

EEOC AND ERD COMPLAINTS: HOW TO INVESTIGATE AND RESPOND

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TOPICS OF DISCUSSION

- Conducting Internal Investigations
- EEOC and ERD Complaints
 - (Federal and State Laws)
- Discrimination and Harassment
 - (Employee Harassment/Discrimination/Retaliation)
- The Investigation Process
 - (Discovery/Notice of Charge/Position Statements)
- Alternative Resolutions
 - (Mediation/Settlement)
- Remedies for Discrimination



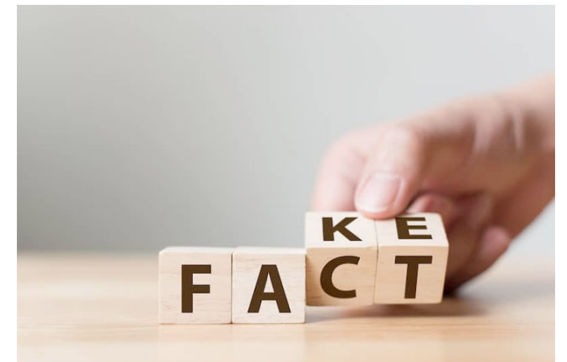
CONDUCTING INTERNAL INVESTIGATIONS

WHY IS THIS IMPORTANT?

- Internal investigations are critical for a variety of reasons.
 - Understanding what actually happened.
 - Identifying all individuals involved.
 - Identifying any laws broken and/or rules/policies violated.
 - Assessing the scope and depth of the situation.
 - Determining the potential liability to employer.
 - Getting to the root cause of the conduct.
 - Determining the proper remedial action to address the matter.
 - Satisfying due process requirements for public employees.

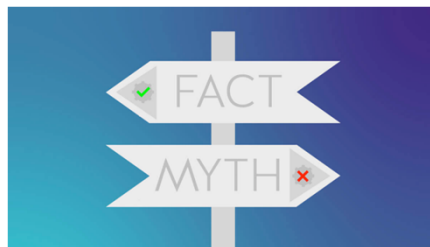
COMMON MISCONCEPTIONS

- If I have an eye-witness to the incident, I need not investigate.
- If it's not in writing, it's not a "complaint."
- If requested by the complainant to keep confidential, it is not a complaint.
- If the complaint is withdrawn by the complainant, it is not a complaint.
- If it is anonymous, it is not a complaint.



COMMON MISCONCEPTIONS (CONT.)

- If it is one person's word against another person's word, it is futile to investigate.
- If, after interviewing all the witnesses, I am sure of my findings, I need not interview the employee being investigated.
- Unless I have an admission, I cannot draw credible conclusions in my investigation, particularly if the majority of what I learned is hearsay.



COMMON MISCONCEPTIONS (CONT.)

- If I have only circumstantial evidence of misconduct, I cannot discipline.
- I must have proof beyond a reasonable doubt.
- If a third party (e.g., law enforcement) investigates the matter, I do not have to investigate.



INTAKE OF THE INITIAL COMPLAINT

- Step 1: Take the Matter Seriously
- Step 2: Addressing a Reluctant Complainant
- Step 3: Contact Human Resources
- Step 4: Get enough information to Investigate the Complaint
- Step 5: Plan for the Investigation
- Step 6: Respond Promptly
- Step 7: Documentation of the Complaint
- Step 8: Be Balanced in Your Approach to the Problem
- Step 9: Tell the Complainant What You Are Going to do Next

CONDUCTING THE INTERVIEW

- **Step 1: Plan for the Interviews**
 - Identify potential witnesses to interview.
 - Individual witness interviews.
 - Set up an investigation file.
 - Prepare each individual's interview.
 - Take advantage of opportunities that present themselves.
- **Step 2: Conduct the Interviews**
 - Interview all potential witnesses about what they have observed or been told.
- **Step 3: Ask the Right Questions**
 - Who, what, when, why, how?

CONDUCTING THE INTERVIEW (CONT.)

