ASSOCIATION OF CORPORATE COUNSEL

Desktop Learning Webcast Transcript

Responding to EEO Agency Charges of Discrimination

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Presented by ACC's Employment & Labor Law Committee and Jackson Lewis LLP

Faculty:

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Moderator:

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Operator: Just a reminder, today's conference is being recorded.

Female: Please go ahead, (Jim).

(Jim Beyer): Good afternoon everyone or good morning or good evening, depending on what part of the U.S. or elsewhere on the globe you are at today. My name is (Jim Beyer). I am the Chairman of the Webcast Subcommittee. I’m a Senior Employment Law Counsel with Accenture and I’m delighted today to serve as the moderator, which my main job will be to field the questions, to get them to the presenters.

A couple of things related to logistics and then I’ll be delighted to introduce the presenters and get started. You’re able to ask your questions online. If you have your screen open, you should have at the bottom right-hand corner box, which says “questions.” You may type in the questions there. You can enlarge it, if you want to, and I will see those questions and try to get them to the presenters during the session. We may not have time to answer all of them, but we’ll try to get to as many as we can, and then afterwards if there’s still questions we can respond subsequently.
Another important thing is that it’s very important to the presenters and to ACC and to the Committee that the evaluation form is completed. In the middle of the right-hand side of your screen you should see a link to Webcast evaluation. We would very much like it if you could take the time to fill that out at the end of this presentation, as it is a way that we can make these things even better. I’m sure this one will one of the best, if not the best, but we can always improve.

That being said, I think that I can introduce our two presenters and we’ll go from there. First of all, I’m delighted to have both of them. (Linda Whittaker) is the associate general counsel of the Employment Practices Division of Wal-Mart Stores, Inc. She’s been at Wal-Mart since 1998. In 2001 she became the (ADA) coordinator. Currently she has a group of attorneys who advise the Company on all sorts of employment law issues. Her bio is attached as a link, as well, and I urge you to read the rest of her information.

Additionally, we have (Susan McKenna). (Susan) is a partner with Jackson Lewis in Orlando, Florida, practicing in labor and employment law. I will just briefly say that (Susan) is probably selected by a number of different periodicals, et cetera, as one of the best attorneys there is, so what more can you ask for. She’s been selected by her peers for inclusion and the publication leading Florida attorneys, Best Lawyers in America and (Chambers) Best Lawyers for Business. We’re delighted to have her, as well, here today and, again, I commend you to read her – the rest of her biography by clicking the link that has it ((inaudible)).

With that, I will turn it over to (Susan).

(Susan McKenna): Thank you, (Jim). Welcome, everybody. The agenda for this afternoon’s Webcast is displayed and will include the following topics: Very briefly, I will give an overview of the EEOC administrative process, and after I do so, (Linda) is going to share with us thoughts and recommendations on initial actions that in-house counsel should take and consider once a charge of discrimination is received by an organization. Of course, part of that, that (Linda) will talk
about, is how to conduct an effective investigation to gather the information essential to reply to that charge.

I will then talk about preparing the effective-position statement and we'll be able, I hope, to bring to bear almost 24 years of defending employment claims and point out the significant role a position statement, good or bad, can play in a company's ability to defend litigation later, as well as get the agency to agree with our conclusion that no discrimination occurred. And then, lastly, (Linda) is going to wrap up with some final considerations, including the possibility of an onsite visit by the EEOC investigator to the work site.

So, with that as the overview, let's begin by talking about the administrative process itself. The process begins when an aggrieved employee, or applicant, or ex-employee files a charge with the Equal Employment Opportunity Commission, the EEOC, in the appropriate district office that has jurisdiction over the workplace that involved that employee or applicant.

The charge is sometimes filed in person by an individual visiting the office of the EEOC and sitting down with intake individual. A charge is sometimes filed by an over-the-hone telephone interview, in which a charge is prepared and then mailed to the charging party for their signature. Or, sometimes an attorney is involved, even at the charge phase, and will assist or prepare a charge on behalf of that individual employee or applicant.

Once the charge is filed with the EEOC, depending on your jurisdiction and depending on whether there are local or state deferral agencies that also have responsibility for enforcing the discrimination laws. The charge may be dual filed with one of those deferral agencies, one of those state or local agencies.

For example, here in Orlando a charge could be filed with the Orlando Human Relations Department, or the Florida Commission on Human Relations, in addition to the EEOC. And,
these various deferral agencies have work arrangements or agreements with the EEOC district offices, in their various locals, as to which agency will run with the charge, which agency, in other words, will have primary responsibility for conducting the investigation. And, in that event, (you) or the employer will ultimately receive notice as to which of those agencies is going to be conducting the investigation.

(Jim Beyer): (Susan), I’m sorry to interrupt you. I’m getting a number of people that say they are having a hard time hearing, so if there’s any way you could turn up your volume I’m sure they would appreciate it.

(Susan McKenna): Absolutely.

Female: And, I’ve got that taken care of, as well.

(Jim Beyer): Thank you, (Alice).

(Susan McKenna): Thank you. And, I apologize, because normally I’m accused of being too loud, not loud enough, so I apologize and please let us know again if the volume isn’t sufficient. We’ll be happy to correct it.

Once the decision is made as to the agency that will do the investigation then at some point, of course, the employer is going to receive notice that the charge has been filed. As we’ll see, sometimes that notification includes a copy of the charge itself. Sometimes it’s just a notice that says a charge has been filed and nothing additional is provided to the employer at that time. In that event, you get the charge later, usually a few day, or even weeks after you get the notification initially.
Sometimes -- and (Linda) will talk about this a little more fully later -- the initial notification from the agency includes paperwork that will allow an employer to choose mediation through the EEOC. It’s not always offered. It depends on the nature of the allegation and the EEOCs initial view or screening of that charge, but sometimes that opportunity is provided to the employer and that presents an opportunity to consider whether to participate in mediation or to pass and simply reply to the charge.

