows for this exercise.

After you have completed the initial assessment, your next step should be to notify management. Tell key people in management as soon as possible after you receive notice of the charge. This is critical for a number of reasons:

- From the moment it receives notice, the organization is under a legal obligation to preserve all evidence relevant to the case. Managers may have documents, records and other evidence.
- The organization should speak with a single, consistent voice from the outset in responding to questions or inquiries about the charge. Make sure managers know who that person is.
- Supervisors of the charging party need to proceed with caution. Actions taken against the charging party could give rise to additional charges of retaliation.
- Management may need to take immediate corrective action.

EEOC may already have started its investigation.

Who should you notify? Well, that is a little different from organization to organization and situation to situation, but here are some guidelines.

Notify these individuals immediately:

- Legal counsel
- Immediate supervisor and others within the charging party's direct chain of command.
- Human resources department
- Anyone who has custody of relevant documents or records
- Anyone who is likely to receive inquiries
- Insurance carrier, if the charge raises claims that may be covered by the organization's liability insurance

Who not to notify:

- Anyone who does not have a "need to know"
- People outside the charging party's direct chain of command

Prospective new managers if the charging party applies for a different position within the organization

What should you tell the people in management you have identified? Again, each situation is different, and companies have different policies. Check your policies and follow these general guidelines:

Legal Counsel. Tell them anything they want to know. They may want to take charge of notifying others to preserve evidence.

Everyone Else:

- Only what they "need to know"
- Provide a general description of the complaint.
- Remind them of their duty to preserve evidence.
- Remind them of their obligation not to retaliate against the charging party or any employee involved in the investigation process.
- Identify the organization's spokesperson.
- If asked about the complaint, a brief statement of what they should say.

Once a charge is filed with the EEOC, the agency is entitled by law to have access to any information that is relevant to the charge or reasonably likely to lead to relevant evidence. Unless it is an attorney-client communication, it is not privileged against disclosure.

Some protection for materials prepared or compiled during an internal investigation may be available under the so-called “attorney work-product” privilege, provided that certain conditions are met.

Attorney Work Product Privilege Conditions

- *The materials must have been prepared by, or at the direction of, an attorney in preparation for trial or in anticipation of litigation.*
- *The materials must incorporate legally-related mental impressions, conclusions, opinions, strategies, or legal theories of an attorney or other person acting as an attorney’s agent in legal matters.*
- *The information must not have been disclosed to anyone other than the attorney and those persons within management of the company who have a legitimate “need to know.”*

Keep in mind that it’s impossible to guarantee your investigative file documents will remain confidential. However, there are some things you can do to make preservation of the privilege more likely. Select each image to view action you can take.

Get the letter: When you notify legal counsel that a charge has been filed, get counsel to give you a letter that directs you to act as their agent in investigating the case. Make sure the letter states that the investigation is “in anticipation of litigation.”

Mark documents: Label each document you prepare “Privileged and Confidential Attorney Work Product” and cite that it was prepared at the request of the attorney in anticipation of litigation.

Limit access: Keep files labeled “confidential” secure from prying eyes. No document you generate as part of the investigation should be shown to anyone except your attorneys and persons within the organization who have a “need to know.”

In EEOC cases, the name of the field investigator assigned to the case may appear at the bottom of the Notice of Charge of Discrimination form you receive from the agency.

If there isn’t a name listed, it probably means that the EEOC didn’t have an investigator available to assign to the case.

It’s not required, but making an early contact with the EEOC or FEP investigator can sometimes help establish a positive tone for the investigation. A few things you may be able to do during this early contact with the investigator include:

- Introduce yourself as the organization's contact.
- Learn more about the case. Many charges are vaguely worded, and asking the investigator for details may make the charge clearer.
- Find out what the charging party really wants
- Request an extension, if it's needed. In most cases the agency will have asked for a response with a deadline attached. If the deadline is so close you will not be able to conduct a thorough investigation, and respond adequately, try to obtain an extension.

There may be other steps you need to take based on the organization's policies or the nature of the case, but these first steps are critical to setting the stage for the investigation.

It is very important to assess a charge of employment discrimination carefully to determine whether it is timely and valid. Do not assume that all the proper procedures have been followed and all of the filing requirements were satisfied. Occasionally, intake officers at the EEOC and FEPAs make mistakes.

Conducting your own initial assessment of a charge as a first step in your internal charge-handling process could result in your finding a defect that might lead to dismissal of the case, saving you time and effort.

Even if it doesn't lead to a dismissal, correctly pointing out a defect in a charge at the start of the proceedings may add credibility to your position later on, should you reach the stage of defending or attempting to settle the case. Any possible questions as to timeliness or validity of a charge should be referred to counsel immediately.

Your key take-aways from this module are:

- Use the "Charge Assessment Checklist" to determine whether a charge is valid and what steps need to be taken.
- Consider contacting the EEOC investigator to:
 - Introduce yourself as the organization's contact
 - Establish a positive tone for the investigation
 - Possibly find out what the charging party really wants.
- Notify management of the charge as soon as possible.
- Maintain confidentiality of records and protect legal privilege.

Congratulations! You have completed the "Assess the Charge" module. Please check your Participant Guide for information about a Web Session and Discussion Forum activity before moving on to the next module.

You may now close this module by clicking the red X in the top right corner of the window.

Module 4 | The Internal Investigation

Welcome to “Responding to Charges of Employment Discrimination: The Internal Investigation.”

Interviewing witnesses is one of the tools you will use to gather information during internal investigations. You’ll learn more about techniques to help you gather information shortly. Before you begin, take a few minutes to watch the video clip of an interview with Rossers Sales Manager, Heather Newburg. She’s the complainant who submitted the sexual harassment charge against Rossers. It will provide you with some information about the case and help you start thinking about a few important aspects of an internal investigation.

In your Participant Guide, follow the instructions for viewing the video and discussing your observations about the interview with your colleagues in class. The video is 7 minutes long.

When you have completed the activity, return to this module and continue from here.

It’s important to start your investigation of the facts right away. Even if you had all the time in the world, the quality of your investigation may depend on getting to the evidence while it is available, relatively fresh, and untainted.

A well-thought-out investigation plan is critical for conducting a thorough internal investigation. It’s time to build on your preliminary efforts to develop a plan for getting all the information you need.

At the end of this module, you’ll be able to:

- Develop an investigation plan that’s flexible enough to change as the case develops.
- Properly review and handle documents that are pertinent to the case.
- Identify the 2 most valuable techniques for making interviews more productive.
- Select other techniques that “fit” with your personal style and the particulars of the case.
- List the elements that interview documentation should include.
- Assess when mediation may be a reasonable approach to resolution of a charge.

It’s important to start your investigation right away. A good first step is to prepare an investigation plan.

You have already made an initial assessment of the charge and thought through the issues to identify any problem areas. You may have spoken with the EEOC field investigator to find out what the charging party really wants. Now it's time to develop a plan for getting all the information you will need.

Keep in mind as you develop your plan that it must be flexible so it can change as the case changes. Think of the plan as a working document.

The first step when developing an investigation plan is to identify the issues.

For each action or practice complained of in the charge, what factual issues do you need to explore?

- Review each allegation and identify what theory of discrimination the charging party appears to be alleging.
- Consider damages the charging party is likely to claim when identifying issues to investigate.
- Try to anticipate any credibility issues that are likely to arise.

Let's look at a couple of examples.

In the first example, Sarah Giroux alleges that she was disciplined more severely than a male employee, Peter Hiro, for a minor infraction of an organization rule.

Your list of factual issues to investigate might look like:

- Nature and extent of the discipline imposed against Sarah
- Nature and extent of the discipline imposed against Peter
- Circumstances around each employee's infractions
- Other employees who had been disciplined as severely for an infraction of the rule in question
- Legitimate, nondiscriminatory business reasons for the difference in treatment if Sarah was disciplined more severely

Here's another example.

Javier Solas alleges that a company policy to hire only candidates with a high school diploma for a delivery driver position has disparate impact against minorities.

Your list of factual issues to investigate might include:

- Does the company use the alleged policy, and if so, was Javier affected by it?

- Is the allegation of disparate impact supported by valid statistical evidence?
- If yes, is the policy nevertheless job-related and consistent with business necessity?

The second step to develop an investigation plan is to go back through your list of factual issues and identify potential sources of information bearing on each issue.

The sources will vary depending on the nature of the case. Ask yourself a few questions...

- Who made the employment decisions or established the policies or practices involved in the charge?
- What basis might the decision-makers have had for those decisions, policies, or procedures?
- Have there been other charges relating to the same decisions, policies, or procedures?
- Have there been other charges or complaints involving the same managers and/or employees?

The answers to the questions will help lead you to your best internal sources of information. Typically the sources will include records and documents, other physical evidence, and witnesses. Select each source on the left to view a description.

At this stage you are merely identifying *potential* sources of information. It may not be necessary for you to contact all of these sources. However, make your list as comprehensive as possible now.

Complete your investigation as promptly as possible. If you're working against a deadline such as a request for a position statement or a request for information from the EEOC or FEPA, set an overall time frame that also allows enough time to prepare your response to the EEOC and obtain the necessary internal approvals. For example, you may need to obtain approvals from corporate human resources or the legal department.

The sequence of the investigation that you decide to follow in exploring each of the potential sources of information is as important as the time schedule you establish.

1. Start with documents and physical evidence. It helps you focus on issues so that you can prepare for your witness interviews.
2. Then plan the best sequence for interviewing witnesses. Bear in mind you may need to go back to certain witnesses later on.

You're the EEO Compliance Officer for Rossers. Now that you have some initial information about the case, you need to develop a plan for investigating the Heather Newburg charge.

- In your Participant Guide, locate the "Developing an Internal Investigation Plan" activity.
- You'll start developing an investigation plan by answering a few questions.
- When you have completed the activity, return to this module.

Before moving on to the investigation itself, let's review the three steps to develop an investigation plan. Select each step to view the description.

Identify Issues: The first step when developing an investigation plan is to identify the key issues. Go through each allegation in the charge and determine what factual issues you need to explore. Considering the theory of discrimination for each allegation may be helpful in identifying the factual issues to investigate.

Identify Sources: The second step is to identify potential sources of information bearing on each factual issue identified in step one. Use the four questions you learned earlier to help lead you to the best documents, other physical evidence, and witnesses. The sources will vary depending on the nature of the case.

Set Schedule: The third step is to set up a schedule for the investigation. Identify the deadline date on a calendar and work backwards, assigning each phase a period of time. Remember to examine documents and physical evidence first so you are better prepared for witness interviews.

At the bottom left corner of your screen there's a paperclip. Select it to view a checklist that you can use to make sure your investigation plan is complete. Feel free to download it or print it out for future reference.

Once you've set your schedule, you need to get started with the investigation right away. You have obtained the documents that you identified as potential sources of information. They may include:

- Files routinely kept by the organization – such as personnel files, notes, schedules, drawings, graphs, charts, computer files, emails and other electronic records.
- If the charge relates to some matter that has been the subject of earlier proceedings, be sure to review records from those meetings or proceedings.

Ideally, you will look for and find documents that support a legitimate, nondiscriminatory business reason for the personnel action being challenged in the charge. Personnel records, organization policies, and other documents may provide and substantiate this reason.

Based on your understanding of the charge, use your experience to locate existing documentation. Additional documentation may surface as your investigation proceeds as well.

