



Federal Employment Law Training Group LLC  
Teaching the Law of the Federal Workplace  
[www.FELTG.com](http://www.FELTG.com)



# Get it Right the First Time: Accepting, Dismissing and Framing EEO Claims

Presented by

Katherine Atkinson,  
Attorney at Law

October 24-25, 2023

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2023 Upcoming Open Enrollment Calendar

November		7			
<p><b>FELTG Virtual Training Institute</b>  <b>Up to the Minute: The Latest Changes to Reasonable Accommodation for Pregnancy, Disability, and Religion</b>  <b>(1:00-3:00)</b>  <b>(Tuesday)</b></p>					
November		14			
<p><b>FELTG Virtual Training Institute</b>  <b>Clean Records, Last Rites, Last Chances, and Other Discipline Alternatives</b>  <b>(1:00-3:00)</b>  <b>(Tuesday)</b></p>					
November			15	16	
<p><b>FELTG Virtual Training Institute</b>  <b>Advanced EEO: Navigating Complex Issues</b>  <b>(1:00-4:30)</b>  <b>(Wednesday-Thursday)</b></p>					
December		12			
<p><b>FELTG Virtual Training Institute</b>  <b>Discovery Done Right:</b>  <b>Avoiding Sanctions Before the MSPB and EEOC</b>  <b>(1:00-4:30)</b>  <b>(Tuesday)</b></p>					



# Get it Right the First Time: Accepting, Dismissing and Framing EEO Claims

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## Federal Employment Law Training Group, LLC

### Your Speaker This Week

**Katherine Atkinson** is a partner at Atkinson Law Group in Washington, DC, and is admitted to practice in the state of Maryland, before the United States District Courts for the District of Maryland and the District of Columbia, and before the United States Courts of Appeals for the District of Columbia Circuit and the Fourth Circuit. She represents public and private sector employees in employment discrimination and labor disputes before the Equal Employment Opportunity Commission, the Merit Systems Protection Board, arbitrators, federal district courts, and federal appellate courts.

Ms. Atkinson is a member of the Metropolitan Washington Employment Lawyers Association and the National Employment Lawyers Association. She graduated from American University's Washington College of Law and holds a Bachelor of Science from Georgetown University. Ms. Atkinson taught legal writing and appellate advocacy as an Adjunct Professor at the University of Baltimore School of Law.

### FELTG Instructors

**Deborah Hopkins** is the President of the Federal Employment Law Training Group (FELTG), an SBA-certified Woman Owned Small Business. She is an employment law attorney and is admitted to practice law in the District of Columbia. She has experience handling cases before the U.S. Merit Systems Protection Board, the Equal Employment Opportunity Commission, and the U.S. Office of Special Counsel. She has also worked with the Government Accountability Project (GAP), a public-interest non-partisan whistleblower protection and advocacy organization.

Ms. Hopkins has nearly 20 years of experience in adult education and training. She has presented training sessions to thousands of federal employees in the HR, ER, LR, EEO, civil rights, diversity and inclusion, legal counsel, legal writing and supervisory arenas. She has developed courses and authored a number of training manuals for institutions of higher education. She also co-authored *UnCivil Servant: Holding Government Employees Accountable for Performance and Conduct* (Dewey Publications, 2019), now in its 5th edition.

**Ann Boehm** spent 26 years as a government attorney, focusing primarily on employment and labor law. She spent more than half of her career working in federal law enforcement agencies. She worked at the Drug Enforcement Administration for six years, litigating Equal Employment Opportunity Commission and Merit Systems Protection Board cases for the agency and advising management on employment law issues. She spent a short time with Immigration and Customs Enforcement, handling immigration law.

At the U.S. Marshals Service's Office of General Counsel, Ms. Boehm litigated personnel cases for several years. She spent six years in supervisory roles, first as Chief of



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Communications and then Chief of Discipline Management in the Office of Professional Responsibility. As Chief of Discipline Management, Ms. Boehm oversaw the disciplinary process for hundreds of USMS employees. Early in her career, Ms. Boehm worked in the Office of the Solicitor, Federal Labor Relations Authority where she defended the FLRA in the U.S. Courts of Appeals and won a case before the U.S. Supreme Court. Throughout her federal service, she provided employment and labor training to agency employees.

Ms. Boehm is admitted to practice law in the District of Columbia, Georgia (inactive), the U.S. Supreme Court, and U.S. Courts of Appeals for the District of Columbia, Seventh, Ninth, and Tenth Circuits.

Ms. Boehm earned a Bachelor of Arts, with distinction, from the University of North Carolina at Chapel Hill. She received her Juris Doctor from the University of Virginia. She started her Federal career clerking for the Honorable Harlington Wood, Jr., Circuit Judge, U.S. Court of Appeals for the Seventh Circuit.

**Marcus Hill** is Principal of Hill Management Consultancy (HMC) LLC, a minority, veteran-owned small business. HMC shares strategic advice with its clients to achieve business priorities. Mr. Hill also serves on the Senior Executives Association (SEA) Board of Directors and has been an SEA member since 2006, the same year he was appointed to the Senior Executive Service. He retired from Federal civil service in January 2021, after 37 years of honorable service.

Prior to retirement, Mr. Hill was the Senior Executive Advisor for the Federal Law Enforcement Training Centers (FLETC), Department of Homeland Security. He provided component-level, headquarters strategic planning advice and counsel to FLETC executive leadership.

Mr. Hill's career began in 1983 as a personnel management specialist/student trainee with the Department of the Navy (DON). He served in several human capital and management analysis positions with the DON before transferring to FLETC in 1999, where he subsequently served in various senior management and executive roles. During his career tenure, Mr. Hill also worked briefly for the United States Air Force, serving as Chief of Equal Employment Opportunity for Tyndall Air Force Base, FL. As a Transportation Security Administration Administrative Officer assigned to the Jacksonville Field Office, he was instrumental in establishing the TSA infrastructure and screening operations at Jacksonville International and Gainesville Regional airports.

Mr. Hill served an active-duty tour with the US Air Force, and retired from the USAF Reserves in 2007. He received the 2017 Presidential Rank Award for Meritorious Service, the 2014 Department of Homeland Secretary's Under Secretary for Management



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Partnership Award, DON Civilian Meritorious Service Medal, and USAF Meritorious Service and Commendation Medals. Marcus earned a Bachelor of Art degree in History from Valdosta State College. He has also completed executive and leadership development programs with the John F. Kennedy School of Government at Harvard University, Federal Executive Institute, Center of Creative Leadership, Brookings Institute and Air University.

**Dr. Anthony J. Marchese** has more than 25 years of experience developing and delivering organizational transformation initiatives and simulation-based training and tools to drive business results. Specializing in human capital management, leadership development, executive coaching, team effectiveness, and change-management, Marchese has partnered with global enterprises, 50+ federal and state agencies including NIH, CDC, NASA, DOD, DOE, USACE, and more. Dr. Marchese served as Global Director of Learning & Development for a DC-based consulting firm where he developed more than 25 unique programs. An SME in the Federal Employee Viewpoint Survey (FEVS), Dr. Marchese developed multiple, multifaceted strategies to drive employee engagement, performance and accountability, and satisfaction to help leaders understand and elevate year-over-year results.

Dr. Marchese holds a Ph.D. in Organizational Leadership from Regent University, master's in philosophy (ethics/adult learning) from Lee University, and postdoctoral credentials in Human Resources Management from University of California at Los Angeles, Change Leadership from Cornell University, and Negotiation from the University of Notre Dame.

Dr. Marchese is the author of *DESIGN: An Owner's Manual for Learning, Living, and Leading with Purpose* (published by WestBow Press, 2017) and the forthcoming *The Performance Equation: Strategies to Drive Success* (WestBow Press, 2022).

**Shana Palmieri** is the Chief Clinical Officer and Co-Founder of XFERALL. She is a licensed clinical social worker with more than 15 years of experience in healthcare and social services, including direct practice and healthcare administration. Ms. Palmieri's direct clinical experience spans multiple specialties to include emergency psychiatric assessment and treatment, domestic violence, chronic homelessness, mental health, and substance use disorders in both outpatient and inpatient settings. She previously spearheaded the development and implementation of the Behavioral Health Division at The George Washington University Hospital.

Ms. Palmieri received her undergraduate degree from Pennsylvania State University in Human Development and Family Studies and her Master's Degree from the University of Pennsylvania in Social Work. She is currently a licensed clinical social worker in the state of Hawaii.



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**Ricky Rowe** is a US Army Veteran. He began his federal career with the Department of Defense in 1988 and transitioned to the Department of Veterans Affairs in 1991. He has more 38 years of federal service. His most recent federal position was National EEO Manager where he provided Equal Employment Opportunity guidance, advice and assistance to more than 340,000 VA employees, including senior management officials, mid-level managers, and union partners.

Mr. Rowe began working in the Office of Resolution Management (ORM) in 1999. He held roles including EEO Counselor, EEO Investigator, Mediator, and EEO Manager. He conducted high profile administrative investigations and fact-findings and trained others on investigations and fact-findings. He also served as a Program Support Specialist, Lead Patient Service Assistant, Computer Assistant, Human Resources (HR) Assistant and HR. Mr. Rowe has been a Nationally Certified Trainer for the Equal Employment Opportunity Commission (EEOC) for 19 years, as well as a VHA trainer, mediator, and facilitator. He was the recipient of the Resolution Award for the Highest Formal Resolution Rate (formal EEO investigations) for the VA Office of Resolution Management in the Southeastern Operation in 2007 and 2008.

**Joe Schimansky** is the former Executive Director of Federal Service Impasses Panel (FSIP) and has more than 32 years of experience with the FLRA and its major components.

As the FSIP's Executive Director, Mr. Schimansky provided leadership and supervision to the professional staff that investigates, analyzes, and makes recommendations and binding decisions to resolve negotiation disputes between Federal agencies and the labor organizations representing their employees. He participated in numerous informal conferences and mediation-arbitration proceedings, both as the FSIP's primary representative and assisting various FSIP Members, which resulted in voluntary settlements.

Mr. Schimansky issued hundreds of Decisions and Orders by direction of the FSIP, and numerous Opinions and Decisions (i.e., interest arbitration awards). Mr. Schimansky was part of the task force whose work led to the creation of the FLRA's Collaboration and Alternative Dispute Resolution Office (CADRO). He has provided training to Federal agencies throughout his career and most recently assisted the Air Force General Counsel's Office of Negotiation and Dispute Resolutions in efforts to rebrand and refresh its ADR program.