Ultimately, the employer, of course, is going to respond to that charge, unless mediation resolves the dispute, following an investigation and following gathering of information necessary to put forth the company’s response. That submission is usually referred to as the “position statement,” which is accompanied with documentation, sometimes affidavits. In addition, many times the agency asks not just for the position statement, but for a list of documents or information, a request for information that must be provided, as well, and so part of the responsibility of whichever party is compiling this information is to respond, as well, to those requests for information.

(Jim Beyer): (Susan), I’m sorry to interrupt. We’ve got a couple of questions related to the position statement and I wondered if this was an appropriate time or you want to defer those for a little later?

(Susan McKenna): Now is fine, (Jim). Go right ahead.

(Jim Beyer): There was one question, which says, “What are the pros and cons to providing affidavits, along with the position statement, to the EEOC?”

(Susan McKenna): In fact that’s a good question and it anticipates something that we’ll talk about a little bit later, because in my view, unless you’re required to provide affidavits, I usually opt not to provide sworn testimony of witnesses to the EEOC, and we will talk about that a little later. It’s a
tactical decision that we have to make. Many times you are able to successfully defend a charge without providing sworn testimony and, in my view, that’s an advantage, if we can avoid doing so, if we end up in litigation later. But that’s a good question, anticipating something coming down the road.

(Jim Beyer): OK. This one may be in the same vein, but I’ll ask it here. “How do you recommend responding to a request for files which appear to be completely unrelated to the charge being investigated?”

(Susan McKenna): And that will be something we talk about, as well – the scope of the information that we provide.

(Jim Beyer): Very (good).

(Susan McKenna): Very good questions, looking down the road as to what’s coming up.

(Jim Beyer): All right.

(Susan McKenna): Once the employer has submitted the response then any number of things can happen, and one of those could be a request from the agency for additional information, perhaps because you didn’t give them everything they wanted initially, they come back and want more. They may want to actually conduct witness interviews, either in person or over the telephone. They may wish to pay a visit to the facility itself. As I mentioned, (Linda) will be talking about that a little bit later. So that’s the process itself and how it works.

Now there are numerous outcomes that can occur as a result of a charge filing, and some of those are dispositions that occur before an actual decision or determination is made by the EEOC. For example, the agency could dismiss a charge because they decide it’s untimely filed.
But, if we assume that the EEOC conducts a full investigation then there’s usually three possible outcomes, three typical outcomes. The one is that the EEOC finds cause, finds reason to believe that discrimination may have occurred, and if they do there are options that kick in, as well, one of which is requesting the parties to engage in conciliation, and if that is successful the matter concludes and nothing more occurs.

The other would be that if that request to conciliate is either refused or conciliation is unsuccessful then the EEOC will either issue a right to sue that gives that aggrieved party the opportunity to file in the appropriate court and within 90 days of their receipt of the right to sue, or the EEOC could choose to file suit themselves on behalf of, if you will, the aggrieved person, and sometimes ((inaudible)) there are similarly situated employees, as well. That, of course, is the outcome we want to avoid – a (cause) determination.

More typically and, in fact, statistics show much more common is the EEOC issuing what we still in the vernacular refer to as a “no-cause determination,” even though the EEOC quit using that specific word choice some years ago. The no-cause determination is really the EEOC saying that based on their investigation they’re unable to conclude whether or not a violation occurred. The statement goes on to say “we’re not saying that the respondent is in compliance. We simply can’t conclude that discrimination occurred.” That would be accompanies again by that notice of right to sue. It would give the aggrieved party 90 days to bring suit.

Sometimes the EEOC doesn’t really decide one way or the other as to whether they think discrimination may have occurred, they simply terminate the administrative process, they issue that right to sue and then the options are open to that aggrieved person as to whether to pursue it in a judicial arena. So of course, one of the significant aspects of the EEOC process is that win, lose or draw that charging party will have the right to bring a lawsuit after exhaustion of the administrative process. The only exception to that is that in some cases the EEOC will choose to be the plaintiff and to initiate that litigation on their own.
The other significance of this EEOC process, of course, is a very practical one. If the employer is able to present a very persuasive argument that no discrimination has occurred, and if the charging party is not at that time represented by counsel, then that makes it more difficult for that person to retain counsel at the end of the administrative process to pursue a lawsuit. It’s just a practical matter of plaintiff’s counsel being much more eager to take on a case in which there’s been a finding of cause, than one of no cause, particularly if they’re able to get their hands on that position statement and are persuaded that this is going to be a very difficult road towards attorney’s fees to take on that particular plaintiff.

(Jim Beyer): (Susan), it’s (Jim) again, and it may be helpful if you actually repeat my question, because apparently some people are having trouble hearing me. But, just in case – got a question. “What kind of cases (or fact) patterns are likely to result in a suit being filed by the EEOC on behalf of a single plaintiff?”

(Susan McKenna): Typically that would be a case that has class ramifications, or pattern and practice ramifications, or a case against an employer that may have a history of previous cause findings, or previous findings of liability by the government. It’s much, much more rare and, in fact, given their limited resources today it’s very atypical for the EEOC to file suit on behalf of an individual plaintiff without their being broader implications, either in terms of the allegations or who the employer is.

(Jim Beyer): Another question, sort of related ((inaudible)) process. I know you’re going to talk more about mediation, but will the EEOC allow or request mediation after it finds probable cause?

(Susan McKenna): It will not. Once the EEOC has found cause then they will be interested only in coming to a conciliation agreement and that usually requires the employer to agree to things that they would never need to at the mediation stage, such as posting requirements, reporting
requirements and the like. So, once they've found cause, the EEOC is not going to let you kind of back pedal, if you will, and agree to a mediation.

(Jim Beyer): OK, one more question, although you may want to defer it. “Are position statements turned over to the charging party?”