What if a document is missing? Or what if there is more paper than seems necessary? Select each of the images to view an explanation.

Missing Document? If your experience indicates that there should be a document where there is none, try to determine why or why not. Is it attributable to poor documentation procedures, like

no record was ever made? Is it possible, even likely, that the document was destroyed? If so, by whom, when, and why?

Too Much Paper? If you find more paper than seems necessary under the circumstances, consider whether the charging party could claim that minor incidents or infractions were blown out of proportion; or that it was over-documented because the supervisor was “out to get” him or her.

Remember, any document regarding any issue raised in the case can become evidence in a lawsuit if the charge isn't resolved earlier.

- Never destroy a document that could be relevant to a pending case. If you think a document is a “smoking gun” that could hurt the organization's position or cause someone embarrassment, bring it to the attention of the organization's legal counsel.
- Don't write on or otherwise alter documents in any way, either by adding or deleting information. Writing on the documents will confuse things later as you try to explain two sources of writing on the same page. Use a separate piece of paper or sticky note to jot down your notes.
- Follow a systematic procedure for identifying original documents and other evidence at the earliest opportunity. Then keep them secure after that. Your organization's counsel will have to establish that the documents are authentic and have not been forged, fabricated, or altered.
- Maintain structural integrity of collections of documents. Keep files intact. If you need a particular document for use in your investigation, make a copy. Then attach a note to the copy showing where it came from. That way you'll be able to identify it later and show that it is an authentic copy of an original document.
- Make copies only as needed – especially of sensitive documents. In fact, it's best to treat all your documents as sensitive.
- Be cautious when reviewing medical records of employees. There are strict confidentiality requirements imposed on medical records by the ADA. Check with legal counsel if you need to review medical files.

Witness interviews are generally the most critical step in an investigation. There is no single “right way” to interview witnesses.

Successful techniques vary depending on the interviewer, the witness, and the subject matter.

The two most valuable techniques for making interviews productive are:

- Careful planning in advance; and

- Attentive listening during the interview.

Let's start with advance planning.

Select a time and place that allows the witness to speak freely and privately, and concentrate on the case without a lot of interruptions.

Plan your questions in advance to allow for a logical sequence and to cover all the areas where the witness might have relevant information.

If you intend to question the witness about documents, have the documents tabbed so that you can quickly locate the relevant portions.

Consider having someone else in the room. There are some good reasons for this. For example:

- When a witness is hostile to the organization's position or the company itself, it may be helpful to have your own witness in the room.
- For delicate issues, like sexual harassment, having a person in the room of the same gender as the witness – if you aren't – can help to increase a witness' comfort level.
- When a witness is a high-level manager, you may want to have a person of similar rank or stature present to back up your authority to conduct the interview and ask probing questions.
- For note-taking, so that you can focus on asking questions, developing probing questions, and interacting with a witness.

At the bottom left corner of your screen there's a paperclip. Select it to view a checklist you can use to ensure you're prepared for your interview. Feel free to download it or print it out for future reference.

No matter how carefully you have prepared for an interview, matters you did not anticipate come to light. So listen carefully, and follow up on the matters as they arise. In addition:

- Cover all the questions you prepared but be flexible so you can chase down points that come up in the interview.
- Watch for statements and subtle clues that may lead to important information. Follow those clues.
- Cover every point the witness might be asked by an EEOC investigator or attorney so you know how the witness will answer.

Preparing in advance and using listening skills when interviewing witnesses are essential techniques for productive witness interviews.

Select the paperclip to open, download and print a list of 22 suggested techniques for interviewing witnesses. We'll review a few of them in a moment but take some time to review all of them. The techniques will help you conduct a more professional interview and ask better questions in order to obtain the information you need.

Let's take a look at 5 of the suggested techniques. Select each one to view a brief description.

Set the tone: Help make your witness feel more comfortable by setting a calm and professional tone. Introduce yourself. Explain the reason for the investigation, your role in the process, and what can be expected to happen as the case proceeds. Explain that the organization's interest at this point is to get all the facts and that the witness can be most helpful by telling you whatever he or she knows. If someone is in the room with you, explain that person's role ("We work together" or "He'll be taking notes").

Get specifics: That means get dates, times, places, persons present, sources of information, etc. Don't move too quickly from point to point. Investigation is the process of systematically gathering and comparing information from a variety of different sources. Details that appear insignificant at first glance often lead to the discovery of highly relevant evidence.

Asking probing questions: Use open-ended questions, ones that can give you a real answer, not just "yes" or "no." Then ask more pointed questions to jog the witness' mind or force them to be more specific. When you spot discrepancies in what a witness tells you, follow-up to see if there is a satisfactory explanation.

Separate facts: That is, separate facts from assumptions. Be alert to determine which statements are based on a witness' own personal knowledge and observations and which are not. When you hear an assumption, opinion, guess, or hearsay, try to get to the basis for each statement.

Be persistent: Don't settle for statements that don't make sense. They may signal fundamental weaknesses in the witness' testimony. Make an effort to tie up loose ends, even if that requires you to come back to the witness several times with "just one more" question.

When interviewing the organization's employees, keep these considerations in mind.

In some cases, you may feel it necessary to interview the charging party in order to complete the internal investigation. While not improper, they can be problematic...especially if the charging party still works at the organization. There is a danger that he or she may misconstrue something said during the interview as a threat of retaliation or a form of harassment by management. That could lead to a new charge or an amendment to the existing charge.

If you must have information that you can only get from the charging party, the safest course is to work through the EEOC or the individual's attorney. If you feel that you must interview the

person directly, consult with your legal counsel first. Then notify the EEOC investigator or his or her attorney in advance. It's also a good idea to have a third person present during the interview to serve as a witness.

For other employees, here are a few precautions. First, make it clear to the employee that the organization respects the right of any employee to file a charge. Second, explain that the only purpose of the interview is to gather facts. And finally, state that you want the truth, whether it is favorable or unfavorable to the organization. If an employee is reluctant to talk with you about another person's charge of discrimination, consult your legal counsel about how to proceed.

The conclusion of your interview should be as strong as your opening. Here are a few techniques that will help close the interview in a professional way.

- Encourage the witness to report any additional information to you;
- Remind the witness of the importance of confidentiality;
- Remind the witness of the organization's policy against retaliation;
- Explain the remaining procedures, but be noncommittal about the outcome of the investigation; and finally,
- Thank the witness for his/her time.

Now that you know more about effective witness interview techniques, let's evaluate Pat Ames' interview of Rossers Store Manager, Brian Parks.

- In your Participant Guide, locate the "Evaluate Brian Parks Interview" activity.
- Identify and discuss with your colleagues the techniques Pat used to gather information.
- When you have completed the activity, return to this module.

You should always document witness interviews. Discrimination charges often take many months or even years to resolve, and witnesses may forget details or leave the company before the case is over.

Check your organization's policy on documenting witness interviews or consult legal counsel. The organization may have to disclose to the EEOC and/or the charging party's attorneys any documentation you prepare.

Let's look at a few general tips for documenting witness interviews.

Generally, your documentation should include a listing of the preliminary matters you covered with the witness, such as the caution not to discuss the case with others, not to retaliate

against the charging party, and your inability to promise complete confidentiality. Include the date, time, place, and names of all persons present. And make sure your notes are true, correct, and complete.

Label any written statement of the witness or notes from the interview as “confidential.” Place it in your investigation files, and limit access to only those who “need to know.”

After completing the internal investigation, review the information, documents, and records you’ve collected.

Look at:

- The quality of the evidence. Is it objective or subjective? Is it based on first-hand observations? Hearsay? Speculation? Is it inherently believable?
- The source of the evidence. Was it provided by someone known to be reliable? Someone with a motive to lie?
- Reasonable inferences. What logical inferences can be drawn from the evidence?
- Overall consistency. If there are conflicts in the evidence, can they be reconciled? Is one version of the facts more consistent with the overall evidence than another?

A realistic assessment of the organization’s position provides you with a basis for deciding whether the organization should defend itself against the charge or attempt to settle the case. This is the “fight or settle” decision.

Consider all the evidence, favorable and unfavorable. Then ask yourself these questions. Select each question to view a brief description.

Are we right? In many cases, your investigation will reveal that the organization indeed is in the right, and your decision will be to go ahead and defend the case. In others, you may determine that the organization is in the wrong, and that settlement is the best option. Occasionally, the answer to this question is a matter of degree. For example, the investigation may reveal that the treatment of the charging party was not illegal, but it was unfair or improper. To the extent that the investigation shows that the organization did something wrong, consult legal counsel. You may want to take prompt, corrective action, even if the organization may be able to win the case in court.

Can we win? Sometimes it may be difficult to mount a successful defense against a charge, even if the organization is completely right. Charging parties have the right to a jury in most discrimination cases if they go to trial. Juries can be more influenced by sympathies and impressions than by legal rules and facts. The organization may have acted entirely for legitimate business reasons. But can it document them convincingly? Will a jury understand the

business aspects of the decision? Will they find the organization's witness credible? Does the action the organization took appear to be fair and impartial?

What's the organization's exposure? What remedies – monetary or otherwise – is a court likely to impose if the organization litigates and loses the case? Consider not only back pay, compensatory and punitive damages, costs and attorneys' fees, but also the possibility of an order directing reinstatement of the charging party, changes in seniority rights, modification of existing organization policies, posting of notices, etc.

What's the public relations impact? Public relations factors may cut either way in an organization's decision whether to fight or settle a charge of discrimination. In some circumstances, settling might be preferable to taking a case to court and risking adverse publicity. In other instances, settlement might pose the greater danger because it could be perceived as an admission of wrongdoing by the organization.

What will it cost to defend? Sometimes it just isn't worth what it would cost to fight a charge, even though the organization is confident that it could win. The potential costs of fighting include not only attorneys' fees and other litigation costs, but the loss of countless hours of productive time on the part of managers, staff members, and employee witnesses involved in the case. Even if the organization wins the case, it generally will not be entitled to reimbursement for any of the costs.

What's the effect on other employees? An organization justifiably may be concerned that if it settles one charge, even for a "nuisance value" payment, word of the settlement may encourage other individuals to file charges against it, perceiving that the organization is an "easy mark." Some companies take the position that they will defend, rather than settle, any case in which they are convinced that their action was right. This, they think, sends a message to employees and others that the organization will not allow itself to be a victim of "blackmail" charges.

At this point, you do not need to make a final decision about settlement of the case. There may be many opportunities to revisit the "fight or settle" decision as the case proceeds.

But this initial evaluation of the strength of the case and what is at stake should provide you with a good basis for deciding how to respond to the charge.

If the organization decides to settle the case, it may contact the EEOC and request mediation – or accept EEOC's offer of mediation if there is one. Mediation is a process in which a trained neutral helps disputing parties to negotiate a mutually acceptable agreement. Mediation of EEOC charges differs from conciliation in that a trained neutral conducts the mediation. All information obtained during the proceedings is confidential in mediation. The trained neutral may be an EEOC employee or contractor but is outside the investigation process. In conciliation, the EEOC agent conducts proceedings and could become the organization's adversary if both

parties don't reach a settlement. You'll learn more about the conciliation process later in the course. Let's take a look at why the organization might agree to mediation.