Since leaving his position at the FSIP, Mr. Schimansky has been consulting at a number of federal agencies on topics including ADR program development and labor negotiations over a successor CBA. In addition, Mr. Schimansky is on the FMCS's roster of arbitrators where he has been selected by parties to resolve grievances in the federal, public, and



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private sectors. He has also been selected as a permanent umpire by the Department of Labor and AFGE, Local 12, to arbitrate grievances arising under their CBA.

**Susan Schneider's** federal career in the Department of Health and Human Services included the National Library of Medicine, the Office on Smoking and Health, and the National Center for Health Statistics (NCHS).

Among many accomplishments, Susan facilitated Department-level listening sessions related to Federal Employee Viewpoint Survey (FEVS) results and developed a Developmental Assignments Program to combat silos and enhance employee skills.

Susan's MS in Library and Information Science is from Simmons; her EdM is from Harvard. She is a certified coach for individuals and teams. Just six weeks into retirement, Susan is developing her coaching practice and facilitating workshops for federal supervisors.

Susan and her husband live in Annapolis, Maryland. They intently observe the interactions between common and exotic waterbirds, and dream about having a boat at their dock.

**Robert L. Woods** served as the Principal Deputy Assistant Secretary of the Navy (Manpower and Reserve Affairs) and Acting Assistant Secretary of the Navy (Manpower and Reserve Affairs). Mr. Woods was the principal advisor to the Assistant Secretary in executing responsibilities for the overall supervision and oversight of manpower and reserve component affairs of the Navy, including the development of programs and policy related to military personnel (active, reserve, retired), their family members, and the civilian workforce; the tracking of the contractor workforce; and, the oversight of Human Resources systems within the Department.

Mr. Woods previously served as Assistant General Counsel (M&RA) where he was legal advisor to the Secretariat for matters concerning military and civilian personnel policy. He also coordinated the efforts of Navy attorneys worldwide in administrative and federal court employment litigation. Mr. Woods, a member of the Senior Executive Service, was appointed Special Counsel Litigation where he was responsible for the most important litigation matters under the cognizance of the General Counsel. Before his work at Navy started in 1999, Mr. Woods handled labor and employment litigation for the General Services Administration and the Department of Commerce.

Mr. Woods retired from the U.S. Air Force in 1998 as the Chief of the Air Force Central Labor Law Office, after more than 20 years of active duty. He earned his Bachelor of Science degree in Psychology at King's College; his Master of Arts in Human Resources Management at Pepperdine University; his Juris Doctorate at Rutgers Law School; and, his Master of Laws in Labor and Employment Law at Georgetown Law Center.





# FELTG's Virtual Training Institute Agenda

## Get it Right the First Time: Accepting, Dismissing and Framing EEO Claims

October 24-25, 2023

with Katherine Atkinson, Attorney at Law

### Tuesday, October 24

- 1:00-2:00: Accepting, Dismissing, and Framing Claims Overview  
 What are the bases to dismiss claims?  
 What is claim fragmentation?  
 What is the role of the EEO Counselor's Report?  
 What are the legally protected categories under the EEOC's jurisdiction?
- 2:00-2:30: Theories of Discrimination  
 Spotting and framing Intentional Discrimination Claims
- 2:30-3:00: Break
- 3:00-4:00: Theories of Discrimination  
 Spotting and framing Intentional Discrimination and Disparate Impact  
 Spotting and framing Hostile Work Environment Claims
- 4:00-4:25: Theories of Discrimination  
 Spotting and framing Reasonable Accommodation claims  
 Spotting and framing other ADA/Rehabilitation Act causes of action
- 4:25-4:30: Q&A and Wrap-Up



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### Wednesday, October 25

- 1:00-2:00: Theories of Discrimination  
Spotting and framing reprisal claims, including *per se* retaliation
- 2:00-2:30: Timeliness Principles
- 2:30-3:00: Break
- 3:00-4:00: Contractor Complaints
- 4:00-4:25: Exercises on Acceptance/Dismissal/Framing
- 4:25-4:30: Q&A and Wrap-Up

## Tips for a Successful FELTG Training Experience

- We'll start the program promptly at 1:00 pm ET.
- Please close all other computer programs.
- Please place your phone/mic on *mute*.
- This program will have four Q & A breaks, plus a 30-minute break midway.
- We will end promptly at 4:30 pm ET.
- Ask lots of "hypothetical" questions.
- Submit questions via the chat feature or email them to [info@feltg.com](mailto:info@feltg.com).



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## Get it Right the First Time: Accepting, Dismissing and Framing EEO Claims

October 24, 2023

Presented by  
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In addition, no recording of any type is permitted.



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## Topics for Today

- Accepting, Dismissing, and Framing Claims Overview
  - Bases to Dismiss Claims, Claim Fragmentation
  - EEO Counselor’s Report, Legally Protected Categories
- Theories of Discrimination
  - Spotting and Framing Intentional Discrimination, Hostile Work Environment, RA Claims, ADA/Rehabilitation Act



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## Accepting, Dismissing, and Framing Claims

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## First Things First

- Send an acknowledgment letter right away
- “Immediately upon receipt of a formal complaint of discrimination, the agency shall acknowledge receipt of the complaint in writing.”

MD-110, Ch. 5, § 1 (emphasis added)



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### Accepting Claims

- “An Agency shall accept a complaint from any aggrieved employee or applicant for employment who believes that he or she has been discriminated against by the agency because of race, color, religion, sex, national origin, age or disabling condition.”

*Delphina F. v. USPS,*  
 EEOC App. No. 2019004004  
 (Nov. 7, 2019)  
 (emphasis added)



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### Accepting Claims

- Framing the claims
  - Be sure to look at both the formal complaint and the counselor’s report.
  - Don’t fragment the claim!
  - Be careful with joint employer cases.
  - Be careful with mixed cases.
    - Don’t accept as a mixed case if the employee doesn’t have MSPB appeal rights.

*Nadine M. v. EEOC,*  
 EEOC App. No. 0120180745  
 (Nov. 27, 2019)



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### Dismissing Claims

- Bases for dismissal:
  - Fails to state a claim or claim is pending before another agency or EEOC
  - Is untimely or raises matter not raised with counselor
  - Is the basis of pending or adjudicated civil action



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### Dismissing Claims

- Bases for dismissal (cont.):
  - Raises matter in MSPB appeal or negotiated grievance process
  - Is moot or involves proposed action
  - Complainant can't be located
  - Complainant fails to cooperate



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### Dismissing Claims

- Bases for dismissal (cont.):
  - Alleges dissatisfaction with process, or
  - Is an abuse of EEO process

29 CFR § 1614.107(a)



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### Formal Complaint -- Acceptance/Dismissal

- Agency can accept some claims, dismiss others.
- Dismissed claims not investigated and not subject to immediate appeal.
- Review by administrative judge.

29 CFR § 1614.107(b)



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### Common Mistakes: Failure to State a Claim

- Complainant’s allegation must be accepted as true and dismissed only if he or she can prove no set of facts that would entitle him or her to relief.

*Cobb v. Secretary of Treasury,*  
EEOC Petition No. 05970077 (1997)

- Injury requirement interpreted broadly to include “chilling effect” in retaliation cases.

*Burlington Northern & Sante Fe Rwy. Co. v. White,*  
126 S.Ct. 2405 (2006)



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### Collateral Attack

- Complainant alleged he requested Continuation of Pay (COP) and did not receive it and that he received a letter stating his health and life insurance benefits would be terminated as a result of his LWOP status.

*Leo R. v. U.S. Postal Serv.,*  
EEOC App. No. 0120170390 (May 26, 2017)



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### Collateral Attack

- The EEO process cannot be used to lodge a collateral attack against another proceeding.
  - A claim that can be characterized as a collateral attack, by definition, involves a challenge to another forum’s proceeding, such as the grievance process, the unemployment compensation process, or the workers’ compensation process.

29 C.F.R. § 1614.107(a)(1)



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### Collateral Attack

- Continuation of Pay (COP) is a special leave category which entitles employees to have their regular pay continued with no charge to their own leave for up to 45 calendar days (this includes weekends, holidays, and non workdays) of disability and/or medical treatment that follows an on the job injury.



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### Collateral Attack

- The Commission held:
  - Without allegations of other instances of discrimination, these issues both fall squarely in OWCP territory; thus, the proper forum for Complainant to have raised his concerns is with the OWCP. Instead, Complainant is inappropriately using the EEO process to lodge a collateral attack on the OWCP/DOL process.
  - Complainant’s claim is dismissed because the EEO process is not the proper forum for remedial measures addressing OWCP issues.



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### Collateral Attack

- Citing:
  - *Pirozzi v. Dep’t of the Navy*, EEOC Request No. 05970146, 1998 EEOPUB LEXIS 5697 (Oct. 23, 1998)
  - *Abiuso v. U.S. Postal Serv.*, EEOC Appeal No. 0120100241, 2010 EEOPUB LEXIS 3263 (Oct. 5, 2010)
  - *Smart v. U.S. Postal Serv.*, EEOC Appeal No. 0120054627, 2007 EEOPUB LEXIS 4758 (Nov. 19, 2007)



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### Collateral Attack

- Employee alleged discrimination on the bases of race and color when, among other issues:
  - Claim 3: Management denied him *Weingarten* Rights
- Agency dismissed Claim 3 for failure to state a claim, noting that claim 3 constituted a collateral attack and impermissibly abused the EEO process.



*Joshua F. v. Soc. Sec. Admin.*,  
EEOC App. No. 2021004705 (Nov. 22, 2021)

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### Collateral Attack

- Commission upheld the dismissal, explaining:
  - With regard to the Agency’s decision regarding claim 3 involving Complainant’s *Weingarten* Rights, Complainant must raise such claims within the collective bargaining agreement process and not here.
  - A claim involving an issue relating to union representation (e.g. denial of *Weingarten* Rights) is a collateral attack on the grievance process.
  - The dismissal of claim 3 for failure to state a claim was appropriate.



*Id.* 20

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### Spin-Off Complaints

- Under 29 C.F.R. § 1614.107(a)(8), an agency shall dismiss a complaint that alleges dissatisfaction with the processing of a previously filed complaint.



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### Spin-Off Complaints

- Chapter Five of the EEOC Management Directive 110 (Aug. 5, 2015) defines such a complaint as a “spin-off” complaint.
- Spin-off complaints should be referred to the agency official responsible for complaint processing and/or processed as part of the original complaint.



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### Spin-Off Complaints

- On appeal, Complainant raised allegations about the processing of Complaint 1:
  - [A] case file should never have been opened
  - The Agency “set him up for failure” by assigning Complaint 1 a case number after his initial interview but prior to an investigation of his allegation.
  - EEO Counselor did not take any action, such as contacting his supervisor, after the initial interview.