(Susan McKenna): They’re not turned over to the charging party during the administrative process itself, although investigators will typically share freely information in them with the charging party, over the phone, to try to get the charging party to respond to information that’s contained in them. But, they’re not actually physically shared with the charging party during the administrative process. After the process is complete, either side, through a Freedom of Information Act request, can get their hands on what the other side has submitted to the agency.

(Jim Beyer): OK, if you don’t mind a couple of more. “Is there really evidentiary damage to an employer to a finding of probable cause or does it just serve to give the charging party a tailwind in negotiating the settlement, hiring the lawyer, et cetera?”

(Susan McKenna): Well, it depends on your jurisdiction because in some jurisdictions the conclusions of the EEOC have been found to be admissible at trial and in others they have not, so that’s going to depend on the jurisdiction.

And, I think with that I’m going to turn it over to (Linda) to talk about what happens once a charge comes in to the company.

(Linda Whittaker): Thanks. I would just add that from time to time the EEOC will announce that it’s particularly interested in specific kinds of actions. A few years ago they were particularly interested in actions involving – what do I want to say – like multiple causes, someone who was, for instance, over 40 and disabled, or a race discrimination charge linked with sexual harassment.
They were interested in those kinds of things. They are also very interested in finding the right case to advance a particular guideline or interpretation of an act that they’re interested in promoting.

You know, many of the EEOCs – not many, but some of the EEOCs guides have been turned down by courts and they will look for opportunities to take that message back through a different circuit and perhaps prevail in that way.

(Jim Beyer): (Linda), sorry to interrupt and I know (Alex) is I’m sure working on this, but a number of people are saying their ...

Operator: ((inaudible)) (fix) the volume, (Jim). Thank you.

(Jim Beyer): OK, great.

(Linda Whittaker): OK.

(Jim Beyer): Sorry to do that but ...

Female: No problem.

(Linda Whittaker): No problem. I’m sorry about that. I hope that’s better.

What do you do when you get the charge? And the first things I’m going to tell you are what not to do, and this applies to you and to your internal clients. The first thing is don’t take it personally and that’s really difficult. Having been named in one of these things, I can tell you that the first thing I did was take it personally, and the second thing I did was calm myself down and tell (me) that really this was not about me and that’s very difficult. If you are – and you have as your client,
your internal client, people who have integrity and self respect and they’re accused of illegal behavior they do take it personally.

The second thing is don’t panic. Just because someone is accusing you or your company of something doesn’t mean that that’s really what happened. And, the third thing goes along with it, which is don’t jump to conclusions one way or another.

And with that in mind, I’ll tell you what – we’ll go through what to do. And, the first thing, of course, is review the charge carefully. And, I know that sounds simple, like a (dah), of course I’m going to read it. But review it very carefully, word for word. Consider whether it was timely filed. You know, generally speaking, a complaining party has only 180 days from the last act in order to file their charge, but that changes to 300 days if the state has a similar or parallel agency. So, you want to check with local counsel, review your own rules, depending on where it was filed, make sure it was timely filed, because it can be dismissed for not being timely filed.

Notify the appropriate people. I would notify them in writing. I recommend having a form to do that. On the form – this is for internal use – briefly recite the allegation. Tell them that we’ve gotten the charge of discrimination, here’s what ((inaudible)) (charges), failure to accommodate, whatever the charge is explain it a little bit and in broad terms describe what the allegation is. Tell your in-house people who their in-house contact is, otherwise they don’t know. You may be the only lawyer ((inaudible)) say I will be your contact on this issue.

If you’ve hired a local firm to represent you, which I have found to be very effective, please put that in the notice as well. You would be amazed how many times you’ll get calls from a facility saying “so and so showed up. They say they’re our lawyer. Is it OK to talk to them?” You can avoid that or most of it, not all of it, by putting that in your notice as well. I would put in the notice something like “we need your help. Within the next 72 hours please provide our outside counsel or me” – depending on who’s doing the investigation – “the following.” And what you want the
facility, or whoever is doing this, to gather are personnel docs of all kinds and we’ll talk a little bit more about who’s in just a moment, any coaching, which is what we call our “disciplinary process,” any investigation filed, any other filings that are going on, other complaints, any e-mails concerning the charging party.

In the notice think about media concerns. We tell our facilities, in a line, in our notice to them, if you get inquiries from the media or any of the following agencies or advocacy groups please contact so and so and give them a contact. Particularly, I think, thinking about this ahead of time is a good idea, because that goes back to the don’t panic thing. You won’t have to panic if you’ve got all of this laid out in advance.

And, we also include – and I would advise this – a document retention notice, which is the litigation hold on documents. Make it formal. Give your in-house people examples of the kind of documents they are to retain and tell them where to look. Believe it or not, hypothetically speaking, of course, you may have managers who carry around documents in the trunk of their cars for safekeeping. You can even have personnel managers who will refer to the medical information file as the secret file. I would encourage you to not let them do that. But, at the same time, give them examples of places to look for the kind of documents you want.

The people you need to notify are, obviously, HR, any supervisors or managers who have a need to know. And, I would advise you to be fairly broad with this. When I was in private practice, I had more than one manager who learned they were being sued individually when their mother called them because there had been an article in the local paper about the filing in the court case. So, if you give people a heads up on this they do appreciate it and it helps them not react when – react adversely when they are at least informed of things ahead of time.

You need to notify people that the complaining party cannot be retaliated against in any way for filing this charge. You may have insurance, in which case you need to notify your carrier, and
outside counsel, if outside counsel is doing the charge. And, I would say, with that regard, we have in the past done all of the initial statements and interactions with the EEOC internally, and a few years ago we converted to doing it with outside counsel, a position which I had advocated vigorously for, but I was outside counsel, because I believe that there is a benefit to the kind of relationship you can get locally. If you’re an employer and you’ve got one or more facilities and you’re located in one region, or with only one district office of the EEOC, then you’re going to have a relationship with them that you can really build effectively as in-house counsel. When you’re in a situation like we are, where you’ve got facilities spread across the country, in order to build that relationship I think it’s an advantage to have a local relationship. And, you begin the gather your information.