Companies may consider mediation because it has several benefits:

- Potential for early resolution;
- Parties retain control over the outcome – In mediation, nobody makes a decision or ruling, and you don't have to agree to a settlement you don't like;
- Confidentiality – Both sides enter into a written agreement at the outset that everything discussed in the mediation session is confidential and cannot be used in any administrative or judicial proceeding. They also agree not to subpoena the mediator, and that the mediator's own notes will be destroyed after the mediation;
- Firewall restrictions prohibit sharing information with the EEOC investigative or legal staff even if the mediator is an EEOC employee or contractor; and
- Information is exchanged – You may have the opportunity to let the charging party know the legitimate business reasons underlying an adverse decision, or remedial steps you took of which the charging party is not aware. You may also learn information from the charging party that did not turn up in your investigation and may change your view of the case. At the very least, mediation offers a chance for each party to hear, through a neutral, where the other side is coming from.

A UAM is an agreement between the EEOC and an organization to consider mediating all eligible charges filed against the organization before EEOC's investigation or litigation.

- It establishes an organization's willingness to mediate on cases eligible for mediation.
- Because mediation is voluntary, the organization or the charging party may opt out of mediation on a particular case even though the UAM is signed.
- There's a point of contact for the organization and the EEOC that accelerates the flow of information between the organizations.
- Fast-tracking the flow of information expedites the scheduling of mediation sessions.

For more information on Universal Agreements to Mediate, click here [link – <https://www.eeoc.gov/eeoc/mediation/uam.cfm>] .

Your organization shouldn't make a decision to enter mediation of the case until it has completed 5 tasks.

First, your internal investigation must be completed. This provides you with enough facts to make a decision.

The decision is based on your “fight or settle” analysis. If the decision is to settle, then participating in mediation may be the best way to conduct the settlement negotiations. If the decision is to proceed with a defense, you may still want to consider mediation because of its potential benefits.

Define the organization’s interests. In other words, identify the goals the organization hopes to achieve through mediation. For example, consider how important early resolution is to the organization, the potential range for a monetary settlement, whether or not the organization will consider reinstatement of a discharged employee, and whether the organization would consider giving a positive or neutral reference.

Next, identify the key players. Who needs to attend the session? Is it necessary to bring legal counsel? It is important to bring the person who has the authority to agree to a settlement.

Finally, develop a negotiating strategy. You know the organization’s goals, so identify how you’re going to get there.

After you have the strategy, then you’re ready to enter mediation.

During this module you covered a lot of ground. You learned how to prepare an investigation plan, conduct an internal investigation into a charge of discrimination, and assess evidence to arrive at a decision to either defend against the charge or settle the case.

After developing an investigation plan, you learned to start reviewing documentation and gathering evidence, interviewing witnesses and documenting each interview. After reviewing all the evidence, the organization makes a decision to either defend against the charge or settle. Either way, mediation is an option.

A decision to defend against the charge will require the organization to communicate its decision and key findings from the internal investigation to EEOC. Your role as impartial investigator is largely done now. Prepare for a new role!

Your key take-aways from this module are:

- Start your investigation plan right away. Set deadlines, but keep the plan flexible.
- Treat all documentation as evidence.
- The two most valuable witness interview techniques are advance planning and attentive listening.
- Use witness interview techniques that fit both your own style and the particulars of the case.
- Weigh both favorable and unfavorable evidence when making the “fight or settle” decision.
- Finally, consider mediation when it’s appropriate in order to resolve a case and when the charging party agrees to mediate.

You have completed the “The Internal Investigation” module. Close this module by clicking the red X in the top right corner of the window and proceed to the next module.

Module 5 | The EEOC’s Investigation

Welcome to “Responding to Charges of Employment Discrimination: The EEOC Investigation.”

When the EEOC decides that it needs information from an organization to complete a charge investigation, it has a variety of tools at its disposal to obtain that information. You will learn more about the tools in this module.

At the end of this module, you’ll be able to:

- Identify and briefly describe tools the EEOC uses to investigate charges.
- Describe the EEOC’s investigative authority under Title VII, ADA, GINA, ADEA, and EPA.
- List 3 ways the EEOC can expand the scope of an investigation.

After you have determined the organization’s position, your role shifts from impartial investigator to advocate for the organization. Now your responsibilities are to:

- Present the facts and the organization’s position to the EEOC or other EEO enforcement agency officials.
- Present the organization’s case as persuasively and credibly as possible.

Under the law, the EEOC has the right to obtain information through a variety of tools. They include:

- Request for a position statement;
- Request for information;
- Onsite investigation;
- Witness interviews; and
- Subpoena.

Let’s look at each of these tools.

Usually, the EEOC will request a position statement from the organization. The position statement presents the organization’s response to the charge – “its side of the story” – to the EEOC. It’s developed after the investigation is complete and the organization has decided to defend itself against the charge.

The EEOC requests the position statement on the Notice of a Charge of Discrimination - Form 131.

The EEOC may request information, and they may do that along with the position statement on the Notice of a Charge of Discrimination, or separately at any time afterwards during its investigation.

The request should relate in some way to the allegations contained in the charge under investigation. Often, though, the EEOC requests information that has little or no real relevance to the issues raised in the charge. You'll learn more about how to respond to requests later in the course.

Requests for information may include a list of questions – what the agency refers to as “interrogatories.” They also may include a request for documents.

Sometimes the EEOC sends field agents to the organization's premises to seek evidence relating to a charge. The agents may review and copy documents as well as interview employees relevant to the charge. The EEOC claims authority to conduct onsite investigations under Section 709a of Title VII. The agency's authority is explicit under ADEA and EPA.

If the agency wants to schedule an onsite visit immediately, consider the charge a Category A case. Alert your legal counsel and executive management right away.

EEOC may interview management and employee witnesses as part of its investigation. The organization has a right to have a representative present when the agency interviews management witnesses.

Finally, the EEOC may use subpoenas to obtain relevant information pertaining to the charge if it cannot get it from the organization voluntarily. If the organization fails or refuses to comply with a subpoena, the agency may petition the federal district court to enforce it. The courts will generally enforce it

- if the information being sought is relevant to the matter under investigation or reasonably likely to lead to relevant evidence;
- if the request for information is not unduly burdensome; and
- if it's not legally privileged against disclosure.

Ordinarily, the EEOC relies at first on the organization to provide information voluntarily in response to requests for information.

You'll learn more about developing position statements, replying to requests for information, and managing onsite investigations later in the course.

The EEOC's authority to investigate possible violations is either charge-driven or not charge-driven, depending on the law.

“Charge-driven” means the agency investigates a charge filed by:

- An individual,
- A third party on behalf of an individual or individuals, or
- An EEOC Commissioner.

The EEOC can conduct investigation for charges under Title VII, ADA, and GINA only if there is a “live charge.” The agency is entitled to all evidence related to the charge, and courts have ruled that the EEOC has broad authority to investigate any matter expected to grow out of the charge.

On the other hand, “not charge-driven” means the agency may launch an investigation on its own initiative...a live charge isn’t needed. This is allowed under ADEA and EPA. These types of investigations are referred to as “Directed Investigations.” The EEOC may initiate an investigation based on information received from any source concerning the law.

Let’s look at the Commissioner’s charge investigation under Title VII, ADA and GINA, and the “Directed Investigation” under ADEA and EPA more closely.

A Commissioner’s charge may occur because an EEOC field office has learned of some information suggesting an organization may be engaging in a discriminatory practice, but no one has filed a charge.

If you receive notice of a Commissioner’s charge, *notify your organization’s attorneys immediately.*

There are 3 major steps in the Commissioner’s charge process.

First, a Commissioner’s charge proceeding may occur because an EEOC field office has learned of some information that the organization may be engaging in a discriminatory practice – either widespread or serious discrimination or conduct that may raise important issues of law or policy. No one has filed a charge. The field office conducts an independent investigation using sources outside the organization.

Second, based on the investigation’s results, the field office refers the case to any one of the five EEOC Commissioners in Washington, DC, with a recommendation that a Commissioner’s charge be issued under Title VII, ADA, or GINA.

Third, once a Commissioner issues the charge, the EEOC notifies the organization of the charge within 10 days.

Similar to a Commissioner’s charge, a “Directed Investigation” may occur because an EEOC field office has learned of some information suggesting an organization may be engaging in a discriminatory practice, but no one has filed a charge.

If you receive notice of a Directed Investigation, *notify your organization's attorneys immediately.*

A Directed Investigation may occur because an EEOC field office has learned of some information that the organization may be engaging in a discriminatory practice – either widespread or serious discrimination or conduct that may raise important issues of law or policy. There may or may not be a charge, but the agency proceeds with an independent investigation.

The EEOC can expand the scope of an investigation by:

- Amending an individual charge to include one or more additional charges;
- Seeking a Title VII, ADA, or GINA Commissioner's charge during a Directed Investigation of an ADEA or EPA investigation; or
- Launching an ADEA or EPA Directed Investigation during investigation of a Title VII, ADA, or GINA charge

You've covered a lot of information about EEOC's investigation procedures. Let's check your knowledge before we wrap up this module.

Knowledge Check: Drag the terms on the right to their descriptions on the left.

This tool asks the organization to provide copies of documents and answer questions.

Witness interviews

If the organization refuses to comply with this, the EEOC may petition a federal court to enforce it.

Onsite investigation

The EEOC may use this tool to obtain information directly from your organization's employees, both management and non-management.

Information request

Position statement

This tool allows the organization to present its response to the charge – its side of the story – to the EEOC.

Subpoena

If the EEOC schedules this first to obtain information from the organization, consider the charge to be Category A.

Knowledge Check: You receive Form 131 from the EEOC related to an alleged case of racial discrimination in your organization. What assumptions can you make?

- A. The investigation is not charge driven.
- B. The investigation is charge driven.
- C. The EEOC may seek to expand the scope of the investigation.
- D. The EEOC has broad investigative authority to investigate this matter.

Knowledge Check: Your organization's legal counsel informs you that the EEOC is conducting a Directed Investigation of the organization. There are no other EEOC investigations at the present time. What assumptions can you make?

- A. *The investigation is not charge driven.*
- B. *The investigation is charge driven.*
- C. *The EEOC may believe that the organization is engaging in widespread or serious discrimination practices.*

Knowledge Check: Select the scenario below that does not describe the expansion of an EEOC investigation's scope.

- A. *Seeking an ADA Commissioner's charge during a Directed Investigation under EPA.*
- B. *Amending an existing charge to include an additional charge.*
- C. *Conducting an onsite investigation.*
- D. *Launching a Directed Investigation under ADEA of a Title VII charge.*

The EEOC has broad investigative powers. Because of limited resources, however, the EEOC can only fully investigate a fraction of the cases that come before it. The agency focuses primarily on those charges that it believes are most likely to result in “cause” findings. It leaves other charges for handling through private litigation or by EEOC “as resources permit.”

Hyperlink for “cause” above: On the basis of all the evidence, the EEOC determines that it is more likely than not that the alleged violation(s) occurred.

The EEOC's enforcement program focus is likely to result in somewhat more aggressive action in cases it pursues itself, but also efforts to turn cases over to private counsel if it cannot resolve them at an early stage.

Your key take-aways from this module are:

- The EEOC's authority to investigate possible violations are either:
 - Charge-driven – Title VII, ADA, GINA; or
 - Not charge-driven – ADEA, EPA.
- If you receive notice of a Commissioner's charge or Directed Investigation, notify your organization's attorneys immediately.
- The EEOC can expand the scope of an investigation by:
 - Amending a charge; or
 - Initiating a Commissioner's charge or Directed Investigation.