- Step 4: Identify Documents to be Reviewed
 - Work rules, policies, procedures.
 - Notes, emails, memos, calendars, diaries.
- Step 5: Determine Whether Law Enforcement or Other Authorities Should be Notified
- Step 6: Talk to the Alleged Offender
 - Explain a complaint has been filed against him/her.
 - Reinforce the employer takes matters seriously.
 - Explain the allegation and ask whether it is true.
 - Give the alleged offender the opportunity to provide his/her side of the story.

ATTORNEY AS INVESTIGATOR – THE REPORT

- Will the attorney act as fact-finder only?
- Will the report contain a findings and conclusions?
 - Limited to whether any employer rules/policies violated?
 - Will it include an opinion regarding whether any laws were broken?
 - Will it include potential liability to the employer?
- Will the report contain a recommendation?
 - Will the report recommend punishment?
 - Will the report recommend remedial action?
 - Will the report recommend changes to employer practices/conduct/etc.?

DECIDING ON THE CONTENTS OF THE REPORT

- Step 1: Decide whether you want to use/disclose the Report.
- Step 2: Decide whether the Report may be required to be disclosed.
- Step 3: Decide whether we want to preserve the contents of the Report from disclosure.
- Step 4: Make a decision on the Contents of the Report.



POTENTIAL ISSUES

- What happens if you use a Report containing legal advice and marked as Attorney/Client Privileged and then want to or need to make it public?
 - **Work product doctrine** limits disclosure to the document itself.
 - **Attorney-client privilege** may be subject to the “subject matter waiver doctrine.”
 - That means the employer could potentially waive all attorney-client privilege as it pertains to the entire investigation/matter.

CONDUCT TO AVOID DURING THE INVESTIGATION

- Dismiss the complaint because it is his word against her's.
- Take the matter lightly or make comments like “it happens all the time.”
- Assuming guilt.
- Discussing the complaint/investigation with people other than those who need to know.
- Call an all-employee meeting to discuss the complaint.
- Unduly prolong the investigation.

INFORMING THE COMPLAINANT OF THE OUTCOME

- Advise the Complainant of the findings/conclusions
- Advise the Complainant of the next steps to be taken
- Advise the Complainant to notify if any retaliation
- Advise the Complainant to notify if there are any further incidents.





EEOC AND ERD COMPLAINTS

STATE EMPLOYMENT DISCRIMINATION LAW

The Wisconsin Fair Employment Act

Employers are prevented from discriminating against any individual on the basis of age, race, creed, color, disability, marital status, sex (including pregnancy), sexual orientation, national origin, ancestry, arrest record, conviction record, membership in any component of the military forces of the United States or this state, and use or non-use of lawful products off the employer's premises during non-working hours.

FEDERAL EMPLOYMENT DISCRIMINATION LAWS

Title VII of the Civil Rights Act of 1964

Discrimination not allowed with respect to compensation, terms, conditions or privileges of employer because of race, color, religion, sex or national origin.

The Pregnancy Discrimination Act of 1978

Expands the definition of the term “sex” in Title VII to include “because of or on the basis of pregnancy, childbirth, or related medical conditions.”

FEDERAL EMPLOYMENT DISCRIMINATION LAWS

The Age Discrimination in Employment Act of 1967

Discrimination on the basis of an individual's age is prohibited (age 40 and over is protected class).

The Americans With Disabilities Act

Discrimination on the basis of a person's real or perceived disability is prohibited.

FEDERAL EMPLOYMENT DISCRIMINATION LAWS

The Uniformed Services Employment and Reemployment Rights Act

Protects employees from discrimination based on the employee's military status or use of military leave.

The Immigration Reform and Control Act of 1986

Protects employees from discrimination based on the employee's citizenship status.

EQUAL EMPLOYMENT OPPORTUNITY COMPLIANCE

- Mandatory notices posted.
- Retention of personnel records compliant with law.
- Written policies prohibiting discrimination.
- Written procedures for handling complaints of discrimination.
- Communicating policies to employees.
- Training of supervisors/managers.
- Specific person responsible for administering fair employment practices.