Let’s go to the next slide (two), because I jumped back and forth there. (inaudible)) a game plan. Who will be the contact with the agency? And, again, I advise you, do this ahead of time. You may never have seen a charge – this would be a good time to do it before you see one. Is it going to be you? Is it going to be your HR manager, your VP of HR? Is it going to be outside counsel? Who’s going to be the main contact with the agency?

Do you need an extension? Try not to do this. You may need an extension due to special circumstances. I can tell you from experience that the EEOC is not amused by routine requests for extensions.

Should you mediate? This is a really good question. You will need to prepare some kind of initial evaluation of the case in deciding whether to mediate. Please understand that mediation will – its got its own pros and cons, but you will need a thorough analysis of the facts and the law before you determine whether or not to mediate.

The pros include: There’s a possibility of early and inexpensive resolution, and in this way if you suspect you’re going to settle this will save you huge fees later on, as time goes on, and so you
may be able to cut this off early. It does give the complaining party a chance to speak, vent and be heard. This may be more effective if at the mediation you have someone who has authority with regard to charging parties, such as the supervisor, or manager, or even a regional manager, just depending.

But, at the same time, if it’s you sitting there, you will get a chance to hear the complaining party speak, vent and be heard, and that will be a great opportunity to either have you or outside counsel evaluate the credibility of the complaining party. Even if you don’t get much factual information, you’re going to be able to evaluate that credibility and intensity.

The cons, which is the next slide for us – it really does generally require a willingness to make some kind of monetary offer. My experience is that if I go into a mediation without cash and without a willingness to come up with some, the mediator is not a happy person. It is almost never going to be attractive to the complaining party to go away for nothing at all, and so you have to be willing to do that. If you really think the claim is baseless, but you’re willing to pay money to avoid attorney fees then that’s your decision, as well.

There are time and resources required in order to participate. Sometimes mediation can be done by phone and you can avoid travel and those sorts of expenses, sometimes it can’t. The time involved with may be you, it may be the corporate rep and it can be outside counsel, as well. It may require you to give the complaining party some free discovery. It can work for you, especially if complaining party is also represented by independent counsel at the mediation. If you’ve got good facts going in, good evidence, you may be able to influence complaining party through their attorney, when the attorney realizes the kind of case and kind of evidence you’ve got so far.

And, I actually did have that happen many years ago when I was in private practice, where we had terminated a manager and we went to the mediation with the idea in mind that we were going
to demonstrate the reasons why he had been terminated and we were able to get a dismissal. He dismissed his case, or his charge, based on that because he realized — and his attorney helped him realize the kind of situation they were dealing with. It doesn’t always happen, but it’s nice when it does.

Let’s go back to — a couple of slides back. So, our next thing to consider is whose going to investigate? Are you going to investigate, as corporate counsel? Are you going to have HR investigate? Are you going to have outside counsel investigate? This really is, in many ways, a business decision. Who’s going to draft the position statement? Are you going to do it, outside counsel, your HR? Do you want your managers to participate? Who’s going to review it?

I recommend reviewing anything that goes anywhere for thoroughness, for accuracy, whether it’s you doing it, whether it’s outside counsel doing it. You’re going to want to have someone else review it.

We talked about mediation.

(Jim Beyer): (Linda) ...

(Linda Whittaker): Yes.

(Jim Beyer): ... I’m sorry to interrupt, but we’ve got a number of questions that came in ...

(Linda Whittaker): Oh, OK.

(Jim Beyer): ... and some of them really before you get to talking about mediation ((inaudible)) maybe it would be good to answer.
First one is “how responsive is the EEOC to an assertion of untimely filing? When should that defense be raised, with or without an actual response to the charge?”

(Linda Whittaker): I would do it pre response, and really what you’re doing is telling them that they don’t have jurisdiction. And, in my experience, they’re very responsive to it.

(Jim Beyer): OK. The next one is a two-part question. “What factors would lead you to not notify (named) managers in the charge? For example, if it’s sexual harassment, or the charging party is currently working for the manager named, and this is the first time you’ve heard of the claim?”

(Linda Whittaker): What I would do – what I’d recommend doing in a situation like that is conducting your investigation, especially if – particularly because this is the first time you’ve heard of it. This really is the notice you’re on and you’re going to need to do an investigation and part of your investigation is going to be interviewing that manager. But, I think I would conduct it as an investigation, rather than notifying the manager up front.

(Jim Beyer): OK. You talked about this a little bit. There’s a couple of questions about the – sort of the notice. One is “do you suggest the formal notice (to) (this) charging party, if still employed, of the non-retaliation policy?” (Linda)?

(Linda Whittaker): I’m thinking about it.

(Jim Beyer): Oh, OK.

(Susan McKenna): I mean I guess the advantage – if I can jump in, (Linda). The advantage, if you have a current employee that’s the charging party, of acknowledging to them that you are in receipt of the charge, that that’s now been deferred to legal, or however you phrase that, but we want to assure you that our policy prohibits any kind of retaliation because you’ve exercised your rights.
You’re simply able to position yourself as having put them on notice of that being your policy and, at the same time, you would want to tell them that should any acts occur that you think are retaliatory you should contact us and let us know. It puts them on notice and their failure to do so could be used against them later for not cooperating with your internal policies and procedures. So that’s one take on it.

I don’t know if you have another.

(Susan McKenna): I’ve just had enough – well, I’ve had a few incidents where charging parties would view that as harassment, and I know that doesn’t sound logical, but that’s – you know, some charging parties are occasionally illogical. I see the advantages, though, that (Susan) is talking about. I don’t know that it would be – I’m not sure how effective it would be, but I don’t have any good reason not to do it.