You have completed “The EEOC's Investigation” module. There is a Web Session to complete before starting the next module. Check your Participant Guide for details.

Close this module by clicking the red X in the top right corner of the window.

Module 6 | The Position Statement

Welcome to Responding to Charges of Employment Discrimination: The Position Statement.

The position statement is your organization's position in response to a charge. A well-developed position statement responds to the allegation or allegations of the charge by:

- Stating the relevant facts,
- Describing evidence that supports those facts,
- Explaining the meaning and significance of the evidence, and
- Stating the conclusions that should be drawn from them.

Whether or not the Equal Employment Opportunity Commission or the Fair Employment Practices Agency asks for a written statement of the organization's position in response to a charge of employment discrimination, it's good practice to submit one. This is your opportunity to present the organization's "side of the story" with respect to the allegations in the charge and to pull together the evidence showing that the charge is without merit.

[Fair Employment Practices Agency: Fair Employment Practices Agency, or "706 agency," State or local EEO agency that maintains a cooperative relationship with the EEOC for processing discrimination charges.]

During this module, you will learn how to develop a position statement that presents the evidence relevant to the charge, provides information about the organization that is useful for the EEOC, and focuses on the important issues.

At the end of this module, you will be able to:

- Write position statements that include the four major sections: introduction, background, response, and conclusion.
- Ensure your position statement is clear, persuasive, accurate, complete, and objective in tone.
- Select and present only relevant exhibits.
- Identify and overcome bad facts in order to ensure an accurate response.

Why should you prepare a position statement? Well, technically, you have a choice. However, it's a good idea to prepare and submit one for three reasons.

First, you have a story to tell, right? This is your opportunity to tell the organization's side of the story.

Second, It will help focus and may shorten the investigation.

Lastly, the position statement, if done well, may prompt the investigator to close the case.

If you don't provide a position statement, EEOC could read it as:

- A signal that you don't have anything to say in your defense; or
- That you're hiding something.

It's also a lost opportunity to make the organization's case and focus the investigation.

On the other hand, you might not want to submit a position statement when:

- The organization has a jurisdictional defense;
- The charging party is represented by counsel and has begun the process of requesting a Right to Sue Letter; or
[Right to Sue Letter: Written notice by EEOC to charging parties advising them of their right to file a lawsuit in federal court in 90 days.]
- The organization is in the process of negotiating a settlement. You'll want to let EEOC know about this.

What if the EEOC doesn't ask for a position statement? That could mean that the charging party has requested a Right to Sue letter or that the EEOC has deemed the case suitable for dismissal. These reasons could mean there is no more work to do on the case.

The agency may not ask for a position statement if it is perfecting a charge. That means the agency still has work to do on the case.

The EEOC uses organization position statements for a number of purposes. First, they serve as evidence in an investigation and a law suit; second, the investigator uses it to focus the investigation, assess the organization's credibility, and make a finding; and finally, the Office Director, Regional Attorney, General Counsel and agency Commissioners may evaluate it before issuing a determination, if the case appears to be a good "litigation vehicle" or if litigation requires higher-level approval.

Never submit a position statement or other detailed response to a charge until you have conducted a full internal investigation. This ensures that you have thoroughly assessed the charge, developed an investigation plan, and completed the internal investigation. Once you complete your investigation, work on drafting and submitting your position statement by the EEOC's deadline.

A typical deadline for filing a position statement is 2 weeks to 30 days from the date on the Notice of a Charge of Discrimination. Factors that can influence the deadline are the strength of the charge, the investigator's case load, and the culture of the particular office handling the charge.

Write your position statements in such a way so that you can accomplish these 5 goals. Select each goal to view a description.

Educate investigator: The EEOC or FEPA field investigator probably is completely unfamiliar with your organization and even your industry. Your response to the charge is an opportunity for you to explain aspects of the organization's operations, business environment, and policies and practices that may be relevant to the employment actions challenged in the charge. This background information will be helpful to the investigator by providing a context in which to consider the charge.

Narrow the issues: Emphasize the important and substantial issues contained in the charge. Address all of the allegations to some degree, but put your emphasis on the events and issues that are at the crux of the dispute. In this way, you help the investigator put the allegations in the proper perspective.

Establish central theme: The theme is a clearly and concisely-stated reason that the charge is without merit. You'll learn more about this shortly.

Reduce information requests: Develop a position statement that addresses each allegation set forth in the charge. Including as much information as is relevant and necessary to make your case could prevent the agency from requesting information later.

Secure "no cause" findings: Provide the agency with the information it needs to render a "no cause" finding with respect to each violation alleged in the charge.

Keep your audience in mind when writing a position statement. Avoid legalese. Use plain language to express your argument and make it easy for them to read and understand your organization's position with regard to the charge. Whether it's a simple letter or a document that looks more like a report, keep it organized. Use simple, short sentences. And spell out the conclusions you want them to draw.

There is no required format for a position statement. Your organization may already have forms and form language that it uses. That said, we are going to talk here about one possible structure for a position statement that many organizations have found to be effective.

Let's look at the structure of a position statement from a high level. Think of the document as divided into 4 main parts:

- The Introduction - This is where you'll state your theme.
- The Background - Tell the investigator about your organization and provide context for the charge.
- The Response - Here you state why the actions the organization took were for legitimate nondiscriminatory business reasons.
- The Conclusion - This is a short summary sentence. If you did your job in the preceding sections, the conclusion should be brief.

Here's a tip. Use headings and subheadings that SAY something. Think of them as tools for making your case, not just as ways to identify sections in your document.

Another element of style for your position statement is the tone. It's important to adopt the right one. That means:

- Use an objective tone,
- Be polite and avoid exaggerated and argumentative language,
- Be assertive in stating your case but not extremely aggressive,
- Personalize the organization and depersonalize the charging party, and
- Be respectful toward the agency, the charging party, and all others.

It's time to put into practice what you've learned so far. Turn to the activity titled "Review the First Draft" in your participant Guide. Follow the instructions to complete the activity. Your goal is to provide Pat Ames with constructive feedback on her draft position statement. After you have completed the activity, return to this screen.

Now you're going to "dissect" - in a manner of speaking - the general structure of the position statement into its parts and look at each in more detail. It's usually good to start at the beginning, so you'll start with the Introduction.

Keep the introduction short. Identify the organization and why you're writing. Then move right to your theme and the denial of liability.

Let's look at an example. Select the Pause button at the bottom of your screen and read Sample 1. When you're done, click the Play button to continue.

Sample 1: "This letter responds to the above-referenced charge alleging discrimination on the basis of race and sex. ABC organization denies that it is engaged in any policy or practice that discriminates on either of these bases. In response to the specific allegations in the charge, the organization respectfully provides this Statement of Position."

This sample is very short and pretty generic. Before you begin writing the introduction, check to see if your organization has a template for documents similar to the one you're writing and use it.

Let's look at another sample Introduction...

Once again, click Pause to read the sample. After you're done, click Play to continue.

Sample 2: "This letter responds to the above-referenced charge alleging discrimination on the basis of age. The charging party in this case was terminated for legitimate business reasons – poor performance as well as chronic lateness and absenteeism. All of these instances are well-

documented and make clear that the charging party's termination was not motivated by age, and that she was not discriminated against in any other matter."

This one is a little more detailed, but still only 3 sentences. The last two sentences establish the theme.

Develop your position statement around a central theme. The theme should be a clearly stated reason that the charge is without merit. Usually, this will be the organization's legitimate, nondiscriminatory reason for taking the employment action it did.

Develop your theme to capitalize on the evidence in the case that is most favorable and to minimize the effects of any damaging evidence or what is referred to as "bad facts." You'll learn more about dealing with bad facts later in the module.

Finally, your theme should resolve as many conflicts in the evidence as possible. For example, in Sample 2 the organization states unequivocally up front that the charging party was terminated due to documented poor performance, chronic lateness, and absenteeism. Not age.

Read each statement below and select the better theme by checking the box in front of the statement.

- ☐ *The ABC organization terminated the charging party because her position was eliminated. Additionally, her performance had been unsatisfactory and her attendance record was poor.*
- ☐ *ABC organization terminated the charging party because her position was eliminated as part of a restructuring, and the organization did not have another position available for which she was qualified.*

In the Introduction, you or your lawyers may want to include a statement, which states that your organization reserves the right to add to the position statement later to respond to other information or allegations.

Take a moment to read the sample by clicking the Pause button. When you're done, click Play to continue.

Sample | Right to Supplement: This position statement constitutes the initial position of ABC organization, and we reserve the right to file additional statements and/or documentation as the investigation proceeds.

One caveat: Don't use this "Right to Supplement" as a placeholder until you finish with your investigation. You should only use it as a way to respond to information they present as THEIR investigation proceeds.

Time to put into practice what you've learned about writing the Introduction. Turn to the activity titled "Write the Introduction" in your Participant Guide. Follow the instructions to

complete the activity. Your goal is to draft a "model" introduction for Pat Ames to use in her position statement. After you have completed the activity, return to this screen.

You have laid out the central theme - an unequivocal denial of any liability. Now some background information is helpful. Remember, the investigator probably doesn't know your organization. So introduce him or her to the organization in as positive - yet objective - a light as possible.

Provide some context for the investigator. Explain what the organization does, how and where you do it, and where the charging party fits into the organization.

Then you can brag a little by describing the organization's EEO policies and procedures. Don't overdo it or lie, just state the rules that everyone in the organization is to follow.

Take a look at a sample background section...

Here's the first paragraph of a sample background section. It introduces the organization and provides some context to the investigator. Take a moment to read it by clicking the Pause button. When you're done, click Play to continue.

Sample | Organization Background: ABC organization has been in the business of designing and manufacturing state-of-the-art fly fishing equipment and gear for more than 25 years. Our organization is headquartered in Gentle River, North Dakota. We also employ sales representatives nationwide who market our products and manage client accounts. ABC organization hired the charging party in 2015, and she worked as a sales representative in Portland, Oregon until she abandoned her position in February 2017.

This sample is short and sweet. It may be enough. Depending on the charge, you may need to add more to this part. For example, you may need to describe divisions with the organization. Or, if the charge is related to the Americans with Disabilities Act, you may need to describe a manufacturing process, how your organization performs a task, or essential job functions associated with the charging party's position.

Now let's look at the second paragraph of the background section.

Sample | EEO Policies: ABC organization is firmly committed to equal opportunity and non-discrimination in all our employment practices. Our written policy, which is posted on the organization's website and distributed to each new employee, provides that harassment and discrimination based on an individual's race, color, religion, sex, age, national origin or disability is illegal and will not be tolerated. The policy also makes clear that employees are encouraged to come forth with complaints or concerns about their treatment.

This section explains the EEO policy. Take a moment to read it by clicking the Pause button. When you're done, click Play to continue.

Your organization's EEO policy actually may be broader. For example, if your organization is a federal contractor, the policy probably also includes gender identity and sexual orientation.

Again, a simple summary of the policy may be enough for the position statement. However, depending on the charge, there may be additional details about the policy that it would be helpful to include.

Practice drafting a background section now. Go to the "Write the Background" activity in your Participant Guide. Follow the instructions to complete it. Your goal here is to draft a "model" background for Pat to use in her Position Statement. After you're done, return to this screen to continue with the module.