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### Spin-Off Complaints

- Commission held:
  - Such allegations should have been raised with the agency official responsible for complaint processing.
  - The Agency properly dismissed Complainant’s Complaint for stating the same claim raised in a previous complaint.

*Alvaro M v. Dep’t of Commerce (NOAA),  
EEOC App. No. 2020004133 (Jan. 6, 2021)*



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### Common Mistakes: Fragmenting Claims

- September 2014, EEOC published results of 5 year study of most common mistakes in agencies' procedural dismissals.
- Number 1 was Fragmentation.



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### Common Mistakes: Fragmenting Claims

- **Agencies often fail to distinguish between the factual allegations made by a complainant in support of a legal claim and the legal claim itself.**



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### What is Fragmenting?

- Fragmenting is breaking up a claim.
- **A claim is the assertion of an unlawful employment practice that a Complainant raises.**
- Fragmenting a claim entails separating parts of the claim into different claims.



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### Fragmenting

- When a complainant has not alleged disparate treatment regarding a specific term, condition, or privilege of employment (discrete act), **EEOC will examine whether a complainant’s allegations, when considered together, are sufficient to state a hostile work environment claim.**

*Routson v. NASA,*  
EEOC Request No. 05970388  
(Feb. 26, 1999)



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### Fragmenting

- It’s on You, Not the Complainant.
- Individuals who come to report an unlawful employment practice do not know the law like you do – they may come with a litany of individual incidents.
- **Your job is to frame it as a legal claim by spotting the legal issues.**



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### Fragmenting, cont.

- Agencies fragment harassment and hostile work environment claims by dismissing each factual incident cited by complainant separately, reasoning that the incident was insignificant and did not affect the work environment.
- EEOC reversals consider the language in the complaint and the information in the EEO counseling report.



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### Fragmenting Problems

- Undermines employee’s ability to present a coherent claim of an unlawful employment practice, i.e. to exercise their rights and obtain relief for discrimination
- Substantially increases the number of complaints an agency has to process and causes losses at OFO/litigating old complaints



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### Common Mistakes: Timeliness

- Two issues with timeliness:
  - Timely EEO contact
  - Timely filing of formal complaint



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### Timeliness: EEO Contact

- Employee/applicant for employment/contractor has 45 days to make EEO contact.
- EEO contact = contact with someone reasonably related to the EEO process

*Ballard-Freeman v. Dep’t of Justice,*  
 EEOC App. No. 01A54937  
 (May 12, 2006)



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### Timeliness: EEO Contact

- Complainant alleged discrimination occurred on Nov. 2, 2016 and Jan. 27, 2017.
- Complainant told counselor that she tried to contact a counselor on December 16, December 22, and January 6.
- Complainant filed formal complaint on Mar. 23, 2017.
- Commission reversed dismissal for untimely contact.

*Natalya B. v. VA,*  
 EEOC App. No. 2019003134  
 (Dec. 5, 2019)



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### Counselor's Report

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### EEO Counselor's Report

- When a complaint is filed, the EEO counselor must submit a written report to the agency's EEO office concerning the issues discussed and the actions taken during counseling.

29 C.F.R. Section 1614.105(c)



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### Counselor’s Role

- The EEO Counselor must determine what action(s) the agency has taken or is taking that causes the aggrieved person to believe s/he is the victim of discrimination.
- The EEO Counselor must be certain that the claim(s) are clearly defined and the aggrieved person agrees with how the agency defines the claim(s).



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### Thorough Counselor’s Report

- Those descriptions – of the action(s) the aggrieved individual believes are discriminator and the bases of the alleged discrimination (i.e. protected categories or activity) **must be thoroughly documented in the Counselor’s Report.**
- If the Counselor’s Report leaves out details, the claim might be improperly dismissed.



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Questions?




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Protected Categories  
EEOC Jurisdiction

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Statutory Bases

• Title VII of 1964 Civil Rights Act:

- Race
- Color
- National Origin
- Religion, and
- Sex



- Created EEOC
- Federal government exempt until 1972

42 USC § 2000e-16



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On the Basis of Sex:  
Sex Stereotyping

• *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989):

- Female employee was not promoted to partner because she was not feminine enough.
- She was told to wear jewelry, style her hair, dress like a woman, walk more femininely, refrain from swearing, and “take a class at charm school” if she wanted to have a chance at partnership.
- This was the first case analyzing gender stereotyping as sex harassment.



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## On the Basis of Sex: Sex Stereotyping

- *Price Waterhouse* (cont.):
  - The Supreme Court found that Price Waterhouse’s decision was based on sexual stereotyping of appropriate female appearance and behavior and held that it is covered under Title VII as sex discrimination:
    - “[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.”



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## Also Included in Sex Stereotyping

- Caregiver status
  - See EEOC’s *Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities*, EEOC Notice No. 915.002, at II.A.3 (May 23, 2007)
- Parental status
  - See *Complainant v. Department of Treasury*, EEOC No. 0120143110 (Mar. 10, 2015)
- Pregnancy
  - See *Doe v. DOJ*, EEOC No. 0720090006 (2012)



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## Pregnancy Discrimination Act

- Passed in 1978 to overrule:
  - *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976)
  - & *Nashville Gas Co. v. Satty*, 434 U.S. 136 (1977)
- Clarifies that “because of sex” in Title VII includes discrimination based on:
  - Pregnancy;
  - Childbirth;
  - Related medical conditions.



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### On the Basis of Sex: Sexual Orientation and Transgender Status

- Sex discrimination includes discrimination on the bases of:
  - Transgender status, and
  - Sexual orientation.

*Macy v. Attorney General*,  
EEOC Appeal No. 0120120821 (2012);  
*Baldwin v. Secretary of Transportation*,  
EEOC Appeal No. 0120133080 (2015)



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### *Bostock v. Clayton County Board of Commissioners*

- Supreme Court decision on Jun. 15, 2020
- “An employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex. Sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids.”



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### *Bostock Decision*

- “[I]t is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.”
- It does not matter if the employer’s intent is to discriminate on the basis of sexual orientation or gender identity – it cannot achieve that without considering the employee’s sex, and that violates Title VII.



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### Bostock Decision

- Example:
  - “Imagine an employer who has a policy of firing any employee known to be homosexual. The employer hosts an office holiday party and invites employees to bring their spouses. A model employee arrives and introduces a manager to Susan, the employee’s wife. Will that employee be fired? If the policy works as the employer intends, the answer depends entirely on whether the model employee is a man or a woman.”



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### On the Basis of Disability



Rehabilitation Act of 1973, amended

- Prohibits discrimination against qualified individual with disability;
- Requires reasonable accommodation of qualified individual with disability if not undue hardship on agency.
- Non-affirmative action requirements of Americans with Disabilities Act apply to Rehabilitation Act cases.



29 USC § 791-794

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### Americans with Disabilities Act

- ADA Amendments Act of 2008:
  - “An act to restore the intent and protections of the Americans with Disabilities Act of 1990.”
  - Effective Jan. 1, 2009.
    - Codified at 42 USC § 12101, *et seq.*



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### On the Basis of Age: Age Discrimination in Employment Act

- Prohibits discrimination against individuals who are 40 years of age or older.
- Does not prohibit discrimination against individuals who are under 40.



29 USC § 633a



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### Equal Pay Act

- Prohibits gender discrimination in payment of wages for work requiring equal skill, effort and responsibility and performed under similar working conditions.
- Any violation of the EPA is also a violation of Title VII.



29 USC § 206(d)



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### Genetic Information Nondiscrimination Act of 2008

- Title II prohibits employment discrimination on the basis of genetic information.
  - Gives EEOC enforcement authority
  - Effective Nov. 21, 2009



Codified at 42 USC § 2000ff, *et seq.*



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## Reprisal

- Each act also prohibits retaliation for participation in EEO process and opposition of discriminatory practices, as do EEOC regulations.

29 CFR § 1614.101(b)



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Spotting Claims

## Theories of Discrimination

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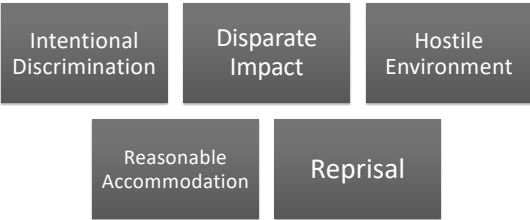
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## Theories of Discrimination



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Theories of Discrimination

## Intentional Discrimination

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## Intentional Discrimination

- Employer discriminates against employee because of his or her race, color, national origin, religion, sex, age, disability or genetic information.
- Focus in these cases is on the intent of the employer. Not necessary that employer know the actions are illegal, if one of prohibited factors is taken into account.



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## Intentional Discrimination

- Two methods of proving intent:
  - Circumstantial evidence
  - Direct evidence



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### Intentional Discrimination

- Circumstantial evidence. Often confused with disparate treatment, which is only one kind of circumstantial evidence.
- Basic problem in these cases is how to establish motive when there is no direct evidence of motive. Not an unusual proof problem.



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### Circumstantial Evidence

- *Prima facie* case. Any set of facts that would permit an inference of discrimination.
  - Disparate treatment of similarly situated individuals
  - Past statements that indicate bias
  - Past actions that indicate bias
  - Unduly harsh actions
  - Creates rebuttable presumption of discrimination



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### Circumstantial Evidence

- Legitimate, nondiscriminatory reason.
  - Need not prove, merely “articulate”
  - But there must be some evidence to support claim of legitimate reason
  - Must be sufficiently specific to frame issues for pretext analysis



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### Circumstantial Evidence

- Pretext.
  - Reasons given as legitimate are not true
  - Reasons given as legitimate are true, but not the real reason the employer acted



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### Circumstantial Evidence

- Any set of facts permitting an inference of discrimination
- Burden of production through specific and admissible evidence
- Reason given is not true or not true reason for acting



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### Direct Evidence

- Direct evidence:
  - Evidence of discriminatory bias
  - Linked *directly* to the personnel action at issue
  - Also called mixed motive cases because of defense that there was also some other legitimate reason for acting



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### Direct Evidence

- Burdens of Proof
  - Complainant must prove by preponderance of the evidence -- *i.e.*, that it is more likely than not that discrimination was a significant factor in decision.



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### Direct Evidence

- For claim in which complainant proves violation and respondent demonstrates it would have taken the same action even absent discrimination:
  - Only declaratory relief and attorney fees
  - No equitable relief or damages

42 USC § 2000e-5A(g)(2)(B)



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### Direct Evidence

- Burden of Proof
  - Agency must prove it *would have* taken same action even absent discrimination -- not *could have*.
  - Reasons agency relies upon must have existed at time of action and agency must have been aware of those reasons at the time it acted.