(Jim Beyer): OK, a couple of more. I think I understand what the person is talking about, but I’m not positive. They asked, you know, “if you issue a broader notice, if you will, would that put you in better stead for avoiding a retaliation claim?”

(Linda Whittaker): I think you have to make sure you – in the sense that – notify everyone with an interest in this, on a need-to-know kind of basis. So, I would tend to be more inclusive, rather than less inclusive.

(Jim Beyer): OK. There are a lot of questions on this subject, so I’ll just try to combine them into one broader question, which is the whole issue of the role of in-house counsel. First, does the privilege still apply? Second, you know, is there a downside to assigning an investigation to in-house counsel? What happens if they’re called as a witness later one? You know, is it (easier) – protect the investigative report from the commission. If it’s done by outside counsel, what attorney-client privileges exist if in-house counsel does the investigation and then writes the
position statement? So that’s a very long question and about 10 questions in one, but that’s the whole issue that people are very interested in knowing about.

(Linda Whittaker): I think you can protect the investigation. Well, some of it depends on the jurisdiction too. If I were doing an investigation myself, in this context, I would title an inquiry for information with – in order to provide you with legal advice, I need you to provide me with the following information. I would label everything as work product. I would do what I could to protect it. Some jurisdictions are not crazy about in-house layers and you’re going to have a better chance of protecting work product, what I think is really work product, if you have outside counsel doing it. So, some of it depends on the jurisdiction.

(Susan McKenna): And, of course, (Linda), I guess the advantage of at least labeling it as work product or attorney-client privilege is that you have some opportunity later to try to assert the privilege, even though many times you’ll want to waive the privilege, especially if it’s your first investigation and you want to show that the employer acted promptly to take remedial action. But, then at least you have the option of that strategy.

(Linda Whittaker): Yes.

(Jim Beyer): Yes, so my two-sense worth, I think it’s to your point of reviewing the charge carefully and identifying an appropriate persons. You know, there may be an advantage sometimes to having the in-house attorney do it. There may be advantages to external counsel. There may be advantages to HR. It all depends on the particular charge.

I’m sort of curious – I mean, you know, clearly ((inaudible)) Supreme Court authority that says that in-house counsel do have the attorney-client privilege certainly can be waived, but, you know, as a legal standard it does exist.
(Susan McKenna): Yes.

(Linda Whittaker): And, I guess the other practical point to keep in mind is whoever signs the position statement will be disposed, almost undoubtedly, in the event of later litigation. You may still be able to claim privilege, but you are setting yourself up as a likely deponent if you end up in court.

(Jim Beyer): I can tell you from personal experience, in a case where (Susan) sits in Florida, when I was in-house somewhere else, I signed a position statement, which I don’t like doing and there’s a reason why.

Female: No good deed goes unpunished.

(Jim Beyer): That’s right. The court ultimately said that they could not dispose me, but it was a real battle and it’s no fun sitting in the middle of it.

Female: Exactly.

Female: Yes.

(Linda Whittaker): And having also – this is (Linda) again. And, having been disposed in a couple of different ways, it’s very awful being disposed as an attorney because you know you can’t reveal things that came to you through the attorney-client privilege. But, on the other hand, you may be a fact witness, or you may have information about policies or procedures that you can answer. It’s not a position that anyone would relish, I don’t think.

(Susan McKenna): Right.
(Linda Whittaker): Let’s talk about the investigation. Obviously, a thorough investigation is absolutely the key, particularly if this is your first notice of the problem. I’m sure everyone has seen or will see a time when the situation itself could have been resolved, but the fact that there was not a prompt thorough investigation and a resolution of the issue is what is giving you a problem now. So, if this is your first notice of the problem begin an immediate investigation, document the fact that you are doing that and take the steps necessary. Gather all facts necessary to respond. In that situation, I would say don’t take no for an answer and don’t take yes for an answer. That’s very difficult.

Now, gathering all the facts obviously means finding out what happened. It also means collecting all of the witnesses, not just the ones the complaining party identifies, but anyone who might have been in the general vicinity. You will want everyone’s disciplinary history. You will want to gather any relevant policies and any related policies. I’ll give you an example of that. You may have an ADA policy. You may have a leave-of-absence policy. You may have a policy dealing with injuries or illnesses that are not disabilities. You may have a separate policy that deals with when you get paid when you’re sick or out of work. All of those policies may be relevant to a reasonable accommodation charge, so there may be more than one related policy.

You’ll want to gather the history of the facility. Has the facility had any similar complaints, whether they’re internal or external previously? How have they handled them? Have they had similar situations before? And, again, to use an easy example, there are complaints against an employee for making inappropriate comments. Have there been other complaints about other employees making similar comments? You want to find out if there’s alleged similar misconduct by others. When was this allegation reported? To whom was it reported? What action was taken? As we just mentioned a minute ago, it may be that the actual event that the person is complaining about is something that could easily be resolved or it's going to result in a no probable cause finding. But, the fact that you haven’t done the investigation and you haven’t taken that action can be a separate issue for you.
What are the specific allegations? I mean as a general matter you gather all these facts, but then you need to know what are the specific allegations. If it’s a discrimination charge, you will want comparators. Who allegedly received better treatment than the complaining party? Who has, in fact, received worst treatment than the complaining party? Have there been jokes made about a particular group? Has there been offensive language in the workplace that could be, not direct evidence of discrimination, but evidence that there is an issue in that facility? What is the specific allegation?

If it’s discrimination is it at hiring – a failure to hire claim? If it is who got the job and what were their qualifications? Failure to promote – again, who got the promotion? What were their qualifications? What did the applicant pool look like? All of those things are specific to a discrimination charge.

Has there been – for instance, if it was a termination, has there been similar conduct engaged in by other people – well what happened to them? If there were 20 people involved in the misconduct and you fired 18 of them, what was the difference between those 18 and the other two?