A word of caution before you start writing. EEOC policy calls for the disclosure of an employer's position statement and all "non-confidential attachments" if requested by a charging party during the course of an investigation of a discrimination charge. Accordingly, the position statement should refer to, but not specifically identify, any relevant information that the organization asserts is sensitive medical, confidential commercial, or confidential financial information.

If the position statement refers to any such confidential information, the organization should provide the information in separately labeled attachments, identify the confidentiality category in which the information belongs, and provide a substantive explanation justifying the confidential nature of the information. We will talk more about this issue later in this module.

The next section of the position statement is the response to the allegations. This section supports the theme by presenting the evidence related to the charge. Before getting into details about this section, there are a couple of rules you need to know to ensure that you stay on course.

Rule #1: Only respond if you have to respond. Don't offer a detailed response to allegations that are untimely or otherwise outside the EEOC's jurisdiction. That doesn't mean you can just ignore them, however. You need to explain the reasons for not responding to them. Don't "respond" to claims that aren't there. And don't "kitchen sink" the charging party - you know, throw everything you can at them. Rather focus on the legitimate nondiscriminatory business reason or reasons that actually formed the basis of the decision being challenged.

Rule #2: Respond to ALL allegations in the charge that you should properly address. If you don't respond to all the allegations, you could be sending a signal.

Your failure to respond to each allegation may lead the agency to an "adverse inference." That is, it may suggest to the investigator that the organization has no defense to that allegation or that it has something to hide or may not be willing to cooperate. This could invite a more aggressive investigation.

Now let's get into some details about writing this section of the position statement. You cannot rely on simple denials or general statements that the organization was merely following its policies. It's important to know the law when developing this section.

Your legal counsel can help. Before you start writing, you should know:

- What the charging party has to show to establish discrimination; and
- What defenses are available to the employer and how to prove them.

Work with your organization's legal counsel to put the facts of the case in context of the law. State the relevant facts and describe the evidence that supports them. Explain their meaning and significance within a legal context. Finally, state the conclusions that the investigator should draw from them.

Skip citing cases unless the charge raises a novel legal issue or a legal question specifically addressed by the courts in your jurisdiction.

It's better to cite the EEOC's regulations, policy guidance, and the EEOC Compliance Manual. The agency's website has this information.

Stop here to complete the activity in the Participant Guide called "Plan Your Defense". Follow the instructions to complete the activity. Your goal is to answer the questions so that you have a solid grasp of the law before writing the response to the allegations. Return to this screen after you have completed the activity.

As you write the response to the allegations, keep in mind what the investigator is looking for when he or she reviews the position statement. The EEOC Compliance Manual instructs that an employer's position may lack credibility if it:

- Isn't supported by the evidence
- Is contradicted by facts of the case
- Appears to have been made up after the fact
- Changes during the course of the investigation
- Is unnecessarily vague

As you are writing this section, try to put yourself in the place of the EEOC investigator. Evaluate how your position statement will sound. Is it convincing? Does it pass the "smell" test?

When you finish your draft, you may even want a colleague to read it and give it an objective evaluation for you.

This is a good time to look at the features of an effective position statement. Select each feature to view a description.

Clarity: Develop a central theme and state it in a clear and simple way. Simple, short sentences that state the facts and convey the appropriate concepts will make it easier for a busy field investigator to read and understand your position statement.

Persuasive: Write forcefully, but not in an exaggerated way. Be compelling, but not argumentative. State your case, putting your strongest points first and making one point at a time. Use the active voice, not passive. Use specific and concrete terms rather than general and abstract ones. Use metaphors and figures of speech where they add clarity as well as color, but avoid clichés.

Accuracy & Consistency: This is the most important feature of a position statement. Be sure that the statement faithfully recounts the time, place, and sequence of events. Be sure it correctly identifies the individuals involved in the charge. Errors, even minor ones, undercut the document's credibility in the investigator's eyes. Make sure exhibits support your conclusions. Have legal counsel and others review the statement for a "reality check."

Complete: Address each allegation of the charge. If you ignore an allegation, the agency will conclude that you agree with it. Spell out inferences and conclusions that you want the investigator to draw from the evidence. Even if you get an opportunity to supplement the position statement later, the investigator may not look at the supplement. So make the first submission a finished product.

Objective: The position statement is your opportunity to confront unfavorable evidence and show that the favorable evidence negates or outweighs it. By doing this, you provide the investigator with a perspective on how the negative evidence fits into the overall case. This is a strategic decision, however, and you should review it with legal counsel before disclosing the damaging evidence.

In terms of writing style, keep a few simple techniques in mind to make your position statement more credible.

- Use good grammar.
- Make sure there are no typographical and spelling errors. Mistakes send bad messages. Don't just spell-check the document, proofread it.
- Use "plain language." Avoid legalese and don't try to impress the investigator with highfalutin vocabulary.
- Write in the active voice. Say "the organization terminated the charging party for poor attendance" rather than "the charging party was terminated for poor attendance." Active voice is more powerful than passive voice.
- You've done the difficult parts of the position statement. Now it's time to conclude it. Just do like you did at the Introduction...keep it simple and short.
- Deny liability and request a "no reasonable cause" finding.

Here's a sample conclusion. Click the Pause button to read it. Click play when you are done.

Sample: For all the reasons set forth above, the charging party's claim of sex discrimination is without merit. Therefore, ABC organization respectfully asks the Commission to issue a no reasonable cause finding in this case."

That's it. Short and sweet. There's no need to rehash all your points if you have successfully drawn and articulated conclusions already.

Time to practice what you've learned. Turn to the activity titled "Review the Second Draft" in your Participant Guide. Follow the instructions to complete the activity. After you have completed it, return to this screen.

Exhibits, that is, documents that illustrate and back up the information you are providing in your position statement, can be very helpful.

Documentation that shows that the organization took the required steps in a progressive disciplinary procedure, lists or charts that show how other employees who broke the same rules were disciplined in the same way, or copies of organization policies that were followed, can create the picture that is worth a thousand words.

If you decide to include exhibits with the position statement:

Use copies of documents, not originals, unless you create an exhibit specifically for the position statement, such as a chart or a list.

Present exhibits in an organized fashion. Use lettered or numbered tabs to identify each exhibit.

Refer to the tab in the appropriate place in the text. And indicate the conclusion you want the investigator to draw from it. For example, write, "Exhibit A is a copy of the manager's notes from the meeting in which she gave the Charging Party a verbal warning for tardiness. Exhibit B is a copy of the written warning she gave the charging party for tardiness three weeks later."

But only provide what the agency needs. Don't drown them in extra paper. Unnecessary information not only causes confusion, but may also provide the EEOC with information it might use to expand the charge.

As we mentioned earlier, the EEOC will give the charging party a copy of the position statement and all "non-confidential" attachments on request. Accordingly, never put confidential information in the position statement.

Instead, if you must provide confidential information to the EEOC, do it in one or more separate attachments, labeled with the word "confidential" and one of the categories of confidential information that the EEOC has identified.

These are:

- sensitive medical information;
- social security numbers;
- confidential commercial information;
- confidential financial information;
- trade secrets information;
- non-relevant personally identifiable information of witnesses, comparators or third parties;
- references to other charges filed against the organization; or
- references to other charging parties.

Sensitive medical information: All sensitive medical information, except for the charging party's medical information.

Confidential non-relevant identifiable information: Non-relevant identifiable information of witnesses, comparators or third parties (for example, including but not limited to social security numbers, dates of birth in non-age cases, home addresses, personal phone numbers, personal email addresses.

References to other charges: Any reference to other charges filed against the Respondent or to other charging parties, unless the other charges are by the charging party.

For each attachment, include an explanation justifying the confidential nature of all of the information contained in the attachment. Keep in mind that the EEOC has made clear that it will reject "unsupported assertions of confidentiality," and thus the failure to provide a justification for segregating particular information as confidential will result in that information being automatically disclosed to a charging party who requests access to a position statement.

Keep in mind, too, that the EEOC retains sole discretion to determine whether particular information will be considered confidential and therefore protected from disclosure to the charging party, regardless of how the information is designated by an employer. Accordingly, don't assume that just because you labeled a document "confidential" the EEOC will see it that way.

Finally, be cautious when you upload confidential attachments to the EEOC's digital charge system. When uploading documents, an employer has the option to select the document type, with the options of: Position Statement; Position Statement Attachments - Non-Confidential; and Position Statement Attachments - Confidential. The Respondent Portal User's Guide states that once a position statement is uploaded onto the digital portal, it cannot be retracted. Accordingly, be sure that you upload confidential attachments under the proper document category.

Pat has prepared a list of possible exhibits, with some side notes explaining why she thought they were important. Select each item and read the explanation in the box to the left for why

the document is, might be, or is not useful as an exhibit to the position statement. Use the scroll bar on the right of the list to view the lower part of the list.

Copy of employee manual: Most of the material isn't relevant to the case. Just the cover page and selected excerpts related to EEO policies and procedures is sufficient.

Copy of sexual harassment training agenda for managers and supervisors: This could be helpful if it is a good one.

Copy of sign-in sheet for last training session: This can be helpful as well, although you may want to redact, or black-out, the names of the other people who attended.

Affidavit signed by Parks denying sexual harassment allegations: It is probably not a good idea to take and submit a sworn statement from the accused harasser unless the investigator specifically asks for one (some EEOC offices do so as a common practice).

Affidavit signed by Jack Ross explaining Rosser's practice for reassigning departments: An affidavit from Jack Ross explaining the reassignment practice isn't necessary or even particularly helpful. A written harassment policy would be more appropriate to include.

Copy of Parks' personnel file to show he is a long-time employee with no record of harassment: It's not necessary to include the file. If there are documents in his file that illustrate a point you are making in your position statement, then you might consider using them.

Copy of Newburg's personnel file: When looking for exhibits to illustrate points in your position statement, look for documents that help the case. If there is something in the file that meets this requirement, consider using it. But probably not the whole file.

Copy of Rosser's Department Store sales handbook: This is not necessary. At least not all of it. If there is something in it that illustrates a point you are making, say, the way accounts are reassigned when a sales manager leaves, then include that page or pages with an explanation in the position statement.

Copy of the memo documenting Rosser's verbal counseling session with Parks: No, because our position is going to be that Parks did not do anything wrong. So while a cautionary verbal counseling may be a "best practice," and you may even want to mention that in the position statement, including the actual memo may be more inflammatory than helpful.

Copy of written complaint made by Newburg through Rosser's grievance procedure: It's not necessary to include the internal complaint.

List of all managers at the Tyson's Corner store for the past 15 years: It's not a good idea to provide a list of names, and certainly not going back 15 years.

Facts are facts. You are stuck with them, good or bad. This is why you complete your internal investigation first; it gives you the opportunity to uncover all the facts related to the allegation and handle them in an appropriate way. Some facts may look bad, but they are not necessarily illegal. Still, these "bad facts" have to be dealt with.

Common "bad fact" scenarios include:

- Inappropriate (but not discriminatory) decision-making or behavior
- Stray remarks, like the occasional inappropriate comment
- Abusive supervisors or "equal opportunity harassers" - not the prettiest defense, but it happens
- Decisions that aren't consistent with past practice
- Decisions contrary to organization policy and procedure

When you identify a "bad fact," consider four questions:

- Can it be legitimately explained or put into context in the position statement? In other words, can you explain it away - or why it is not as bad as it looks?
- Are there any legal defenses available? If you've discovered that hostile environment sexual harassment did happen, can you show that the charging party had ample opportunity to bring her complaint to the organization's attention so that the organization could take appropriate action, and yet she failed to do so?
- Do they make a difference to the outcome of the case? Can you explain how the "bad facts" had no effect on what happened?
- Are there comparators "similarly situated" to the charging party? For example, is the charging party comparing herself to someone she says was treated more favorably. Think about whether they are really similarly situated...maybe there were different circumstances or a different supervisor.