DISCRIMINATION AND HARASSMENT

COMMON AREAS OF EXPOSURE AND LIABILITY

- Recruiting, interviewing and hiring
- Compensation and benefits
- Promotions and job assignments
- Discharge, suspension or other form of disciplinary action
- Retaliation
- Other employment related actions

WHAT IS SEXUAL HARASSMENT?

Sexual harassment is defined as unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature which affects a term or condition of employment, including hiring, promotion, compensation, privileges of employment, discharge, and retaliatory action.

ILLEGAL HARASSMENT

- The courts have expanded sexual harassment to all areas protected from liability, such as age, race, disability, religion, pregnancy, etc.
- Employers must update their harassment policies to ensure that the policy prohibits harassment that is tied to any category protected from discrimination.

WHAT DOES HARASSMENT LOOK LIKE?

- Verbal abuse, epithets, and vulgar or derogatory language
- Display of offensive images or materials
- Mimicry
- Lewd or offensive gestures
- Telling offensive jokes to protected class members
- More than a few isolated incidents or casual comments (a pattern of conduct)
- Interferes with work or creates an offensive and hostile work environment

RETALIATION



Employers may not fire, demote, harass, or otherwise “retaliate” against any individual for:

- Filing a charge of discrimination
- Participating in a discrimination proceeding/hearing, or
 - Includes testifying at a hearing or assisting an investigation
- Otherwise opposing discrimination
 - Any employee action to protest discrimination

OTHER RETALIATION PROVISIONS

- Whistleblower Law (Wis. Stat. § 230.83)
 - No appointing authority, agent of an appointing authority or supervisor may initiate or administer, or threaten to initiate or administer, any retaliatory action against an employee.
 - This section does not apply to an employee who discloses information if the employee knows or anticipates that the disclosure is likely to result in the receipt of anything of value for the employee or for the employee's immediate family, unless the employee discloses information in pursuit of any award offered by any governmental unit for information to improve government administration or operation.
 - Nothing in this section restricts the right of an employer to take appropriate disciplinary action against an employee who knowingly makes an untrue statement or discloses information the disclosure of which is expressly prohibited by state or federal law, rule or regulation.
- An employee must first report abuse of authority in writing to either the employee's supervisor or the appropriate governmental unit in order to be protected under Wis. Stat. § 230.83.



ARE THERE ANY EXCEPTIONS?