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### Direct Evidence

- Complainant**
  - Evidence of bias
  - Linked to personnel action
- Agency**
  - Would have taken same action even absent discrimination
- Result**
  - No equitable relief or damages
  - Declaratory relief and attorneys fees



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### Poll

- Arthur Aggrieved alleged to EEO Counselor that his supervisor discriminated against him when she issued him a seven-day suspension. Arthur showed the EEO Counselor an email S1 sent to Arthur’s co-worker, in which she wrote, “Arthur really has not been the same since he developed arthritis. It’s painful to watch him walk around the office.”
- Is the email direct evidence of discrimination?
  - A. Yes
  - B. No



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### Poll

- How would you frame Arthur’s claim?
  - Type your answer in the chat.



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VIRTUAL  
TRAINING  
INSTITUTE  
FELTG

Questions?



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30-Minute Break



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Theories of Discrimination

**Disparate Impact Discrimination**

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### Disparate Impact

- Disparate or adverse impact discrimination occurs when a facially neutral employment policy has the effect of disqualifying a disproportionate number of members of protected group or groups.



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### Disparate Impact

- No intent requirement. Entire focus is on the impact of the policy.
- Usually invoked in class actions.
- Examples include height, weight and physical strength requirements.



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### Disparate Impact

- *Prima facie* case. Complainant must prove that a challenged policy or practice disproportionately impact protected group by:
  - Identifying the policy or practice
  - Showing statistical disparities between the pool of qualified applicants and agency’s treatment of protected group
  - Show disparities are causally connected to policy or practice



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### Disparate Impact

- Agency must demonstrate policy or practice is job-related and consistent with business necessity.
  - Agency has burden of persuasion;
  - Must show “requirement has a manifest relation to the employment in question.”

*Griggs v. Duke Power Co.*,  
401 U.S. 424 (1971)



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### Disparate Impact

- Complainant can rebut by showing there is alternative practice that would achieve agency’s goal without disparate impact and agency refuses to adopt.



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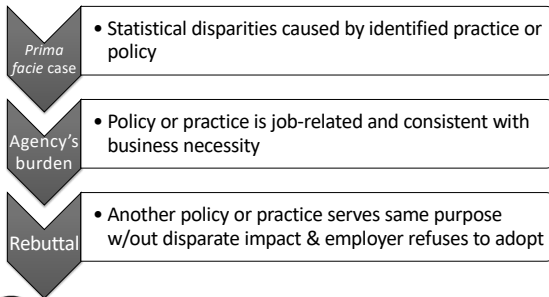
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### Disparate Impact



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**Poll**

- Edna alleged the agency’s hiring practices led to a statistical disparity between male and female engineers at the agency above the GS-12 level.
- The evidence showed that six out of the 38 GS-12 engineering positions at the agency were held by women.
- Over a five-year period, there were 16 or 17 promotions to the GS-13 level, all awarded to men.



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**Poll**

- How would you frame the claim?
  - A. Was Edna discriminated against on the basis of her sex when male employees were promoted to the GS-13 level?
  - B. Did the agency subject female employees to disparate impact discrimination in promotions after the GS-12 level?
  - C. None of the above

*Brannon-Winters v. Navy,*  
EEOC Appeal No. 01A51549 (Mar. 28, 2006)



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Theories of Discrimination  
**Hostile Work Environment**

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## Hostile Environment Harassment

- There are two forms of harassment cases.
  - Tangible employment action cases, and
  - Hostile environment cases



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## Tangible Employment Actions

- Tangible employment action cases
  - Must be a personnel action, *e.g.*, suspension, removal, promotion, failure to promote.
  - No liability problem in tangible employment actions cases because supervisor or manager is acting within the scope of employment and employer is automatically liable.



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## Hostile Environment Harassment

- Supervisors are only those employees who have the authority to take a tangible employment action.

*Vance v. Ball State University,*  
570 U.S. 133 (2013)



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### Tangible Employment Actions

- If there is tangible employment action, case is analyzed the same as a case of intentional discrimination.
  - Circumstantial evidence, or
  - Direct evidence



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### Hostile Environment Harassment

- Hostile Environment Claims
  - May be brought under any EEO basis
  - Including reprisal

*Hitchcock v. Secretary of Homeland Security,*  
EEOC Appeal No. 0120051461 (2007)



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### Hostile Environment Harassment

Elements


- Subjected to unwelcome verbal and/or physical conduct

Of

- Conduct was based on the complainant's protected status

Proof

- Conduct was sufficiently severe and pervasive



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### Hostile Environment Harassment

- Unwelcome conduct
  - Did the complainant invite or encourage the conduct?
  - Submission to conduct, standing alone, does not mean it was welcome.



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### Hostile Environment Harassment

- This is sometimes evidenced by the nature of the conduct
  - Sexual advances
  - Derogatory language tied to protected status, or
  - Symbols or pictures that are offensive sexually, racially, religiously, etc.



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### Hostile Environment Harassment

- Gender-based harassment present where “agency’s own investigation revealed that the atmosphere at the facility was replete with remarks about wife bashing, negative generalizations applied to all women, and demeaning comments about female public figures . . .”
- The general atmosphere, coupled with comments specifically aimed at the complainant, created an abusive working environment.

*Horkan v. Postmaster General,*  
EEOC Appeal No. 01976837 (2000)



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### Hostile Environment Harassment

- Severe or pervasive conduct
  - Would a reasonable person, viewing the conduct from the complainant’s perspective, regard it is hostile, offensive or abusive?
  - Did the complainant actually regard the conduct as hostile, offensive or abusive?
  - How frequent was the conduct?
  - How egregious was the conduct?



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### Severe or Pervasive Requirement

- The Commission “will presume unwelcome, intentional touching of a Complainant’s intimate body area is sufficiently offensive to alter the condition of her working environment and constitute a violation of Title VII”
- A coworker touching complainant’s buttocks twice was sufficiently severe.

*Cecille W. v. VA,*  
EEOC App. No. 0120181765  
(Aug. 22, 2019)



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### Severe or Pervasive Dismissal

- Complainant alleged that the Agency subjected her to hostile work environment harassment when:
  - Claim 1: Customer Service Supervisor (S1) made inappropriate sexual comments to her
  - Claim 2: Lead Clerk (S2) threatened Complainant by using obscene language at her and following her on the workroom floor.
    - No description of this incident in the decision



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### Severe or Pervasive Dismissal

- Agency dismissed holding that Claim 1 was untimely and Claim 2 did not rise to the level of a hostile work environment or effect the terms, conditions, or privileges of Complainant’s employment.



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### Severe or Pervasive Dismissal

- Commission agreed.
  - Claim 1 was untimely.
  - Claim 2 was not sufficiently severe or pervasive to alter the conditions of employment so it did not state a claim.

*Lida G. v. U.S. Postal Serv.,*  
EEOC App. No. 2019003250 (Sept. 11, 2019)



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### Severe or Pervasive Dismissal

- Commission explained:
  - Where complaint does not challenge an action or regarding a specific term, condition or privilege of employment, a claim of harassment is actionable only if the harassment was sufficiently severe or pervasive to alter the conditions of the complainant’s employment.
  - Simple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the terms and conditions of employment.



*Id.*

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### Hostile Environment Harassment

- Two bases for holding employer liable:
  - Supervisor aided by agency relationship
    - Supervisor to employee relationship is not equal
  - Negligence standard for coworkers and third parties



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### Harassment Pitfalls

- Fragmenting
- Timeliness



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Theories of Discrimination

### Reasonable Accommodation & Other Medical Condition-Related Claims

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### Reasonable Accommodation Disability

- Agency must provide reasonable accommodation to qualified individual with disability unless doing so would impose undue hardship on the operation of the agency.



42 USC 12112(b)(5)(B)



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### Disability Accommodation Issue-Spotting

- Employees do not always know they are entitled to reasonable accommodation
  - “My supervisor put me on a DOP recently and I think it is unfair. I am performing as well as I always did. Well, I did miss a few deadlines last quarter. I have been struggling to concentrate since I started taking a new medication. I actually told my supervisor about the issue and at first, she was understanding.”
  - What’s the issue there?



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### Disability Discrimination Issue-Spotting

- I took sick leave, and my supervisor has been micromanaging my performance ever since.
- I asked to leave early one day last month to get to a medical appointment, and my supervisor took me off an important project afterward.
- I had a panic attack during work recently, and my supervisor keeps making comments to me about how I am “unstable” and “crazy.”



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### Catching Other ADA Claims

- The Rehabilitation Act and the ADA limit the extent to which an employer may make disability-related inquires and require medical examinations of employees.
  - Disability-related inquiries and medical examinations may only be made after employment if they are **job-related** and **consistent with business necessity**.

42 USC 12112(d)(4)(A);  
29 CFR 1630.13(b), 14(c)



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### Questions?




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### Poll



The rules regarding disability inquiries apply to:

- Employees who have requested accommodations
- Employees with disabilities, regardless of whether they have requested accommodations
- All employees



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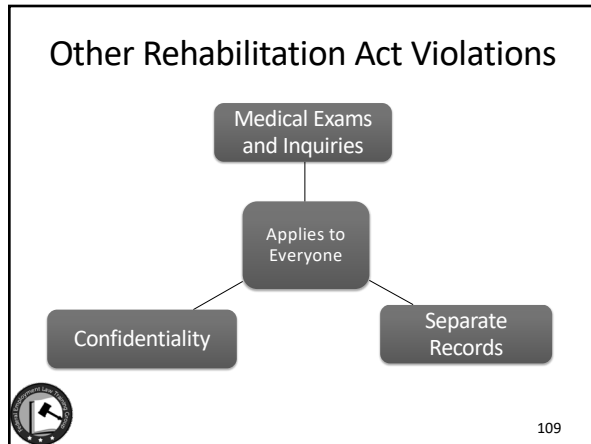
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### Disability Inquiries

- Disability inquiries include such things as:
  - Asking an applicant or employee if s/he has a disability or how s/he became disabled or about the nature or severity of a disability
  - Asking for medical documentation regarding a disability
  - Asking about an employee’s genetic information

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### Disability Inquiries

- Disability inquiries also include:
  - Asking about an employee’s prior workers’ compensation history
  - Asking about current or previous use of prescription drugs or medications, or monitoring an employee’s taking of such drugs or medications, and,
  - Asking an employee a **broad** question that is likely to elicit information about a disability (e.g., Do you have any medical conditions?)

*EEOC Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act*

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**Poll**

Does the prohibition on disability inquiries mean you can never ask someone – applicant, coworker, subordinate – how they are doing?