[Similarly situated: The employment situation is directly comparable in all material respects.]

Should you ignore a "bad fact"? Well, that depends.

If it's not an action that is illegal, but it still looks really bad, address it in the position statement by indicating that the organization isn't proud of it and management has taken action.

If the fact is already out in the public domain or is likely to come out at some point, it's better to address it in the position statement. It will look like a much bigger deal if the EEOC finds out about it from some source other than the organization.

If it's not that big a deal, it may be best to ignore it. Consider, however, that it may be better in the long run that the organization raises it in the position statement than it is for the agency to find out about it.

How you handle "bad facts" depends on the situation. Speak with your legal counsel in order to decide how to handle it.

In summary, the position statement is an opportunity for the organization to tell its story in a clear, concise, and convincing manner. The EEOC cautions its investigators not to rely too heavily on the employer's position statement. However, an effective position statement, backed up by evidence, can greatly increase the chances of a favorable resolution to the charge.

It helps to focus the issues and ensure that evidence and arguments favorable to the organization are taken into account and properly understood. It also helps to ensure that the agency is not misled by arguments by the charging party that otherwise might go unanswered.

Do not rely on simple denials or general statements that the organization was merely following its policies. Substantiate your position with concrete information and documents where appropriate.

It's time to review the finished product - the final position statement Rossers submitted to the EEOC. Turn to the "Final Position Statement" activity in your Participant Guide. Follow the instructions to complete the activity.

Your key take-aways from this module are:

- There are many benefits to submitting a position statement, including telling the organization's side of the story.
- Complete the internal investigation before writing the position statement so you are reasonably certain that you have all the facts.
- Use plain language, keep it brief, and organize it well. Keep the tone of the document objective, yet persuasive. You should play the "Organization's Advocate Role" when developing the position statement.
- Work with legal counsel to put facts regarding the allegations in context of the law.

You have completed "The Position Statement" module. There is a Web Session to attend before moving on to the next module. Check your Participant Guide for details.

Close this module by clicking the red X in the top right corner of the window.

Module 7 | Requests for Information

Welcome to "Responding to Charges of Employment Discrimination." This module is called "Requests for Information."

Rossers Department Store receives a request from the Equal Employment Opportunity Commission for a large number of documents and answers to a list of questions regarding Heather Newburg's charge of sex discrimination.

Does the organization have to hand over everything the agency requested? What if some of the documentation is confidential? Is there a specific format that the organization should use to provide the information?

In this module, you'll get answers to these and other questions, plus tips for developing an effective response that may lead investigators to a positive outcome to the case.

At the end of this module, you'll be able to:

- Respond to a request for information in a way that focuses the investigation and guides the investigators.
- Format the response in an organized way.
- Analyze statistics and raw data, and suggest conclusions the investigator should draw from them.

The request for information will usually be in the form of a letter asking for the organization's response by a specified date. The letter may also indicate that if you don't provide the information by the deadline, the EEOC may issue a subpoena. This admonition might strike you as unnecessarily confrontational, especially if you have done nothing to appear uncooperative. Don't take it personally. It's just a routine notification that some EEOC offices feel they must include in every request.

There are two general types of requests for information: a list of questions – or “interrogatories” – and a request for documents. Your Request for Information may include both.

Now, the EEOC's information requests should relate to the allegations contained in the charge under investigation. That does not mean they necessarily will, however.

Knowing that the EEOC may send you wide-ranging, poorly-focused requests for information and documents, it's important you keep three goals in mind.

First, give the agency what it needs...and only what it needs. You decide what you want to provide.

Second, make sure your responses are consistent with the position statement. This is another opportunity to help focus the investigation.

Third, use this response to continue to persuade the agency.

It's important to keep your goals in mind as you prepare your response, especially if the request is seemingly asking for everything including the "kitchen sink."

One reason for the EEOC to often seek reams of information is that agency investigators use "boilerplate" request forms rather than taking the time to tailor their requests to the specific allegations in the charge. Many investigators seem to prefer the "more is better" approach. So they may use a generic request form or one from some other case stored on their computer to save time.

It's up to you to decide what information and documents to provide. So use discretion. Limit what goes into the response. Say, for example, that the EEOC requests all sexual harassment complaints filed against the organization for the past 5 years. Let's also say the organization has many offices and several departments within different business units. Depending on the case, you probably will have a strong argument for limiting the request along those lines, and anything beyond a certain point is irrelevant.

In addition to using discretion in what you don't provide the agency, you should also use discretion in what you do provide. Be aware that the EEOC can – and frequently does – expand investigations based on information it receives. The EEOC may expand an investigation, for example, if it thinks it sees evidence of systemic discrimination.

When responding to broad requests for information:

- Don't feel compelled to give the EEOC everything it asks for. And don't be intimidated by threats.
- Don't provide irrelevant information. Help the investigator get what they need. Remember, they may not know what to ask for.
- Negotiate the scope of requests. If information isn't relevant, why give it to the government and the charging party?
- Understand that investigators will generally accept less if you can provide a reasonable ground for not providing it.
- Finally, never give anything to the agency that you haven't read.

Now, here comes the "but" to all the suggestions for limiting what you provide.

But, if you won't give the agency something it thinks it needs, they will go to court to get a subpoena. The subpoena isn't self-enforcing; the agency has to go to court to get an order to enforce it.

Courts have ruled time and time again that the EEOC has broad authority to subpoena any information which the agency claimed was relevant to its investigation of discrimination. It may

subpoena information, documents, and the testimony of witnesses. It tends to use this authority as a last resort.

If you get a subpoena – or even think there is one coming – alert the organization’s legal counsel right away.

Be aware that, as a general rule, the EEOC will pass information you provide to the charging party. Take steps to safeguard confidential business information, trade secrets, and private personal information about other employees.

It is a good idea to check with legal counsel before disclosing sensitive information to the agency. Not only will they want to know, but they also may have suggestions on how to limit what you provide to the agency.

“Code” information where appropriate. For example, use numbers rather than names in data reports.

Find less invasive alternatives where possible, such as providing only a summary of a organization-sensitive document, or carefully selecting among documents to provide only what the EEOC actually needs.

If you elect to give the agency confidential information, clearly mark it “confidential.” Tell the agency in writing that you expect them to hold the information confidential, and to notify you and give you a chance to object before they disclose it to anyone other than the immediate parties to the charge. Also ask that they return the information after the case is closed.

The most common grounds for legal objections to an information request are that:

- The information isn’t relevant to the allegations of the charge;
- Providing the information would be unduly burdensome; and
- The information is privileged.

If you are going to object, be polite. Say something like, “The ABC company respectfully submits that....” Your legal counsel can help you with the decision to object and the proper way of communicating it.

The EEOC and FEPAs have no standard response format. There are two common approaches, however, that companies use: folding the response into the position statement and creating a separate document. Let’s look at each approach.

Many companies fold their response into the position statement and do not file a separate document responding to the Request for Information.

You may either find a logical way to work your response to an interrogatory or document request into the text of the position statement or attach a document as an exhibit and explain it in the position statement. If documents don't fit easily or logically into the position statement itself, you can simply mention them in a cover letter and include them in the package.

Many companies find the "position statement only" method to be superior for several reasons. First, it allows you to put each response in context, using it as another opportunity to persuade. Second, it allows you to skip responding to requests for irrelevant information but avoid having to highlight the fact with a formal objection.

A few companies respond to requests for information in a separate document.

If you decide to respond in this format, it's usually most helpful to repeat the question or request from the list, then provide the response.

Similar to the position statement, identify exhibit tabs in the text of the response and describe documents and explain what the investigator should conclude from them. Refer to the position statement when possible.

Let's take a couple of minutes to review statistics and raw data that the EEOC may request. As a rule of thumb, never just hand over this kind of information; you don't know how the agency will interpret it.

Review the data. Analyze them every way you can. Develop a summary. Provide the summary to the EEOC, always telling the investigator what conclusions to draw from the statistics or raw data.

And again, because statistics and data are likely to be sensitive organization information and could lead the EEOC to expand the investigation, it's a good idea to check with legal counsel first.

Just like when you are developing position statements, you may run into "bad facts" while responding to requests for information. Don't destroy the evidence. As you learned earlier, there are serious legal issues with that.

Determine just how bad the evidence is with the help of legal counsel. Then make decisions about how to handle it.

Finally, just like position statements, responses to requests for information should be 100% accurate and complete to the extent that you have chosen to respond.

Let's practice what you've learned about responding to requests for information.

For this activity, you, Rossers' Equal Opportunity Specialist, receive a request for information from the EEOC regarding the Newburg case.

Turn to the activity “Respond to a Request” in your Participant Guide. Follow the instructions to complete the exercise. Your goal is to determine how much and what information to provide to the EEOC. Return to this screen after you have completed the activity.

Your key take-aways from this module are:

- Work closely with legal counsel to respond to requests for information from the EEOC or FEPAs.
- Give the agency what is relevant to the allegations of the charge, nothing more.
- There is no standard format for responding to requests for information.
- Play the “Organization’s Advocate Role” when providing information in response to a request from the agency. Mark confidential information as such. Summarize statistics and raw data to help the investigator draw the proper meaning. Use the response as another opportunity to persuade.

Good job! You have completed the “Requests for Information” module. You may proceed to the next module, “Managing the Onsite Investigation.” Close this module by clicking the red X in the top right corner of the window.

Module 8 | Managing Onsite Investigations

Welcome to “Responding to Charges of Employment Discrimination: Managing Onsite Investigations.”

As part of an investigation of a discrimination charge, the EEOC may send one or more field agents to your organization’s premises to interview witnesses, inspect documents, and view other evidence.

The EEOC’s stated policy is to conduct onsite investigations when:

- It is the only way of getting the information the agency needs, or
- It is the quickest or most cost-efficient way to get the information.

At the end of this module, you’ll be able to:

- Prepare for an onsite visit.
- Plan for an effective entrance conference.
- Manage the onsite investigation to ensure that:
 - The agency gets the information it needs, and
 - The organization maintains the confidentiality of its records.

- Conclude the onsite investigation projecting a positive image and expressing support for equal employment policies

The EEOC claims authority to conduct onsite investigations under a section of Title VII. The provision is also incorporated into the Americans with Disabilities Act and the Genetic Information Nondiscrimination Act. The EEOC has even more explicit authority to enter an employer's premises under the Age Discrimination in Employment Act and the Equal Pay Act.

The purpose of onsite visits is to investigate allegations. They enable the EEOC to conduct interviews, examine potential evidence, and make copies of records.

An onsite investigation can be critically important, and not only to the outcome of the case under investigation. It can also be important to the impression the EEOC will have of your organization in the future.

That's why your organization should have a plan to manage the EEOC's agents' activities while they are on your organization's premises and to keep control of the information to which they have access.

When the EEOC notifies you that they want to conduct an onsite investigation, notify your legal counsel immediately. They may want to participate directly or guide your preparation. At the very least, you will want to have your legal counsel alerted and on speed-dial during the EEOC's visit.