Sexual harassment charge – you’re going to want details. And, I think it’s helpful in this to adapt a kind of I’ve heard this all before kind of attitude, sort of, you know, priest like. You want to gather details and people may or may not be very uncomfortable in gathering those details with you, but you’re going to want to know was there touching involved? Was there not touching involved? Was it a stalking kind of thing? Where did this happen? Was the complaining party offended, physically offended, or others offended, even if he or she was not? Was there any objection to the conduct?
All of these things will help you reveal the strength and weaknesses of the case so that your options can be analyzed. It provides you with the information you need to decide, just on the front end, am I going to mediate this? Is this something we want to – is this a hill we want to die on – can help you make the business decision and assess the credibility, obviously, of your witnesses. Not only does it lock in their recollection, but you’re going to need to have someone, if it’s not you, assess their credibility. It will also – especially if this is the first time this has – you’ve heard of it. It will provide evidence (inaudible) for (medial) action.

The ideal investigator is going to be smart and partial, thorough and discrete. Now, many of you are thinking, oh that’s me – that would be me. Good communication skills. And, again, you’re thinking, oh that’s me – would make a credible witness. Look at the witness part. I know you’d be credible, but it’s the witness part and, as (Jim) says, it’s signing that charge, or signing the statement will get a job as witness for the defense. You will at least be interviewed by the EEOC. It is better to have someone who is experience and trained in fact gathering. Do you provide that training? If it’s your VP of HR, they probably know just how to do this. It helps to be someone who is familiar with the issues that are involved, the policies and the procedures. And, you may need to guide them towards the – you know, this is a charge of this, that or other thing, and therefore you’re going to need to find this kind of information. This is a charge of failure to hire, so we need to know what the applicant pool looked like and things like that.

(Jim Beyer): (Linda), we’ve got a question on this point. “If you’ve already conducted an internal investigation and took action based on the findings, what additional investigation would you do once the charge is filed?”

(Linda Whittaker): I would not duplicate the investigation, but depending on what it is, because we have this situation – I mean this is the situation most of the time. I would still – because of the way you’re going to write this position statement it’s a different question. You’ve already done the internal investigation – let’s just give a hypothetical – you’ve done an internal sexual harassment
investigation and you’ve terminated the accused. What you’re going to want to do that may be
different or more information that you’re going to need is to have available in your statement the
policies, the training that you provided to the charging party that would have shown that, you
know, when she complained about it, it wasn’t – she’s complaining about things that happened
six months ago. She knew that she could complain to so and so and she didn’t do that for six
months, so that you’re going to – I guess the easy way to say that is look at the charge itself and
see what other elements of the charge you’re going to need to address. If you found that
someone had been – let’s say there was a – you’ve concluded that there was discrimination or
some other inappropriate conduct, then you’re going to want to emphasize the remedial action
you took and that may involved getting more information.

Some of the relevant documentation you’re going to need – obviously you’re going to need
personnel files of the complaining party, witnesses, any comparators, the accused. I would
suggest making an inventory for all of this documentation and a checklist when you’ve compiled
it. Personnel information, of course, as we all know – thank you HR manager for the secret file
reference – can be in different places. There’s HR files, supervisory files. Sometimes
supervisors keep their own files. Payroll, timekeeping, medical, including work comp records,
depending on the charge, it may be important to gather those. Comparative data may be the kind
of thing that you didn’t get in the initial investigation, but you want to get now. Your policies and
procedures. And, I would just add to this videotape or other physical evidence, because you may
have that.

I’d like to talk briefly about conducting the interview, because, actually, this is my favorite part.
You’re going to want to talk to the complaining party, if they are a current employee, cooperating
witnesses. Please be prepared to expand this. I’ve had situations where we’ve talked to
everyone named by the complaining party, but we really should have talked to everyone who was
in the department at the same time. Interview. Interview everyone you can think of. Interview
the accused. Interview the decision maker. And, I will give you my really top secret investigative techniques.

I like to have with me, any private location, a stack of papers or a video tape or two, and as I'm – and I do this generally. I start with a general kind of tell me what happened and get more specific, and while I'm doing that I will flip through the papers and go, “ah ha,” “hum,” “OK,” and tap the papers occasionally and glance suspiciously at the video tape and never really refer to them. I found it makes people uneasy and that seems to – they start talking faster and more when they’re uneasy and that's usually useful.

I’d say don’t interrupt the person. First time, through, let them tell you the story. They will typically – most people will tell you the story in a kind of chronological order. I take notes and then I ask them questions out of order. People who are generally being truthful will not have a problem with this technique. Someone who is making things up has memorized their story in a particular order, and so they will – if you jump around a little bit, you'll get a good sense of that. It also helps you evaluate them as a witness and what are they going to be like. I would tell you to take good notes. I get asked about what about tape recording or videoing people. I find it makes people very nervous and they're not as forthcoming, so I don't do that.

And, of course, as I said, you want a private location. You want to know the facts in advance, so that you don’t have to look stuff up. Don’t share information, obviously, things like so and so said such and such. Verify repeatedly – repeatedly – now is there anything else you can tell me about this, you know, what time of day it was, anything else? Is there anything that I can do that would help jog your memory? Anything like that over and over again, especially with the complaining party – is there anything you haven’t told me? Is there anything you haven’t told me? I advise keeping a list of the interviews with the date and time. Include – if you’ve got a witness ((inaudible)) interview. Include their name, as well.
If we go to the next one – obviously keep objective detailed notes and summaries, including date and time. A year from now, six months from now, nobody is going to remember this stuff. Keep your investigative documents segregated from personnel files. Maintain confidentiality. Use – special colored folders is one way just to give you a visual that is separate. Keep your electronic files separately. Advise people that there will be no retaliation for their participation in the project or in the process. You can read these – don’t editorialize on your notes, in the off chance that they are eventually discoverable, you don’t want that there. Trust me on this one. I won’t go into details, but it’s not pretty.