- A. Yes
- B. No

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**Disability Inquiries**

“Questions that are not likely to elicit information about a disability are not disability-related inquiries and, therefore, are not prohibited under the [Rehabilitation Act].”

*Disability Guidance, Ques. 1*



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**Confidentiality**

- Information regarding the medical condition or history of the applicant must be **collected and maintained on separate forms and in separate medical files** and is treated as a **confidential medical record**

42 USC 12112(d)(3)(B), (4)(C)



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### Confidentiality

- Confidentiality is strictly construed by the EEOC.
  - Agency that provided employees’ medical records in response to a state court subpoena violated the ADA because action did not fall within any of the statute’s exceptions.

*Bennett v. U.S. Postal Service,*  
EEOC Appeal No. 0120073097 (2011)



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### But I Meant Well

- In an ADA violation of confidentiality case, the motive for making the disclosure is not relevant, nor is disparate treatment.
  - Supervisor violated ADA by mentioning to coworker that complainant was on medication even though supervisor’s intent was to explain complainant’s behavior to the coworker.

*Becki P. v. Dep’t of Transportation,*  
EEOC App. No. 0720180004 (2018)



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### Confidentiality

- ADA violated when supervisor kept personnel records with medical info in his home closet.

*Grey v. U.S. Postal Service,*  
EEOC Appeal No. 0120121846 (2012)

- Disclosure of ROI with medical info to witnesses violated ADA.

*Scott v. U.S. Postal Service,*  
EEOC Appeal No. 0120103590 (2012)



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### Confidentiality

- Commission reversed the agency’s dismissal of a complaint where the complainant alleged that his supervisor took a photo of his medical information on his personal cellphone. The supervisor maintained that he did so while filling out an injury form for the complainant and was going to use the photo as an attachment to the report.

*Complainant v. U.S. Postal Service,*  
EEOC Appeal No. 0120131372 (2014)



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### Confidentiality

- Supervisor required Complainant to list his medical condition as a reason for returning to the post office late.
- Employees were required to keep forms on desks where they could be viewed by others.
- Commission found breach of obligation to keep medical information confidential.

*Augustine V. v. USPS,*  
EEOC App. No. 0120180469 (2019)



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### Record Maintenance

- Information regarding the medical condition or history of the employee must be collected and maintained on separate forms and in separate medical files.

29 CFR § 1630.14(c)(1)



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### Record Maintenance

- “The evidence of record establishes that the Agency did not maintain Complainant’s confidential medical information in a separate medical file. Instead, the Agency placed the information, including documentation that identified Complainant’s diagnosis and described his symptoms, in a non-medical adverse action file in the Human Resources Department. As the AJ correctly held, the Agency’s actions violated the Rehabilitation Act.”

*Mayo v. Department of Justice*, (BOP)  
 EEOC Appeal No. 0720120004 (2012)



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### Record Maintenance

- “*Contrary to the Agency’s assertion, Complainant was not required to prove that the Agency disclosed his confidential medical information to an unauthorized person.* The plain language of the statute and regulation expressly states that medical information must be “collected and maintained on separate forms and in separate medical files.” 42 USC § 12112(d)(3)(B), (4)(C); 29 CFR § 1630.14(c)(1). The Agency’s failure to maintain Complainant’s medical information in separate medical files constitutes a violation of the Rehabilitation Act, even in the absence of an unauthorized disclosure.”

*Id.* (emphasis added)



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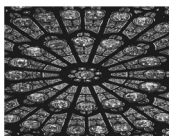
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### Reasonable Accommodation Religion

- Agency must provide reasonable accommodation to religious beliefs and practices of employee unless doing so would impose undue hardship.



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### Reasonable Accommodation Religion

- Complainant must demonstrate:
  - *Bona fide* religious belief or practice that conflicts with work requirements.
  - He or she informed agency of conflict.
  - Work requirement would force complainant to abandon fundamental aspect of religious belief or practice.



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### Reasonable Accommodation Religion

- Agency must demonstrate it made reasonable effort to accommodate belief or practice.
  - Not required to accommodate if it would impose undue hardship.
  - Undue hardship is more than a *de minimis* burden.



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Questions?




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### Upcoming Training Events



- **Advanced MSPB Law: Navigating Complex Issues**
  - October 31-November 2, 2023 (1:00 – 4:30 pm eastern)
  - Earn CLE credits
- **Up to the Minute: The Latest Changes to Reasonable Accommodation for Pregnancy, Disability, and Religion**
  - November 7, 2023 (1:00 – 3:00 pm eastern)
  - Earn CLE credits
  - Meets the President’s mandate to provide training on diversity, equity, inclusion & accessibility in the Federal workplace.
- **Clean Records, Last Rites, Last Chances, and Other Discipline Alternatives**
  - November 14, 2023 (1:00 – 3:00 pm eastern)
  - Earn CLE credits



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Thanks for attending  
 Get it Right the First Time: Accepting,  
 Dismissing and Framing EEO Claims  
 Session One

Come back tomorrow for more!



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### Tips for a Successful FELTG Training Experience

- We'll start the program promptly at 1:00 pm ET.
- Please close all other computer programs.
- Please place your phone/mic on *mute*.
- This program will have four Q & A breaks, plus a 30-minute break midway.
- We will end promptly at 4:30 pm ET.
- Ask lots of "hypothetical" questions.
- Submit questions via the chat feature or email them to [info@feltg.com](mailto:info@feltg.com).



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### Get it Right the First Time: Accepting, Dismissing and Framing EEO Claims

October 25, 2023

Presented by  
The Federal Employment Law Training Group, LLC  
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### Topics for Today

- Theories of Discrimination
  - Spotting and framing reprisal claims, including *per se* retaliation
- Timeliness Principles
- Contractor Complaints
- Exercises on Acceptance/Dismissal/Framing



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Theories of Discrimination  
Retaliation/Reprisal

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### Reprisal

- Agency may not treat employee adversely because he or she has participated in EEO process or opposed a discriminatory practice or policy.



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### EEO Reprisal Formula

Protected Activity (the actor knows about)  
 + Materially Adverse Action  
 + Causation  
 = Unlawful Retaliation



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## Reprisal

- Analytical model is same as intentional discrimination. Either circumstantial or direct evidence. If circumstantial:
  - Complainant must establish *prima facie* case.
  - Agency must articulate legitimate, nonretaliatory motive of action.
  - Complainant must establish reason is pretext for retaliation.



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## Reprisal

- *Prima facie* case.
  - Complainant engaged in protected activity.
  - Agency was aware of protected activity.
  - Complainant was subjected to some form of adverse treatment.
  - There is evidence of a causal connection between protected activity and adverse treatment.



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## Reprisal

- Protected activity:
  - Participation in EEO process, or
  - Opposition to discriminatory practice or policy.



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### What is Protected Activity?

- Participation Clause:
  - Contacting EEO counselor
  - Filing formal complaint
  - Testifying at investigation or hearing
  - Providing documents to a complainant
  - Representing a complainant



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### What is Protected Activity?

- Grievance or MSPB appeal with allegations of discrimination is protected activity.

*Anderson v. Secretary of Interior,*  
 EEOC Appeal No. 01954805 (1996)  
 (informal grievance);

*Daniel v. Postmaster General,*  
 EEOC Appeal No. 01A5372 (2002)  
 (MSPB appeal must allege EEO basis)



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### What is Protected Activity?

- Opposition
  - Complainant must have reasonable, good faith belief practice or policy is discriminatory.
  - Opposition must be reasonable vs. agency's right to manage workforce.



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### What is Protected Activity?

- Opposition Clause:
  - Protected activity if individual explicitly or implicitly communicates to employer a belief that activity constitutes a form of employment discrimination under statutes enforced by EEOC.

*EEOC Compliance Manual, 8-II(B)*



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### What is Protected Activity?

- Opposition Clause Examples
  - Complaints to Managers or supervisors
  - Declining sexual advances
  - Requesting a reasonable accommodation is protected activity



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### Protected Activity & COVID-19

- Requesting a vaccine exemption due to a medical condition or a religious belief is protected activity even if the request is denied.
  - Requests for accommodation are protected activity even if the individual is not legally entitled to accommodation, such as where the employee’s medical condition is not ultimately deemed a disability under the ADA, or where accommodation would impose an undue hardship on the agency’s operations.



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### Protected Activity & COVID-19

- Reporting harassment related to vaccine-exemption requests is also protected activity.
  - “Workplace discrimination laws also prohibit retaliation against employees for reporting harassing workplace comments about their religious reasons for not being vaccinated.”

<https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>



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### What is a Materially Adverse Action?

- Adverse Treatment Requirement.
  - **Language of retaliation clause is broader.** Applies to any adverse treatment, including things that would not constitute personal injury under EEO antidiscrimination statutes.



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### Important Case

- To prevail on a claim of retaliation, a complainant need not suffer an ultimate employment action
    - If a complainant can show reprisal if “a reasonable employee would have found the challenged action materially adverse”
      - Would the action dissuade a reasonable worker from filing an EEO complaint?
      - Even rescinded discipline (37-day suspension) counts
- Burlington Northern and Santa Fe Ry. Co. v. White*, 126 S.Ct. 2405 (2006)



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### What is a Materially Adverse Action?

- Former employer could be held liable for giving negative reference in retaliation for EEO complaint.

*Robinson v. Shell Oil,*  
519 U.S. 337 (1997)



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### What is a Materially Adverse Action?

- Requiring subordinate employees to go to their supervisor prior to filing an EEO complaint and more closely monitoring an employee after a complaint is filed are also actions that would deter a reasonable person from filing or pursuing a complaint.

*Coronado v. Secretary of Air Force,*  
EEOC Appeal No. 0120122196 (2012)



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### What is a Materially Adverse Action?

- Where an agency manager made comments to coworkers about the complainant's refusal to mediate his EEO complaint, this constituted retaliation.

*Malekpour v. Secretary of Transportation,*  
EEOC Appeal No. 0720100016 (2011),  
*recon. denied* 0520120340 (2012)

*See also Jazmine F. v. Dep't of Justice,* EEOC Appeal No.  
0120162132 (Jun. 22, 2018)



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### Causation

- Causal Connection:
  - Proximity in time
  - Disparate treatment (of others or a shift in the treatment of this employee after engaging in protected activity)
  - Comments by supervisor



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### No Intent Required: Per Se Retaliation and COVID-19

- *Per se* retaliation occurs when an Agency official makes comments that are reasonably likely to deter employees from engaging in the EEO process.