The first step in preparing for an onsite visit is to anticipate what the investigators will need and want when they come to your site.

If you received and responded to a request for information, you should have a pretty good idea of the issues and evidence the investigators will want to see.

The EEOC may try to schedule an onsite visit before you have had time to finish your internal investigation. Try to complete your investigation as soon as possible to avoid this situation. The last thing you want is EEOC agents onsite and discovering evidence that takes you by surprise.

If an EEOC investigator writes or calls to schedule an onsite visit, work with the agent to identify a mutually convenient date. You do not have to agree to the first date the investigator proposes. Ask for the number of agents coming, time of arrival, and the duration of the visit. Find out what documents they want to review so you can make arrangements to have them available. Also ask for the names of witnesses they want to interview. These are all legitimate questions in order to prepare.

Finally, prepare management representatives by briefing them on the organization's plans for the visit and the organization's position on the charge. Be sure to take time prepare management and non-management witnesses as well.

For management witnesses, take time to explain what the case involves and what may be expected as the investigation proceeds. Some other basic points to cover are:

- Listen carefully to the questions and answer only the specific question that is asked.
- Keep your answers short and concise. Where possible, simply answer yes or no.
- Don't volunteer information that hasn't been asked for.
- Don't answer too quickly. Think about the question and make sure you understand it before you respond.
- Ask for clarification if you don't understand a question. Don't attempt to guess what a question means.
- If you don't know the answer, say so. Again, don't guess.
- Don't argue with the interviewer. Also, don't lose your temper.
- Be patient. Remember, the interviewer may not be familiar with your industry or the organization's business operations.
- Above all, tell the truth to the best of your recollection.

Because managers and supervisors are agents of the organization, the organization is entitled to have an attorney or other representative present during management interviews. Non-management witnesses are another story.

Explain to non-management employees their rights and help them understand what to expect during the interview. Basic points to cover are:

- Explain that an investigator from the EEOC has asked to interview them in connection with a charge investigation and asked the organization for permission to interview them during the workday.
- Explain that the investigator will ask them for signed sworn statements that can be used as evidence in the case. Advise them to read the statement very carefully before signing it.
- Let them know that they can decide whether or not to meet with the investigator. It's their decision.
- Let them know that whether they meet with the investigator or not, there will be no retaliation. It's important you make clear that the organization will not take any action against them no matter which decision they make.

- Lastly, tell them that they can ask for someone to be with them during the interview – for example, a union steward or an organization representative.

The EEOC agents probably will need a room at your site where they can review documents and conduct interviews. Choose the place carefully.

- Locate a room where you can keep track of the investigators' presence at all times.
- Try to find a space that is somewhat out of the way, where the investigators will be comfortable but not have casual contact with employees or overhear conversations.
- If possible, select a place that is close to a photocopier so the agents can copy any documents while they are onsite. It's OK to charge them a reasonable price for copying.

When the EEOC investigators arrive at the site, it may be worthwhile to have them meet briefly with the people primarily involved in the organization's defense.

The purpose of the meeting is to go over any ground rules, including safety or security requirements, as well as to go over any information that you think might help the investigators put the case in proper perspective. You may want to take this opportunity to provide an orientation to the organization, just be sure to keep it brief and present only information that's relevant to the charge.

The EEOC investigators may ask for a tour of the facility to allow them to observe first-hand the actual work site. Facility tour requests are particularly common in ADA cases, where the investigators will want to see the job at issue being performed.

Taking the investigators on a tour may work to your advantage, since it may help them appreciate the organization's position with respect to the charge. The person assigned as the primary contact during the onsite investigation should lead the tour.

Part of your preparation before the EEOC arrives should be to plan and walk the tour route. Look at the facility through the eyes of the investigators and resolve any potential issues. For example, make sure the right posters are up before the actual tour.

When planning the entrance conference, remember that the objective is not to overwhelm the investigators with details or technical information. It is to communicate - to people who probably don't know much about your business - some basic points that will help them understand the evidence they will be looking at and hearing about while at your facility.

In addition to being able to interview witnesses, another reason why the EEOC may conduct an onsite investigation is to gain access to organization records and documents. They may ask to see all sorts of records, and often make requests for information that are overly broad. As with

responding to the EEOC's request for information, make sure you look at any and all documents before providing them to the EEOC.

Select each record type to view an explanation.

Relevance: The EEOC is entitled only to information that is relevant to the charge under investigation and is not legally privileged. If the investigator asks for information that you think is irrelevant, ask him or her to tell you which allegation of the charge it relates to and how it is relevant. Remember that the EEOC may seek to expand the investigation beyond the underlying charge. If you get even a hint that this is what is going on, tell the investigator you need to check with your legal counsel. Then do so.

Confidential information: Maintaining the confidentiality of records is a legitimate and serious concern to employees. The records you provide to the EEOC during an investigation may contain confidential information that would be damaging or disconcerting to individuals if made public. When you have to provide confidential information to the EEOC, try to obtain a written commitment in advance that the agency will not disclose the information without your approval. Also consider putting the information in coded form before providing it to the EEOC.

Raw data: It's never a good idea to give raw, unprocessed data to the EEOC investigators without some explanation or analysis that will show how to interpret it. If possible, process the data first and provide the investigators your analysis. Then walk them through the underlying records to show them how your conclusions flow logically and inexorably from the data.

Computer records: EEOC investigators may demand access to the organization's computer records. Try to work out arrangements to provide them with relevant information they need in a way that doesn't allow them to roam about the computer data. Consult with your computer systems experts and legal counsel in advance of the onsite visit.

One note of caution: Also check with legal counsel before refusing to provide the EEOC with access to any records or documents.

Remember, the EEOC can issue subpoenas and get them enforced in court if the information they seek is relevant, non-privileged, and not unduly burdensome to provide.

At the end of the onsite investigation, you should meet again with the EEOC investigators. This time your goal is to discuss the results of the investigation. There should not be any surprises at this point. You already should have a pretty good idea of what the investigators have found and the conclusions to which they are leaning.

No matter what the investigators say in this meeting, management should continue to project a positive image and express support for equal employment policies.

The investigators may be willing to tell you whether they intend to recommend a “cause” or “no cause” finding. If they appear to be leaning towards an adverse decision to the organization, you may wish to reemphasize key points that you believe the investigators may have overlooked or misunderstood.

[No cause: The EEOC determines that there is no reasonable cause that discrimination occurred.]

It's time to check your knowledge. Go to the next screen and complete the activity.

In the space below, enter key tasks you should complete in order to manage EEOC onsite investigations. Click the Submit button when you are done.

Treat the onsite investigation as an event with potentially serious consequences. At the same time, it may present an opportunity to clear up confusion or misapprehensions that could be standing in the way of a “no cause” finding.

You can reduce the potential risks of exposure from having EEOC investigators on the organization's premises by planning and preparing in advance for the onsite investigation and managing it effectively while it is underway.

Your key take-aways from this module are:

- Do your advance work by communicating with:
 - The agency investigator to schedule and arrange the onsite investigation
 - Appropriate management staff to make them aware that EEOC will be in the facility
 - Potential management and non-management witnesses to make them aware of their rights and responsibilities.
- Plan an entrance conference as an orientation for the investigator.
- Provide only records that are relevant to the charge, ensuring that confidential information is protected and that the investigators do not draw the incorrect conclusions from data.
- Arrange a brief exit conference to discuss the investigation's results.

Good job! You have completed the “Managing Onsite Investigations” module. Please check the Participant Guide for information about a Web Session before proceeding to the next module.

To close this module, click the red X in the top right corner of the window.

Module 9 | Approaching Settlement

Welcome to “Responding to Charges of Employment Discrimination: Approaching Settlement”

The EEOC’s policies encourage settlement efforts at all stages of the charge handling process. The agency’s procedures provide opportunities for settling cases both before and after it has made a “cause/no cause” determination.

After the EEOC makes a “cause” finding, the agency must attempt to “eliminate [the] alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion” before it may institute litigation.

At the end of this module, you’ll be able to:

- Briefly describe the procedures through which settlement may be approached.
- Identify the most common points in the charge handling process at which the EEOC may approach the employer to attempt a settlement.
- Identify and describe the general steps in the conciliation process.
- Given a fictional scenario, conduct a conciliation discussion in order to attempt to come to an agreement.

The EEOC encourages settlement efforts at all stages of the administrative process. There is a wide variety of different procedures through which the parties may approach settlement.

They are:

- Conciliation under the auspices of the EEOC and only after a “cause” determination.
- Mediation through an EEOC-sponsored or private program.
- Negotiation assisted by the EEOC.
- Unassisted negotiation between the charging party and the respondent, or their representatives.
- Any combination of the aforementioned procedures.

Within these categories there is an almost infinite range of ways that each of these processes may work. Despite the differences in form, however, all these procedures are essentially negotiating. By using these procedures, the parties are - directly or indirectly - trying to reach agreement on some mutually acceptable terms to settle the case rather than go to court.

The EEOC’s policy is to “not stand in the way of parties who are interested in reaching a settlement of their dispute.” So, a settlement can occur almost anytime during the EEOC’s charge handling process. The agency can raise opportunities to settle the dispute. The employer

can raise the possibility for a settlement; and the charging party can initiate a possibility of settlement.

When the EEOC raises the possibility of settlement, it's generally at three points in the charge handling process:

- After the charge is filed, but before the EEOC begins an investigation. We'll refer to this as "pre-investigation."
- After the agency's investigation is complete, but before it makes its determination. We'll call this point "pre-determination."
- After the agency makes a determination. We'll call this "post-determination."

Let's take a look at each one.

An organization should rarely – if ever – settle a charge of employment discrimination before completing its own internal investigation of the case.

On the other hand, there may be advantages to settling after your own investigation is complete but before the EEOC or FEPA investigates. An early settlement may spare the organization time, effort and disruption of having to respond to agency requests for information and prepare a position statement. It may also provide an opportunity to resolve the case before either the charging party or the organization's management become "locked in" to positions that make settlement more difficult.

A field agent could contact your organization when a charge is filed to find out whether settlement is a possibility.

If the agent calls you to explore settlement of a charge before the EEOC has completed an investigation, don't cut off the discussion too quickly. Even if you're fairly sure that the organization would not be interested in settling, listen to what the agent has to say and ask questions. The call may be an opportunity for you to learn more about what the charging party wants. You may also get a sense of how the agency is likely to classify the charge – whether it's a Category A, B or C case.

Now take a look at pre-determination settlements.

After the EEOC's investigation is complete, the agent frequently will make one more pass at settlement before making a "cause" or "no cause" determination.

If the agent is leaning toward a "no cause" determination, he or she will contact the charging party and explain the options for possible settlement or for private litigation.

If the agent is leaning toward a "cause" finding, he or she may contact both the charging party and the employer and see if there is a willingness to settle.

Each party may potentially benefit from settling the case after an investigation.

From the EEOC's point-of-view, a settlement means not having to write up a detailed letter of determination. It also means that the agency will not incur the costs and risks of litigation.

To the employer, settling at this stage may mean a chance for more favorable terms for two reasons. First, the charging party has not yet seen a determination letter that supports the allegations of the charge. Second, the agency has not yet locked itself into a "cause" finding.

To the charging party, a settlement before the "cause" determination may represent the last real chance to settle without litigation, since the employer might feel obligated to contest the case after such a determination is issued.