(Jim Beyer): OK, (Linda), a good question came in. You mentioned this. “Do you recommend having two individuals present at the interviews, one to take notes? And, what if the witness asks to bring his or her own attorney?”

(Linda Whittaker): I do recommend having a witness, just because it avoids the spitting contest thing later. If the person asks to bring in a witness, I don’t recommend that. I think you get – I don’t think you have to and I don’t think it’s – or at least not in our context we don’t have to, and so we don’t do that.

(Jim Beyer): “What about making assessments of credibility of the witnesses interviewed? Should you document that as part of the investigation?”

(Linda Whittaker): Yes, because if you’re like me you can’t always remember these things, but I would not document it on any of the notes I took. The notes you want to be very objective. If you’ve got a witness who is being effusive, you may want to write notes like “paused for a long time before answering,” you know, objectively verifiable things – “appeared to check ceiling for answers” – that sort of thing, but I wouldn’t write down “obviously lying.” I just wouldn’t. I wouldn’t do that.

(Jim Beyer): OK. Thanks.
(Linda Whittaker): Let's go to respondent's primary goals.

(Susan McKenna): All right. And, I guess that's my cue. Thank you, (Linda).

(Linda Whittaker): Yes.

(Susan McKenna): It's important when preparing the position statement to keep these goals in mind. Obviously the immediate goal that we have in mind, when we’re gathering the information, doing the investigation, then drafting a response, is to convince the EEOC that the charging party is wrong, that there was no discrimination, to tell our story in a persuasive way that will convince them that there was no liability.

But, very importantly, is to not forget the second goal and that is that we want to position the employer so that we will be able to rely on that position statement and the underlying data to help defend a subsequent lawsuit, as opposed to having a position statement come back and bite you, because it’s either inaccurate, or it exaggerates, or it contains information that could be shown later to be (protectoral), an attempt by the employer to cover up discrimination. So, it can be a powerful weapon or it can also be, you know, a bomb in your own foxhole if it's not prepared appropriately. That's important to keep in mind.

The effective positive statement needs to have the facts and (Linda) just gone done talking about the importance of doing a thorough fact-gathering process. But, in this context, facts also mean the following statements: That the position statement is factual accurate, it’s authoritative; it's complete, but concise. It's both thoughtful and strategic, in terms of its content.

Now, of course, with respect to factual accuracy, there’s a lot of reasons why that position statement needs to be on all fours in its recitation of the event and in capturing the employer’s
story, if you will, in response to the charge. First of all, it might be important later to witnesses to go back and refer to that position statement, to help them refresh their own recollections about the events that occurred. And, by the way, it's always important — and, (Linda), I'm sure you can back me up on this — for in-house counsel to have that position statement to rely on two or three years later when you’re in litigation and you want to remember what happened.

Certainly, inaccuracies or inconsistencies, as I mentioned before, can create obstacles to successfully defending a later lawsuit. I have been involved in numerous cases in my career where position statements were not factually accurate. Either they were just wrong through inadvertence, or they were skewed in a way to make the position more persuasive, but hence were not truthful, and much harm can come from all those kinds of inaccuracies. Of course, inconsistencies, changing the story, is a very common way for an employee to prove pretext.

And, again, just by way of a quick overview of burden of proof, the plaintiff will make out a prima facie case when there’s circumstantial evidence. The employer can rebut that prima facie case by offering a legitimate non-discriminatory reason for its actions and then the burden is just back to the plaintiff to show that that legitimate reason being offered by the company is a pretext or a cover up for discrimination. One of the ways they do that is by showing that the company has changed their story. They said A, now they’re saying B, which is true? You’re lying. You’re covering up. So, it’s very important not to have inconsistencies.

Indeed, in an extreme case, plaintiffs has used position statements to accuse an employer of intentionally misleading the EEOC, especially if it’s a case in which the EEOC found no cause and the plaintiff wants to make hay out of the fact that they did that only because the company lied to them about the underlying facts.

Very important is that a position statement be authoritative. In fact, if I were to point out a common error of position statement drafting it’s that it is too often a neutral recitation of events
and not written in a persuasive style, but it should be. It should be not just a story without an argument, but an argument embedded in it, always making a point that this couldn’t have been discrimination, this argument is illogical, or whatever the good persuasive points you have to make to attack the charge allegations.

In some cases, you may want to include case recitations, legal argument. Maybe there’s a clear case of somebody not being able to make out a prima facie case because it’s an age discrimination allegation based on termination and the individual was not replaced by a younger individual. And, so that’s an opportunity to not just make that factual point, but to give the EEOC a little citation as to why that fails to meet the legal burden of proof. And, we’ve listed here some other examples. In the sexual harassment case the conduct complaintive may be so benign that it would certainly never satisfy the severe or pervasive standard for a hostile environment sexual harassment.

Sometimes what’s complained about is some kind of an employment disappointment or slight, but that disappointment or slight does not amount to an adverse employment action as a matter of law, in which case, again, the person would not be able to state a claim. So, don’t be afraid to put that kind of legal argument, in kind of a layman-friendly way, included in the text of a position statement.

The ((inaudible)) behind that acronym (facts), about a persuasive position statement is this notion of being complete, but concise. And, again, a common error is to either be so cursory in your response to a charge that you’re not really giving the agency enough information to fully set forth what happened – what the company’s position is. Equally dangerous, in my view, is having a way overly detailed position statement, a position statement that purports to trace the entire employment saga of the individual charging party that is not ((inaudible)) that includes extraneous facts because, again, that kind of overly detailed narrative is not only ineffective, but can be dangerous. You create more of an opportunity for factual errors or inconsistencies.
One truism is that no matter how thorough your initial investigation is if you end up in litigation later and you have full-blown discovery that will be more thorough, in terms of uncovering additional facts. And, so you don’t want to lock yourself into position or give unnecessary detailed information that might be found later to not quite be completely accurate or the full story, so concise is important.