*See, e.g., Onie R. v. Dep't of Def.,*  
EEOC Appeal No. 0120141870  
(Jun. 16, 2016)



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### No Intent Required: Per Se Retaliation and COVID-19

- Supervisors asking Cp if he said that he planned to “play the Latino card” in context of investigating a complaint constituted *per se* retaliation because such behavior could have a chilling effect on the use of the EEO process.
- Comments which, on their face, discourage an employee from participating in the EEO process violate the letter and spirit of the EEOC’s regulations and evidence a *per se* violation of the law.

*See, e.g., Ivan V. v. Dep't of Veterans Affairs,*  
EEOC Appeal No. 0120141416 (Jun. 9, 2016)



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### Reprisal isn't Funny

- Supervisory EEO Investigator made a “joke” to the complainant, an EEO investigator, that in a recent supervisor’s meeting half the time was spent discussing the complainant’s EEO activity.
- Supervisor and complainant always had a jovial relationship.
- EEOC said too bad; *per se* Title VII reprisal because of the chilling effect on potential EEO activity.

*Charlie K. v. EEOC,*  
 EEOC Appeal No. 0120142315  
 (Jan. 24, 2017)



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### No Intent Required: *Per Se* Retaliation and COVID-19

- Watch out for generalized comments about people who request vaccine exemptions, as they could constitute *per se* retaliation.



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Questions?




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Morgan, Ledbetter and Reasonable Accommodation

## Timeliness

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## Regulatory Time Frames

- Complainant must initiate counseling within 45 days of:
  - Effective date of personnel action
  - Date of incident or event alleged to be discriminatory
  - Knew or should have known that personnel action, incident or event was discriminatory

29 CFR 1614.105(a)(1) & (2)



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## Regulatory Time Frames

- The agency or the Commission shall extend the 45-day limit when the employee:
  - Shows he was not notified or otherwise aware of the time limits,
  - Did not know and reasonably should not have known that the discriminatory matter occurred,
  - That despite due diligence they were prevented by circumstances beyond their control from contacting the counselor within the time limits, or
  - For other reasons considered sufficient by the agency or the Commission.

*Id.* at (a)(2)

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### Effective Date

- Limitations period commences when the plaintiff has a “complete and present” cause of action.
- A cause of action does not become “complete and present” for limitations purposes until the plaintiff can file suit and obtain relief.



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### Effective Date

- 45-day period started on the effective date selectee was chosen for the subject position, not from the time that complainant learned his application had not been submitted due to an error in the questionnaire accompanying his application or when complainant’s supervisor advised him that his name did not appear on the referral list of candidates for the position.

*Elliott D. v. Secretary of the Army,*  
 EEEOC Appeal No. 0120161480 (2016)



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### Regulatory Exceptions

- Time limit is subject to:
  - Waiver
  - Tolling
  - Estoppel, and
  - Notice and awareness of time limit



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### Posting Requirements

- EEOC requires agencies to post time limit for initiating counseling.

29 CFR § 1614.102(b)(7)

- Even if notice not posted, complainant must show he or she was otherwise unaware of time limit.

*See, e.g., Gomes-Battle v. Secretary of Transportation, EEOC Appeal No. 0120073604 (2007)*



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### Posting Requirements

- Agency must provide, in complaint file, specific evidence that time limit was posted.

*Gomes-Battle; Mixon v. Postmaster General, EEOC Appeal No. 01A11674 (2002)*

- Standards of notice may be more stringent for applicants.

*Bartolome v. Postmaster General, EEOC Appeal No. 01A11004 (2001)*  
(notice must be in place applicant likely to see)



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### Waiver of Time Frame

- Waiver:
  - Complainant prevented from timely initiating counseling for reasons beyond his or her control
- Examples:
  - Death in family
  - Mental or physical incapacitation, or
  - Natural disaster



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### Waiver of Time Frame

- “When a complainant claims that a physical condition prevents her from meeting a particular filing deadline, we have held that in order to justify an untimely filing, a complainant must be so incapacitated by the condition as to render her physically unable to make a timely filing.”

*Mahalia P. v. Postmaster General,*  
EEOC Appeal No. 0120161137 (2016)



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### Waiver of Time Frame

- But one-day delay excused where complainant on leave for pregnancy-related complications, delivered her baby prematurely and missed the filing deadline while in the hospital attending to her child. Commission acknowledged that complainant was not incapacitated, but excused delay because of the complainant’s “serious medical condition.”

*Kina V. v. Postmaster General,*  
EEOC Appeal No. 0120170248 (2017)



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### Tolling of Time Frame

- Tolling:
  - Complainant reasonably unaware of discrimination.
- Examples:
  - Complainant was unaware that personnel action, incident or event took place at time it occurred; or
  - Complainant was aware of action, incident or event, but had no reason to believe it was discriminatory.



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### Tolling of Time Frame

- “Reasonable suspicion” standard.

*Cottman v. Defense Investigative Service*, EEOC Petition No. 05880312 (1988) (mere inquiry into race and age of selectee did not trigger time limit; knowledge of race and age did); see also *Gilbert B. v. National Aeronautics and Space Administration*, EEOC Appeal No. 0120152531 (2016); but see *Kazuko M. v. Secretary of Veterans Affairs*, EEOC Appeal No. 0120161095 (2016)(advised by an EEO Assistant to submit a FOIA request regarding nonselection, but didn’t make counselor contact until after receiving the agency’s FOIA response)



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### Tolling of Time Frame

- “Reasonable suspicion arises when one has reason to support the belief that prohibited discrimination has occurred, *i.e.*, facts and/or circumstances.”

*Royster v. Secretary of Treasury*,  
EEOC Petition No. 05910690 (1991)



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### Tolling of Time Frame

- Time limit ran from when black physician assistant discovered that white assistant was not terminated for distributing a drug without a physician’s prescription.

*Stevens v. Secretary of Veterans Affairs*,  
EEOC Appeal No. 0120064118 (2007)



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### Doctrine of Estoppel

- Equitable Estoppel:
  - Reliance on agency advice
  - Does not require bad faith



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### Doctrine of Estoppel

- “Equitable estoppel is the principle by which a party is precluded by his own acts, words, or silence from asserting a right to which he would otherwise be entitled against another who rightfully relied on the party’s acts, words or silence to his detriment.”

*Compton v. Smithsonian Institution,*  
EEOC Appeal No. 01A50809 (2005)



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### Timeliness after *Morgan*

- *National Railroad Passenger Corp. v. Morgan*, 122 S.Ct. 2061 (2002)
  - Continually disciplined more harshly than white employees
  - Subjected to hostile environment harassment

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### Timeliness after *Morgan*

- *Morgan*:
  - Statute of limitations for Title VII is 180 days after “unlawful employment practice.”
  - “We have repeatedly interpreted the term ‘practice’ to apply to a discrete act or single ‘occurrence,’ even when it has a connection to other acts.”
  - Each discrete act starts the limitations period.



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### Discrete Discriminatory Acts

- *Morgan*:
  - Continuing Violations -- Discrete Acts:
  - General rule is that “discrete discriminatory acts are not actionable if timebarred, even when they are related to acts alleged in timely filed charges.”



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### Hostile Environment Claims

- *Morgan*
- “Hostile environment claims are different in kind . . . Their very nature involves repeated conduct . . . Such claims are based on the cumulative affect of individual acts.”
- “A hostile work environment claim is comprised of a series of separate acts that collectively constitute one ‘unlawful employment practice.’”



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### Hostile Environment Claims

- *Morgan* -- Result
- Hostile environment claim is timely if any act furthering environment occurred within 45 days of counseling.
- Employer may have defenses that limit period of damages;
- Two-year limitation on back pay.



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### Hostile Environment Claims

- Hostile environment claim spanning three years that included discrete personnel acts, such as performance rating, position assignment and proposed termination.

*Hubbard v. Secretary of Homeland Security,*  
EEOC Appeal No. 0120053612 (2007)



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### Hostile Environment Claims

- *Hubbard* (cont.):
- Where discrete acts were part of pattern combined with sexual comments, the “discrete acts of discrimination were in fact within the relevant time period and are evidence, if proven, of harassment . . . not discrete acts of discrimination.”



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### Hostile Environment Claims

- “A discrete act may be part of a hostile work environment claim . . . [I]f an untimely discrete act is part of a timely hostile work environment claim, complainant may only challenge the act as part of a hostile work environment claim. Recovery for the discrete act is unavailable for the act in and of itself, but is available for the act as part of the hostile work environment.” (Citation omitted).

*Rolison v. Attorney General,*  
EEOC Appeal No. 0120073281 (2007)



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### Timeliness after *Morgan*

- *Morgan* did not address
  - Systemic pattern or practice claims, or
  - Reasonable accommodation claims



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### Systemic or Recurring Violations

- Ledbetter brought EPA and Title VII claim alleging she was paid less than male counterparts.
- Paid less based on previous evaluations.

*Ledbetter v. Goodyear Tire and Rubber Co.,*  
127 S.Ct. 2162 (2007)



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### Systemic or Recurring Violations

- Ledbetter did not allege discrimination in evaluations within limitations period;
- Only the lingering effects of past discrimination.
- EPA claim was dismissed, only Title VII claim went to Supremes.



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### Systemic or Recurring Violations

- *Ledbetter*:
  - “*Morgan* is perfectly clear that when an employee alleges ‘serial violations,’ *i.e.*, a series of actionable wrongs, a timely EEOC charge must be filed with respect to each discrete alleged violation.”



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### Systemic or Recurring Violations

- Lilly Ledbetter Fair Pay Act of 2009, Pub. L. 111-2.
- Reversed *Ledbetter v. Goodyear Tire and Rubber Co.*, 127 S. Ct. 2162 (2007)
  - “[A]n unlawful employment practice occurs, with respect to discrimination in compensation in violation of this title, when a discriminatory compensation decision or other practice is adopted, when an individual becomes subject to a discriminatory compensation decision or other practice, or when an individual is affected by application of a discriminatory compensation decision or other practice. . .”



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### Reasonable Accommodation

- What is reasonable accommodation claim?
  - Is it systemic or recurring violation?
  - Is it continuing violation?
  - Is it one unlawful employment practice?



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### Reasonable Accommodation

- “Because the record does not establish that the agency specifically denied complainant’s requests . . . thereby triggering the time limit . . . Complainant’s EEO contact was timely.”
- Characterized as “recurring” violation.

*McGreevy v. Postmaster General,*  
EEOC Appeal No. 01A43361 (2004)



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### Reasonable Accommodation

- Denial of accommodation continued through date of counselor contact because “there is no indication . . . that complainant was informed she would not be accommodated.”