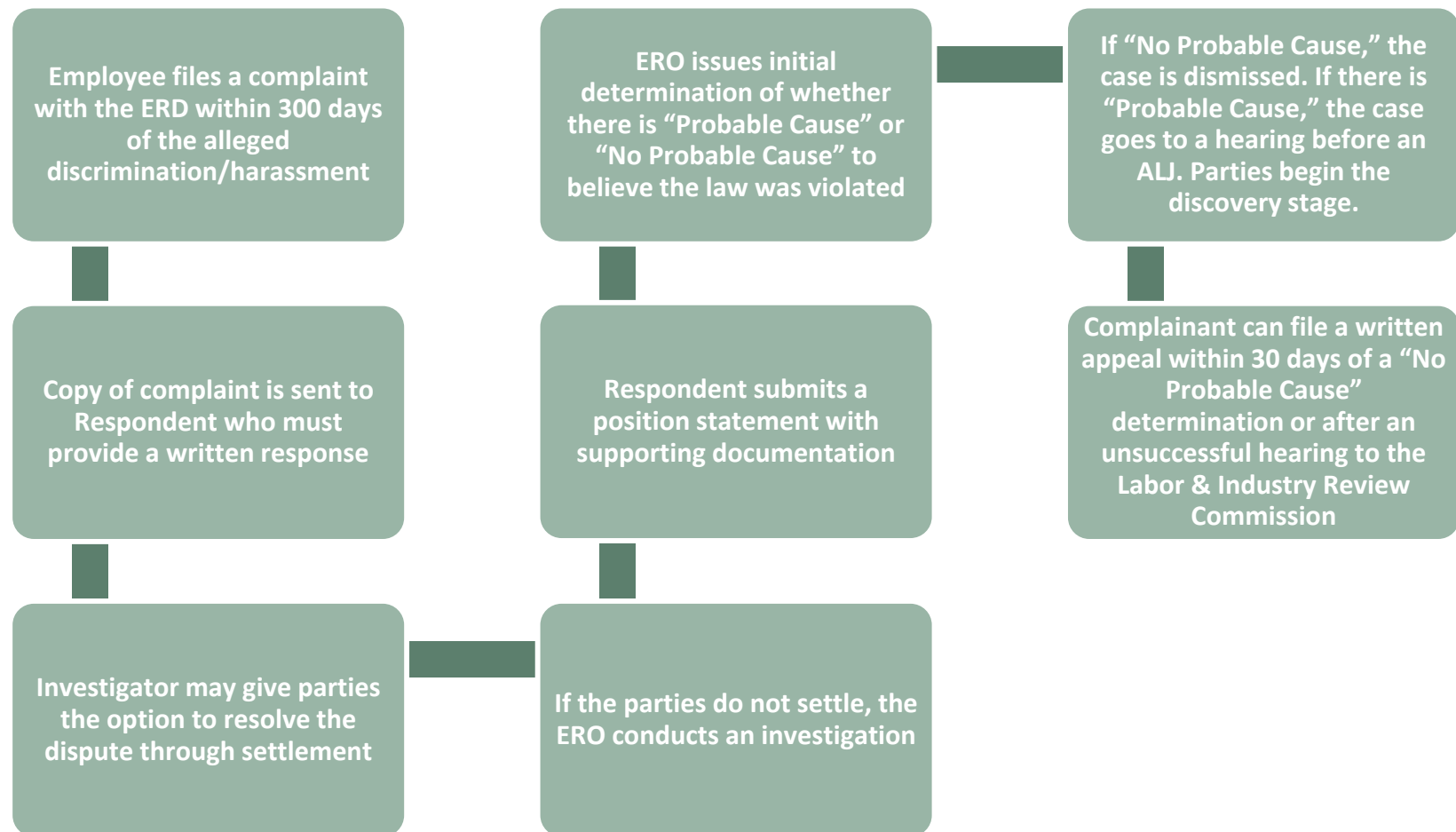
Yes, but they are limited and uncommon. You should consult your attorney if you are unsure whether any of the following exceptions would apply:

- Conviction Record – an employer may reject an applicant or fire an employee whose conviction is substantially related to the job.
- Age – in certain physically dangerous or hazardous jobs an employer may set maximum age requirements.
- Marital Status – an employer may prevent a person from directly supervising his or her spouse.
- Disability – in limited cases, employment of a person with a disability may present a significant risk of real harm to the health or safety of the individual or others.