The ((inaudible)) is thoughtful. This is, in most cases, the company’s first formal explanation of why we did what we did, of why the particular employment decision was made, and so we want that articulation to be kind of the firm, unyielding foundation that we’re going to use going forward, regardless of what the arena may be. So, in developing that firm foundation, we should think about, specifically, OK, what’s the overall scene here? If I had to, in a cocktail party, sum in a few sentences what really happened, what’s that story? What’s that theme that I’m going to explore through the recitation of facts? That'll help you ((inaudible)) out facts that are not important to telling that story and it'll help you with the conciseness of the drafting.

Of course, sometimes background information is very important and relevant, and (Linda) made the excellent point of saying you want to get that kind of background information in the investigation, and then you may decide to include some of that because it helps make the point that you want to make. It helps tell the story that you’re telling. Of course, always, we’re drafting position statements with the eye of putting our best foot forward, coming up with our best offense, but still being truthful, not exaggerating or skewing the facts in a way that is self-serving and could be attacked later. And that’s part of what strategies includes, as well. We don’t exaggerate, we don’t oversell.

We are persuasive, but we’re not in ((inaudible)) belittling in the language that we use, with respect to the charging party. That can come back and bite you in litigation later. That cannot sit well with the EEOC investigator that’s looking into this particular matter. We want to consider the
broader ramifications of the information that we’re analyzing and selecting. We don’t want to win this battle if in so doing we’re going to assert a position that could have broader ramifications later and that could be harmful to the interest of the company, so we’re strategic in thinking about what information that we want to offer.

The structure of a position statement – there’s a lot of ways to do them and all we’re offering here is an example of a common and persuasive approach to take, which begins with an introduction that references the specific charge, that right up front identifies that the company’s internal investigation revealed that no discrimination, no harassment, no failure to accommodate occurred, whatever it is. Then, typically, you will briefly summarize what it is you’re accused of doing, repeating at the end of that – however, this is not true. This is baseless. This is groundless. There was no discrimination. Then you give an explanation of the respondent’s story.

Another trap that many people fall into is to follow precisely the order of information that’s contained in the charge itself. Now, sometimes that’s fine and that’s not going to hurt you at all, but sometimes the charge is disjointed, it’s out of chronological order and a much more persuasive view or approach would be to take a chronological approach or take and issue-by-issue approach that tells your story the way you want it to be told. You do not have to feel wedded to following a sequence that the charging party has included that may be disjointed or illogical. You know, think about readability. These EEOC investigators are not attorneys. They’re layman with varying degrees of training and the easier you can make it read and understood the better off you are. And, of course, in your conclusion, once again, you’re hitting that point – there’s no discrimination here.

In terms of miscellaneous considerations, I know this came up before, (Linda), this whole idea of do you provide affidavits, if you’ve not been required to by the agency or not. And, I expressed
the opinion earlier on that my preference is not to provide sworn testimony of your witnesses
unless you’re being compelled to do so later.

(Linda Whittaker): I would agree with that. And, what you need to provide is a summary, rather than
direct quotes. And, another – we need to wind up here, because we’re a little bit over, and so I’d
like to just make two comments on the next two slides.

You will frequently, frequently get requests that are entirely too broad. I have actually gotten a
request for all complaints made by all women about men in any of your facilities. I got to tell you,
there’s not enough time or paper on this planet to do that. So, you will want to respond to those
by narrowing it. You know, you want to object and then narrow to the relevant answer is, you
know, none. There were no similar complaints about this person, in this facility, in the last couple
of years.

And, on-site visits, I would just make the comment that preparing your employees to be
interviewed, so they know what to expect is important. Most of your employees have never been
through this before. They’re not comfortable with it. You will want to meet with them ahead of
time and walk through it, in part, so that you’ll know generally what they’re going to say. Don’t be
surprised if you’re surprised. And, I also agree with the – ask to attend non-supervisory
interviews. You may be turned down for that, but insist of being present for supervisory
interviews.

(Susan McKenna): Yes, you absolutely have the right to be present, or to have some company
representative present for supervisory or managerial interviews being conducted by the agency.

Now, (Jim), I know we’re out of time. There’s one question I thought I would reply to quickly and
that was a good one – “what about exhibits as part of a position statement?” Of course, if in
telling (the) story, you want to attach exhibits that are helpful to you, even if not requested by the
agency in the request for information, by all means do so. Subject those to the same careful scrutiny that you’re giving every other bit of information that you’re giving the agency, but you have not only the right to do that, but you should do that to tell a persuasive story.

(Linda Whittaker): Absolutely. And, I would include in that – I have a couple of times produced video tape and presented that to the agency with very good results, because we’re ((inaudible)) public facility, you know, we’ve got video of different areas of the stores and ...

(Susan McKenna): Right.

(Linda Whittaker): ... so that’s been very useful.

(Jim Beyer): Great. Well, I know people would have many more questions and, as I said at the beginning, we can have a way to respond to those subsequently and we will. (Linda) and (Susan), just thank you so much for a marvelous presentation. And, again, to remind the participants, if could click on the link to do the survey we would really, really appreciate it.

(Susan McKenna): (Jim), I have one more point that I neglected to mention and I apologize. There will be available on the ((inaudible)) Web site and info pack that will have detailed information on how to reply to a position statement, including helpful diagrams, charts and even an example position statement that could be used as a model. So, please keep that in mind, as well as future reference material.

(Jim Beyer): Great. If we want to give an e-mail address for additional questions or we can post the answers we will do so, so I think you have both e-mails and we can post these, as well. Again, thank you very much for your time. And, the info pack is great. I’ve seen it already and that is an absolutely wonderful resource that your can get from the virtual library. Thank you, everybody.
(Linda Whittaker): Thank you.

(Susan McKenna): Thank you, (Jim).

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