*Coddington v. Postmaster General,*  
EEOC Appeal No. 01A40149 (2004)



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### Reasonable Accommodation

- Complainant should have reasonably suspected accommodation denied when agency offered position he believed was outside restrictions.
- Accepted “under protest.”

*Sipple v. USPS,*  
EEOC Appeal No. 01A43420 (2004)



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### Reasonable Accommodation

- Complainant requested accommodation of telework in April 2004, denied in August 2004.
- Requested accommodation of transfer in August, denied in November 2004.
- Initiated counselor contact in January 2005.

*Noda v. Secretary of Housing and Urban Development,*  
EEOC Appeal No. 0120070309 (2009)



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### Reasonable Accommodation

- Commission found denials were “discrete events” that triggered 45-day period for counselor contact.
- Counselor contact untimely.



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### Reasonable Accommodation

- “The Supreme Court has held that a Complainant alleging a hostile work environment will not be time barred if all acts constituting the claim are part of the same unlawful practice and at least one falls within the filing period. . . This principle applies to this case as it is clear that Complainant initiated contact with an EEO Counselor within the regulatory time frame, at a minimum, in regard to the above referenced reasonable accommodation issue.”

*Hackney v. Secretary of Homeland Security,*  
EEOC Appeal No. 0120093106 (2011)



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### Reasonable Accommodation

- Rules to extract:
  - Express denial of accommodation requests starts time running.
  - Express grant of accommodation requests starts time running if complainant believes it is less than reasonable accommodation.



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### Reasonable Accommodation

- Rules to extract
  - Claim can be revived by subsequent request and denial.
  - But, initial claim remains untimely.



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30-Minute Break



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When is a Contractor an  
Employee for EEO Purposes?

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### Contractors and Consultants

- Under certain circumstances, a contractor employee or independent consultant can be considered an agency employee for Title VII purposes.
- The agency is considered a “joint employer” for EEO purposes and the individual has the right to:
  - Pursue a federal sector EEO complaint; and
  - Pursue a private sector EEO complaint.



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### Contractors and Consultants

- An agency is required to develop an adequate factual record to make a determination on the complainant’s status.
 

*Jordan v. Tennessee Valley Authority,*  
EEOC Appeal No. 05930454 (1994)
- That record can be established during counseling or through formal investigation.



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*Spirides v. Reinhardt,*  
613 F.2d 826 (D.C. Cir. 1979)

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### Case Law Development

- Ms. Spirides worked sporadically as a foreign language broadcaster for Greek Services, a division of Voice of America.
- She worked under a Purchase Order Vendor (POV) specifically stating she was an independent contractor and not an employee of the U.S. International Communication Agency.



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### Case Law Development

- Court emphasized that 1972 amendments, which covered the federal government repeatedly used the phrase an “employee” or individuals “employed by an employer.”
- Court rejected any use of civil service provisions defining an employee because Title VII specifically uses the language “employee and applicants.”



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### Case Law Development

- “Rather, determination of whether an individual is an employee or an independent contractor for purposes of the Act involves, as appellant suggests, analysis of the ‘economic realities’ of the work relationship. *This test calls for application of general principles of the law of agency to undisputed or established facts.*”

*Spirides v. Reinhardt,*  
613 F.2d 826 (D.C. Cir. 1979)



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### Enforcement Guidance

- Do the same coverage principles apply . . . to a federal agency?
  - [A] federal agency qualifies as a joint employer of an individual assigned to it if it has the requisite control over that worker . . . If so, and if the agency discriminates against the individual, it is liable whether or not the individual is on the federal payroll.

*Enforcement Guidance Application of EEO Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms*



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### Beware Timeliness Problems

- Counselor contact period of 45 days set aside where:
  - Contract employee alleged she was unaware of the limit.
  - Agency inspector general referred her to EEO office.
  - EEO office and agency website said federal sector process was not for her.

*Cole v. Secretary of Defense,*  
EEOC Appeal No. 0120111966 (2011)



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*Ma v. Secretary of Health and Human Services,*  
EEOC Appeal Nos. 01962389, 10962390 (1998)

### The Common Law Test of Control

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### Common Law Test

- Maryann Wenli Ma and her husband received awards as Visiting Fellows in the NIH Visiting Program.
  - NIH Manual provided that Visiting Fellows offer advance research and training experience, but do not perform work for NIH.
  - Visiting Fellows must be physically present in NIH facilities and may not accept outside employment.



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### Common Law Test

- NIH Manual also provided:
  - Visiting Fellows were required to purchase their own health insurance, but reimbursed for low-option coverage.
  - NIH did not deduct Social Security from stipends and Visiting Fellows were required to file quarterly income tax forms in their state of residence.
  - Stipends not “salary,” but NIH required reimbursement if Fellow left early.



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### Common Law Test

- Title VII defines employee as “an individual employed by an employer.”
- Identical language in ERISA is “completely circular and explains nothing.”
 

*Nationwide Mutual Insurance v. Darden,*  
503 U.S. 318 (1992)
- In the absence of a definition, Court adopted the “common law agency test for determining who is an employee.”



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### Common Law Test

- EEOC noted that factors used in *Spirides* “economic realities test” were really the factors used in the common law agency test.
- EEOC would apply common law test of agency to determine if Ma and her husband were agency employees for the purposes of Title VII.
- EEOC adopted non-exhaustive 12 factor list from *Spirides*.



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### Common Law Test

- “The Court emphasized, however, that the common law test contains “no shorthand formula or magic phrase that can be applied to find the answer, . . .all of the incidents of the relationship must be assessed and weighed with no one factor being decisive.”

*Ma*, citing *Darden*,  
quoting *NLRB v. United Ins. Co. of America*,  
390 U.S. 254, 258 (1968)



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### The 12 *Ma* Factors - Control

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### Manner and Means

- Factor 1: The extent of the employer’s right to control the means and manner of work performance.
  - “The *Spirides* court indicated, however, that the most important factor to be considered is the extent of the employer’s right to control the means and manner of the worker’s performance.”

*Ma, supra*



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### Manner and Means

- Contract technical instructor was agency employee where:
  - Agency staff conducted regular training for instructor
  - Gave him lecture format and determined if he was lead instructor for classes
  - Told him not to use notes and stand while lecturing, vetoed use of diagram

*Complainant v. Secretary of Homeland Security,  
EEOC Appeal No. 0120122912 (2014)*



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### Manner and Means

- Contract language instructor not agency employee where:
  - Berlitz provided all work materials
  - Controlled methods of teaching, and
  - Set instructors hours

*Kaissi v. Secretary of Army,  
EEOC Appeal No. 01A53101 (2006)*



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### Manner and Means

- Contract vocational nurse was agency employee where:
  - She was supervised day-to-day by agency unit head
  - Unit head assigned job tasks and provided technical guidance and direction
  - Contractor did performance appraisals, but agency had input into appraisals

*Complainant v. Secretary of Navy,*  
EEOC Appeal No. 0120122698 (2014)



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### Kind of Occupation/Skill Required

- Factor 2: The kind of occupation, with reference to whether the work is usually done under the direction of a supervisor or is done by a specialist without supervision.
- Factor 3: The skill required in the particular occupation.



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### Kind of Occupation/Skill Required

- Skilled electrician, worked on agency premises without much direct supervision, was agency employee where:
  - To extent supervision was given, it was by an agency manager
  - Agency provided tools and equipment
  - Only function of contractor was to receive time cards and pay electrician

*Schwartz v. Secretary of Navy,*  
EEOC Appeal No. 0120071769 (2007)



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### Equipment, Place of Work, Length of Service, Payment

- Factor 4: Whether the “employer” or the individual furnishes the equipment used and the place of work.
- Factor 5: The length of time the individual has worked.
- Factor 6: The method of payment, whether by time or by the job.
- Factor 8: Whether annual leave is afforded.



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### Equipment, Place of Work, Length of Service, Payment

- Contract employee was verbatim hearing recorder and not agency employee where:
  - Designated own work days and was not supervised
  - Work was not reviewed for quality and he received no feedback on work
  - Agency provided equipment and work space and he had worked there eight years

*Complainant v. Social Security Administration, EEOC Appeal No. 0120132580 (2013)*



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### Termination of Relationship

- Factor 7: The manner in which the work relationship is terminated, *i.e.*, by one or both parties, with or without notice and explanation.
  - Though not specifically listed as a factor, EEOC also takes into account the agency’s input into hiring, performance evaluations and decisions to renew contractual services, usually under Factor 1.



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### Termination of Relationship

- Contract vision information specialist agency employee where:
  - Contractor hired complainant, but agency had partial or complete control over decision
  - Complainant fired by contractor one day after agency complained about her conduct and requested that next day be her last

*Complainant v. Secretary of Army,*  
EEOC Appeal No. 0120131103 (2014)



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### Business of Employer

- Factor 9: Whether the work is an integral part of the business of the “employer.”
  - This factor has become more prominent in recent years with the EEOC focusing on whether the work performed by the contractor is a “regular part of agency business.”



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### Business of Employer

- A contract aircraft mechanic was not a Coast Guard employee even though work was performed at agency premises:
  - Contactor provided tools and agency provided only tools unique to the aircraft.
  - Maintaining and repairing aircraft not “a vital or express part of the Agency’s mission.”

*Tassy v. Department of Homeland Security,*  
EEOC Appeal No. 0120112472 (2012)



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### Benefits and Taxes

- Factor 10: Whether the worker accumulates retirement benefits.
- Factor 11: Whether the “employer” pays social security taxes.



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### Intent of Parties

- Factor 12: The intention of the parties.
  - Probably the least significant factor if other factors indicate sufficient agency control
  - Aviation Security Officers were agency employees despite language of agreement where agency exercised a high degree of control
  - ASOs performed “critical mission of the agency” in terms of security

*Balderas, et al. v. Attorney General,*  
EEOC Appeal No. 0120063771 (2007)



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### Intent of Parties

- Commission overturned dismissal, writing:
 

“The language of the contract between the agency and the staffing firm is not dispositive as to whether a joint-employment situation exists... EEOC looks to what actually occurs in the workplace, even if it contradicts the language in the contract between the staffing firm and the agency.”

*Maximo L. v. Postmaster General,*  
EEOC Appeal No. 0120171565 (2017)  
(considering length of employment relationship, setting schedule, GPS monitoring, use of equipment)



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### Contractor Factual Scenario

- Agency contracted with FPM (LLC) to provide a Project Director of numerous projects (Complainant was the sole owner of FPM (LLC)).
- These projects were overseen by an Agency employee, the Program Manager. The contract was for a period of 1 year with multiple option years.
- Under the contract, the Agency paid FPM (LLC) for services under the terms of the contract. The Agency did not provide insurance, leave, disability or retirement benefits.