THE INVESTIGATION PROCESS

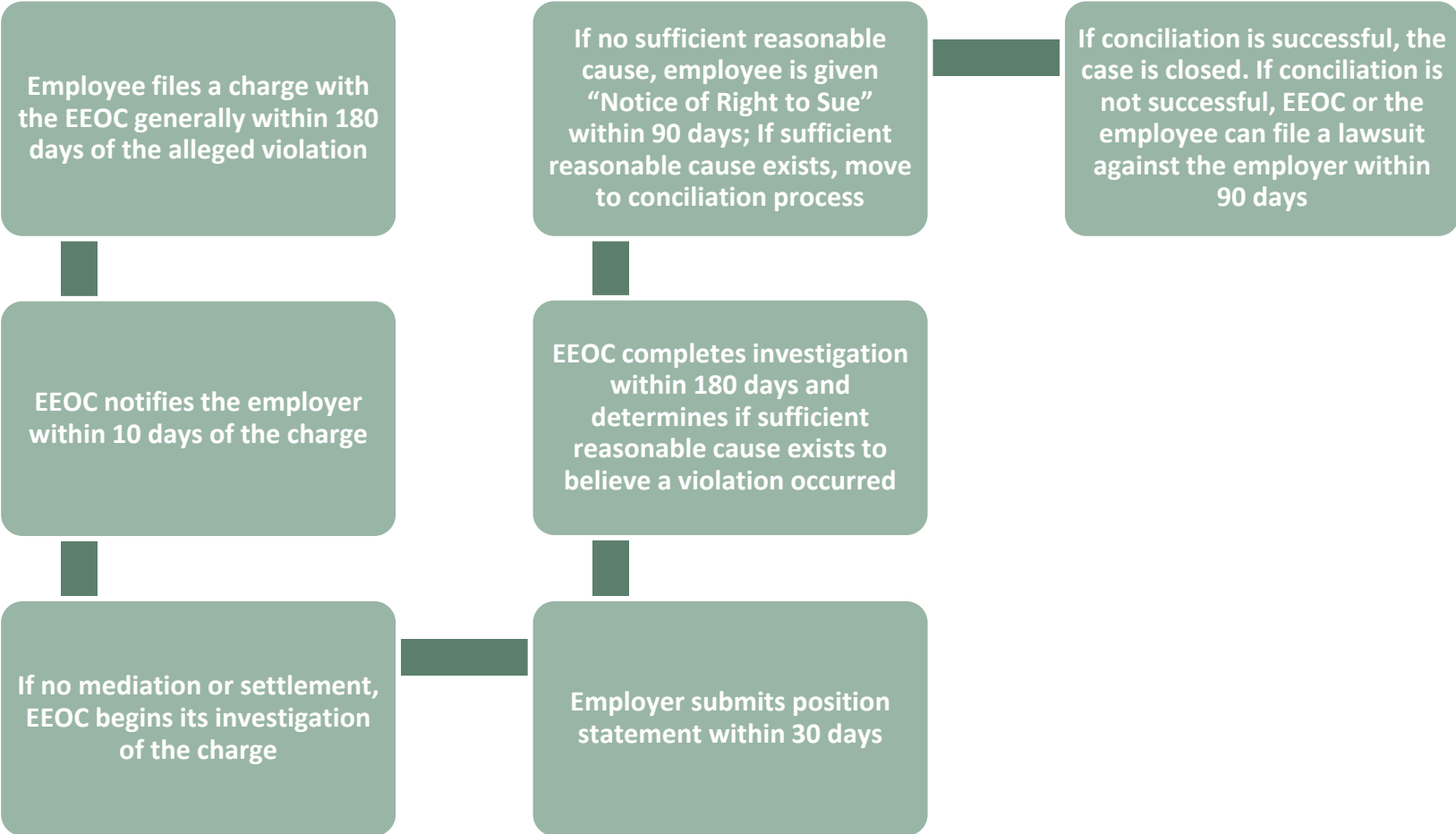
PROCESS OF ERD INVESTIGATIONS



TIPS FOR DISCOVERY STAGE

- Consider whether to prepare Requests for Admission, Interrogatories and Requests for Production
- Consider deposition of the complainant
 - Helpful if the complainant attempts to change “facts” later in the process
 - Helpful to determine proof the complainant may (or may not) have

PROCESS OF EEOC INVESTIGATIONS



TIPS AFTER NOTICE OF A CHARGE

- Notify your insurer and legal counsel right away
- Begin to identify relevant witnesses and supporting evidence
- Consider the pros and cons of mediation or settlement
- Timely make your request for any extension to submit your statement, gather evidence, or consider mediation

POSITION STATEMENTS

- What should be included?
 - Specific, factual responses to every allegation in the charge
 - Any other facts deemed relevant to the EEOC's investigation
 - Articulate clearly the respondent's version of the facts
 - Identify specific documents and witnesses that support the respondent's position
 - Submit all documentary evidence that is responsive to the allegations in the charge
 - The statement should be signed by an officer, agent or representative of Respondent who is authorized to speak officially on its behalf

POSITION STATEMENTS (cont.)

- Tips for preparing the position statement
 - Address each act alleged in the charge and your position regarding it
 - Submit documents that support your version of events
 - Include a description of your business
 - Provide any practices, policies or procedures applicable to the allegations in the charge
 - Identify other individuals who have been similarly affected by the practices, policies or procedures
 - Identify officials who took action relating to the allegations in the charge

POSITION STATEMENTS (cont.)