Now let's look at post-determination settlements.

When the EEOC makes its determination, it will notify both the charging party and the employer.

If the determination is "no cause," the EEOC will send the charging party a short-form notice of dismissal along with a notice explaining the charging party's right to pursue private litigation.

If the determination is for "cause," the EEOC issues a substantive "Letter of Determination" explaining the basis for the agency's findings and conclusions. Shortly thereafter, it will pursue conciliation efforts with the employer.

Before making a "cause" determination, the EEOC will seek "appropriate" relief. There is no definitive guidance on what constitutes "appropriate." After a "cause" determination, the EEOC will want "full" relief, but will not want to settle for less than "substantial" relief.

It is likely that the agency will want any settlement agreement to include at least some significant relief for each violation found. Having found unlawful discrimination, EEOC agents may feel a duty to obtain relief that, as nearly as possible, makes all the "victims" of that discrimination whole. They may also feel obliged to vindicate the public interest by including provisions that will deter future violations by the employer.

Accordingly, "full" or "substantial" relief may include reinstatement, back pay, front pay, compensatory and/or punitive damages, notice posting, corrective action, agency oversight, and/or training.

Conciliation is simply a method of negotiation that occurs after the EEOC has issued a "cause" determination on a charge. Note that the EEOC will not be interested in debating the merits of the case at this point. It has reached a decision and that's where conciliation begins.

The EEOC is required to make a "good faith" effort to conciliate before instituting litigation. The agency has been dinged in the past for not negotiating in good faith – that is, for doing things

like settling unreasonable deadlines, presenting “take it or leave it” proposals, or hiding information in order to get a deal.

There are no specified legal standards governing how the conciliation process is to work. The Supreme Court has said that in order to meet its conciliation obligation, the EEOC has to tell the employer about the claim. It also must give the employer an opportunity to discuss the matter in an effort to achieve voluntary compliance.

But there are some general steps worth reviewing. There are four general steps in the conciliation process. Keep in mind that in real life, the process isn’t as linear as it’s depicted here...and often not as clear-cut. Select each step in the process to view a description.

Gather information: An EEOC representative – the conciliator – meets with the charging party to gather information for use in preparing a proposal according to the agency’s conciliation standards.

Develop draft agreement: The conciliator develops a draft agreement and sends it to the employer. The draft agreement reflects “full” relief or something close to it. Remember, though, that the conciliator can approve an agreement that provides for less, as long as it is “substantial.”

Negotiate: If the employer offers a counterproposal to the draft agreement that the conciliator feels meets the “substantial” relief standard, he or she will relay it to the charging party. There may be some shuttling back and forth at this stage in an effort to find common ground between the EEOC’s and the organization’s terms.

Final agreement: When all parties agree on terms, the EEOC develops a written conciliation agreement.

The EEOC will be a party to any agreement that the parties reach.

If conciliation fails – that is, an agreement is not reached – then EEOC will either initiate litigation against the employer or issue a “Right to Sue” letter to the charging party.

Approach conciliation with a clear understanding of each party’s respective interests, strengths and weaknesses. Weigh the costs and obligations under a settlement agreement against risks of a lawsuit.

If a conciliation agreement is reached, the EEOC will be responsible for ensuring compliance with all its provisions. For this reason, the agency will insist that the agreement contain some provisions requiring the employer to report periodically on the status of compliance until all of the agreement’s requirements have been satisfied. For example, the employer may have to report when it has paid all monetary relief or the charging party has been reinstated. These

provisions may include periodic desk audits, inquiries for information, and even onsite reviews. The EEOC may seek litigation authorization in the event of noncompliance.

The process of settling a discrimination charge is essentially a negotiation process. As in other negotiations, to represent your organization's interests effectively, you need to prepare in advance. Understand, as clearly and precisely as possible, what each party stands to gain or lose by either settling the case or proceeding to litigation.

Above all, know your case *inside and out*. Its strengths and weaknesses. Its complications and implications.

In no small way, your ability to represent your organization's interests effectively at the settlement stage depends on how well you handled the processing of the charge at each of the earlier stages.

Your key take-aways from this module are:

- Settlement is essentially a negotiation process.
- The EEOC's policy encourages settlement at any time during its charge handling process.
- At the conciliation stage, the EEOC is likely to open with a proposal asking for "full" relief – essentially, everything they could get if they took the case to court and won the most they possibly could. Depending on how strong or weak they perceive their case to be, however, they may – and should – be willing to negotiate and agree to accept less.
- Know your case inside and out in order to approach settlement in an informed way.
- Settlement is the culmination of all your work up to the settlement stage. You should be in a good position to negotiate the best settlement the case will allow if your initial assessment was on target, your internal investigation was thorough, the position statement was well thought-out, and your dealings with the EEOC were professional.

To conclude the "Approaching Settlement" module, you must complete the capstone activity for the course. It gives you an opportunity to negotiate a settlement of the Newburg case. Turn to the activity titled "Conciliation Discussion" in your Participant Guide. Then follow the instructions to complete the activity.

You should have received guidance and additional information from the facilitator. Your goal is to negotiate a settlement of the case with your assigned colleague. You'll share the results of that negotiation with the class in the upcoming Web Session.

For now, you may close this module by clicking the red X in the top right corner of the window.

Module 10 | Course Summary

Welcome to “Responding to Charges of Employment Discrimination.” This is the Course Summary module.

You are close to completing CWC’s Responding to Charges of Discrimination course. We have covered a lot of ground.

The goal of this skill-building course is to provide you with techniques and strategies for handling discrimination charges, from the moment an employer receives notice that a charge has been filed with the EEOC, through the final resolution or referral of the case to litigation.

We hope you feel like you have gained the knowledge and skills to effectively handle a charge of discrimination.

Before you complete your final tasks and leave the course, let’s review some of the key concepts we’ve covered.

Having an understanding of the EEOC’s and the FEPAs’ charge handling process will help you organize your internal investigation.

Remember that your role changes as you progress through the organization’s internal investigation and approach settlement. These roles are not mutually exclusive. You will find yourself switching back and forth frequently between the roles.

How well you handle the charge assessment and internal investigation stages determines your ability to represent the organization’s interests effectively when responding to the charge and perhaps negotiating a settlement.

Let’s look at each of these three concepts briefly.

The EEOC’s charge handling procedure consists of these stages: Intake, Investigation, Determination, Conciliation and Litigation.

Concurrent to the EEOC’s charge handling process is your organization’s process.

At the end of the EEOC’s intake phase, it sends notification to your organization. You then complete an initial assessment of the charge to determine the actions you need to take in order to respond to it.

As the EEOC conducts its investigation, your organization conducts an internal investigation, develops a position statement, responds to any requests from the EEOC for information, and manages contacts with EEOC.

If the EEOC makes a cause determination, your organization participates in any conciliation discussions.

You are responsible for the internal processing of charges in your organization, and therefore, you will play a variety of roles depending on where you are in the charge handling process. Click each role to view the description.

Impartial Investigator: When you make an initial assessment of the charge and gather all of the relevant facts, you should try to be an impartial investigator. Of course, you never lose sight of the fact that you represent the organization. But until you have a full grasp of the facts, you need to be as objective as possible and not allow personal loyalties to shape your thinking about the case.

Confidential Advisor: After your investigation is complete, your role shifts slightly. At this stage you function more as a confidential advisor to the organization. You make judgements about the strengths and weaknesses of the case, including credibility of the witnesses for and against the organization. Based on those judgements and other factors, you make recommendations about how the organization should proceed. Your focus is on how the organization's interests can best be served, both in the immediate term and the long term.

Advocate for the Organization: After you and others in management have reached a decision on what position to take, your primary role becomes that of an advocate for the organization in presenting facts and the organization's position to the EEOC or the enforcement agency officials. In this role, your objective is to present the organization's case as persuasively and credibly as possible.

Proactive Consultant: At various points in the charge process, you may find it appropriate to serve as a proactive consultant to the organization, providing advice and recommendations that may help the organization minimize any adverse effects of the charge or avoid similar charges in the future. Your principle concern is with how to implement (and maybe even improve) the organization's policies and practices to ensure that the fundamental EEO and affirmative action commitments of the organization are realized.

You have heard this a lot in the course: How well you handle the charge assessment and investigation stages determines your ability to represent the organization's interests effectively when responding to the charge and perhaps negotiating a settlement. So, let's review the 6 steps quickly. Click each step to view the description.

Assess the charge: It is very important to assess a charge of employment discrimination carefully to determine whether it is timely and valid. Do not assume that all the proper procedures have been followed and all of the filing requirements were satisfied. Occasionally, intake officers at the EEOC and the FEPAs make mistakes. Conducting your own initial assessment of a charge as a first step in your internal charge-handling process could result in your finding a defect that might lead to dismissal of the case, saving you time and effort. Refer to counsel any possible questions as to timeliness or validity of a charge.

Conduct internal investigation: It is important to start your investigation of the facts right away. Even if you had all the time in the world, the quality of your investigation may depend on getting to the evidence while it is available, relatively fresh, and untainted. A well-thought-out investigation plan is critical for conducting a thorough internal investigation. It's time to build on your preliminary efforts to develop a plan for getting all the information you need.

Make "fight or settle" decision: After developing an investigation plan, start reviewing documentation and gathering evidence, including the process of interviewing witnesses and documenting each interview. After reviewing all the evidence, the organization makes a decision to either defend against the charge or settle. Either way, mediation is an option.

Develop the position statement: The position statement is an opportunity for the organization to tell its story in a clear, concise, and convincing manner. An effective position statement, backed up by evidence and arguments favorable to the organization are taken into account and properly understood. It also helps to ensure that the agency is not misled by arguments by the charging party that otherwise might go unanswered.

Respond to requests for information: Work closely with legal counsel to respond to requests for information from the EEOC or FEPAs. Give the agency what is relevant to the allegations of the charge, nothing more. If the agency decides to conduct an onsite investigation, treat it as an event with potentially serious consequences. It may present an opportunity to clear up confusion or misapprehensions that could be standing in the way of a "no cause" finding. You can reduce the potential risks of exposure from having EEOC investigators on the organization's premises by planning and preparing in advance for the onsite investigation and managing it effectively while it is underway.

Approach settlement: The process of settling a discrimination charge is essentially a negotiation process. As in other negotiations, to represent your organization's interests effectively, you need to prepare in advance. Understand, as clearly and precisely as possible, what each party stands to gain or lose by either settling the case or proceeding to litigation. Above all, know your case inside and out.

It has been a pleasure having you as a participant in CWC's virtual classroom. We appreciate your participation and hope to see you back for another CWC course.

Please remember that, as you go forward and use your new skills, we're here to support you. Contact the facilitator by email if you have questions about handling charges of discrimination. And continue to use the General Discussion Forum for 3 months. Share your questions and experiences with the facilitator and your fellow participants.

Congratulations! You're almost done. Just complete these 3 tasks:

- Complete the Post-Course Knowledge Check

- Click Launch Postwork at the Activity Overview screen in the CWC Learning System to complete the Participant Feedback Form online. Your feedback is critical to continuing to improve the course, so please give us your honest feedback. Also, be sure to scroll down through the screen, answer all the questions, and then select the Submit button.
- Print Your Certificate of Completion online. The certificate will only appear after you have submitted the feedback form.

Close this module by clicking the red X in the top right corner of the window. Thank you for participating in the course.