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Questions?




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Exercises and Wrap-Up

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### Exercise

- Alice Aggrieved alleges that her supervisor has been rude to her since she started working for him over 3 years ago. Alice wears hijab and she wonders if her supervisor is Islamophobic.



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### Poll

Accept?

- A. Yes
- B. No

If accept, how do you write the claim?



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### Exercise

- Cliff alleges that his Agency discriminated against him on the basis of his disability when his Agency subjected him to random drug testing.



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**Poll**

Accept?

- A. Yes
- B. No

If accept, how do you write the claim?



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**Exercise**

- Brett alleges disability discrimination when his supervisor gave all the employees in his division a test intended to identify employees' personality traits like honesty and reliability.



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**Poll**

Accept?

- A. Yes
- B. No

If accept, how do you write the claim?



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### Exercise

- Elvia alleges she has been subjected to sexual harassment by her supervisor on numerous incidents over the past three years. Her supervisor made sexual advances and sexual comments and also told her that, if she ever has a problem at work, she should come to him and he will take care of it. He said, “never go to EEO. They just make trouble.”



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### Type Answers in Chat



What claims, if any, does Elvia have?



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### Exercise

- Employee alleges discriminatory non-selection on the basis of national origin. Relevant dates:
  - Selection: February 1
  - Selectee (from outside government) began work: March 1
  - Initial EEO Contact: April 1
  - Is there anything else you want to know?



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**Poll**

Accept?

- A. Yes
- B. No

If accept, how do you write the claim?



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**Wrap-Up**

- Claim: an unlawful employment practice or policy for which, if proven, there is a remedy under employment discrimination laws
  - Remember the Theories of Discrimination
- Components of a Claim
  - Action being challenged
  - Basis (protected category or activity)



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**Remember**

- The legal claim is different than the factual allegations or evidence the employee identifies
- Always ask yourself:
  - What claims do these facts present?



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VIRTUAL  
TRAINING  
INSTITUTE  
FELTG

Questions?




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Upcoming Training Events 

- **Clean Records, Last Rites, Last Chances, and Other Discipline Alternatives**
  - November 14, 2023 (1:00 – 3:00 pm eastern)
  - Earn CLE credits
- **Advanced EEO: Navigating Complex Issues**
  - November 15-16, 2023 (1:00 – 4:30 pm eastern)
  - Earn EEO Counselor & Investigator refresher hours
  - Meets the President’s mandate to provide training on diversity, equity, inclusion & accessibility in the Federal workplace.
- **Discovery Done Right: Avoiding Sanctions Before the MSPB and EEOC**
  - December 12, 2023 (1:00 – 4:30 pm eastern)
  - Earn CLE credits



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Thanks for attending  
Get it Right the First Time: Accepting,  
Dismissing and Framing EEO Claims



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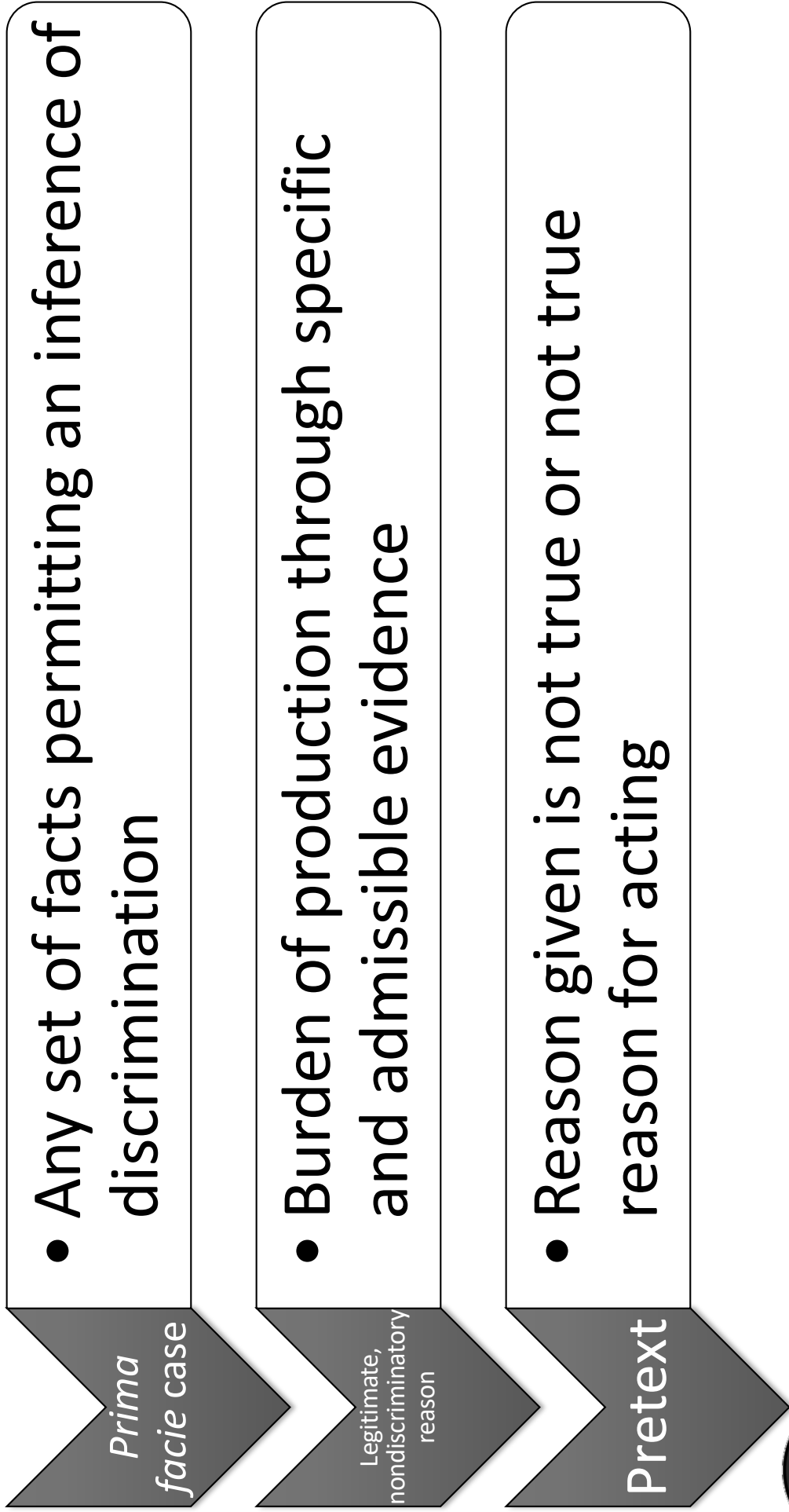
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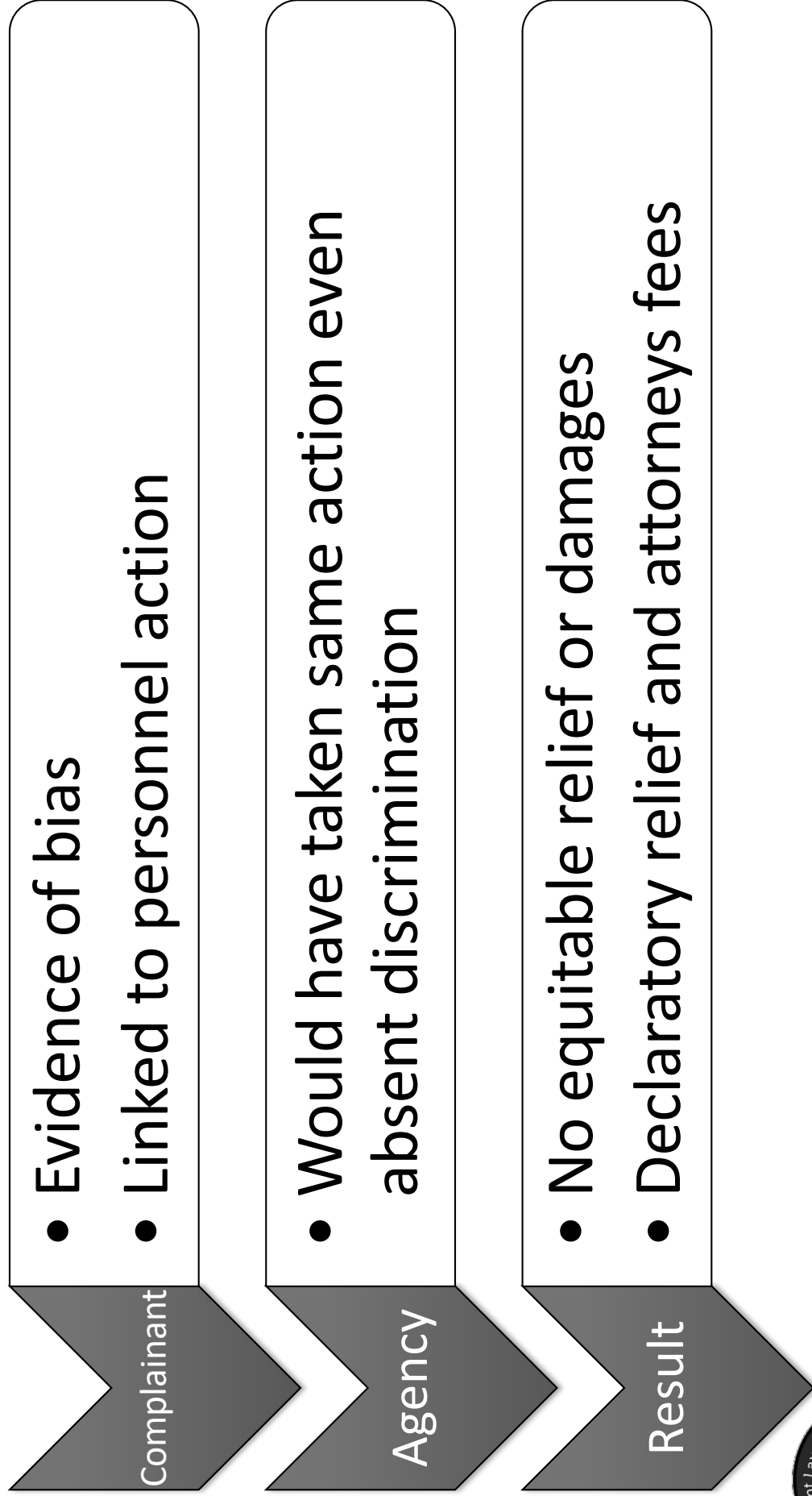
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# Circumstantial Evidence



# Direct Evidence



# Disparate Impact