- Tips for preparing the position statement
 - Provide specific dates, times, locations and actions
 - Submit reports of internal investigations or grievance hearings related to the allegations
 - If the matter can be resolved, indicate your proposed resolution in the statement
 - Make your statement clear, concise, complete and responsive
 - Do not simply deny the allegations without providing your version of events or supporting information
 - If you are providing supporting documentation that is confidential, separate that information from the position statement and label it as “sensitive” or “confidential”

POSITION STATEMENTS (cont.)

- What is confidential information?
 - Sensitive medical information, excluding the Charging Party's medical information
 - Social Security Numbers
 - Confidential commercial or financial information
 - Trade secrets information
 - Non-relevant personally identifiable information of witnesses, comparators or third parties
 - Any reference to charges filed against the Respondent by other charging parties

POSITION STATEMENTS (cont.)

- Provide your position statement within the stated deadline
 - You generally have **30 days** to provide your response and supporting documentation to the EEOC.
 - If you need additional time to prepare your response, at the **earliest possible time** in advance of the due date, you must make a written request for an extension.
 - Specify in your request why the extension is necessary and the amount of additional time needed to complete the response.
 - It must be clear that you are working with due diligence to supply all of the information necessary for the EEOC to investigate the charges. This may include a partial submission of information related to the allegations in the charge.
 - If you do not provide a position statement, the EEOC may make a determination on the merits of the charge based on the information available to it or subpoena specific information related to the allegations in the charge.
 - Upload your statement and supporting documentation into the Respondent Portal.



ALTERNATIVE RESOLUTIONS

ERD MEDIATION AND SETTLEMENT

- Consider why mediation may be a good opportunity
 - Resolve the complaint easier, quicker, and at a lesser cost
 - ALJ/Mediator can try to preserve a working relationship between the parties
 - Allows the parties to determine how they want to resolve the dispute and possibly agree to different remedies
 - Good success rates
 - Agreements can be written to preserve confidentiality and protect the privacy of each party

ERD MEDIATION AND SETTLEMENT (cont.)

- When is mediation requested?
 - After a complaint is made, the ERD will send a letter to the respondent seeking a written response. A respondent does not need to file a written response if they are interested in mediation.
 - When the respondent expresses an interest in mediation, the ERD will contact the other party to see if mediation is desired.
 - If both parties agree to mediation, an ALJ/Mediator is assigned to the case to help the parties reach a voluntary and mutually agreeable settlement.
 - Mediation is scheduled by the ALJ/Mediator either in-person or via telephone if agreed to by the parties.

ERD MEDIATION AND SETTLEMENT (cont.)

- How is mediation conducted?
 - In mediation, the parties determine how they want to resolve the dispute and it is ultimately their decision whether or not to settle.
 - If an agreement is reached, the parties may draft a settlement agreement that includes, among other provisions:
 - The remedy for any discrimination
 - A non-admission of liability provision and release of claims
 - A confidentiality or non-disclosure provision
 - Once an agreement is reached, the ALJ/Mediator will ask the complainant to sign a form to withdraw the complaint. The form is sent to the Equal Rights Officer (ERO) who was originally going to investigate the case. The ERO will issue an order dismissing the complaint.

ERD MEDIATION AND SETTLEMENT (cont.)

- What if the parties could not reach an agreement?
 - The ALJ/Mediator will refer the case back to the ERO to investigate the complaint.
 - The respondent will have to answer to the allegations in the complaint by submitting a position statement.
 - The ERO will determine whether there is or is not probable cause to proceed to a hearing on the merits.
 - If there is probable cause or an Initial Determination of No Probable Cause is appealed, the case will proceed to a hearing.
 - Mediation can be reinitiated at a later point in the investigation process if the parties want to settle.

ERD MEDIATION AND SETTLEMENT TIPS

- Consider the pros and cons of the mediation process if it is offered
- Retaining an attorney to assist in the mediation process is not required but is generally helpful
- Consider the possible remedies if a complaint did proceed to a hearing and the strengths and weaknesses of your case
- Be respectful towards the ALJ/Mediator and the other parties involved in the mediation
- Understand that reaching a settlement can take time and may require some patience
- Consider settlement terms that may satisfy you and how flexible you may be to the other parties' requests

EEOC RESOLUTION ALTERNATIVES

- Mediation
 - Advantages
 - Free if eligible for the program
 - Average processing time is 84 days
 - Program is completely voluntary
 - If mediation is successful, the charge filed with EEOC is closed and there is no investigation
 - It is a confidential and informal process
 - Avoids lengthy, costly, and unnecessary litigation
 - Help parties repair an ongoing relationship
 - Settlement agreements secured during mediation are enforceable but do not represent admissions by the employer of any violation of laws enforced by the EEOC

EEOC RESOLUTION ALTERNATIVES

- Settlement
 - Advantages
 - Charges may be settled at any time during the investigation of a complaint
 - Settling early may save time, effort, and money associated with investigations
 - It is an informal process to reach an agreement that is satisfactory to all parties
 - There is no admission of liability
 - The charge will be dismissed if all the parties, including the EEOC, reach a voluntary agreement
 - Settlement agreements are enforceable
 - Avoids lengthy, costly, and unnecessary litigation

EEOC RESOLUTION ALTERNATIVES

- Conciliation – the parties are informed that the investigation established a “reasonable cause” to believe that discrimination occurred. The investigator works with the parties to develop an appropriate remedy before the EEOC considers the matter for litigation.
 - Advantages
 - This process is voluntary
 - It is a negotiation process so counter-offers may be presented
 - Offers the parties a final opportunity to resolve the charge informally (occurring after an investigation but before a litigation decision is reached)
 - Removes the uncertainty, cost and animosity inherent in litigation



REMEDIES FOR DISCRIMINATION

TYPES OF DAMAGES

The following damages may be awarded in cases involving discrimination based on a protected ground.

– **Compensatory damages**

- Paid to victims for out-of-pocket expenses caused by the discrimination
- To compensate for any emotional harm suffered as a result of the discrimination

– **Punitive damages**

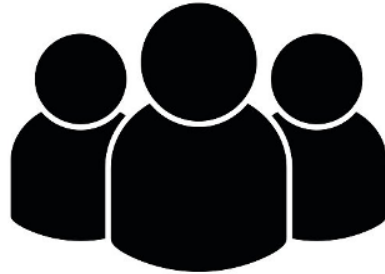
- Awarded to punish an employer for an especially malicious or reckless act of discrimination

TYPES OF DAMAGES (cont.)

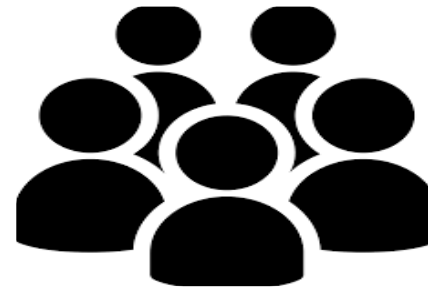
When there is a case involving age or sex discrimination, victims may be entitled to **liquidated damages**.

- Awarded to punish an employer for an especially malicious or reckless act of discrimination
- Amount awarded may be equal to the amount of back pay awarded to the victim

DAMAGES ARE LIMITED



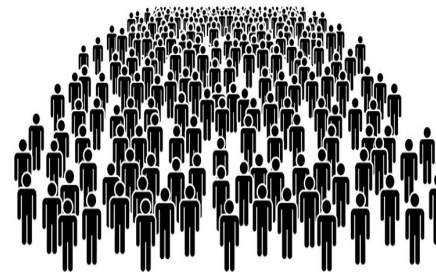
15-100 employees
limit is \$50,000



101-200 employees
limit is \$100,000



201-500 employees,
limit is \$200,000



500+ employees,
limit is \$300,000

OTHER REMEDIES

To restore a victim of discrimination to the same position that he or she would have been if the discrimination did not occur, these remedies may be required/recovered:

- A victim may be able to recover attorney's fees, expert witness fees, and other court costs
- Placement in a job or promotion that was denied because of discrimination
- Award of back pay and benefits that were withheld



QUESTIONS?
COMMENTS?
CONCERNS?

THANK YOU!

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