Framing EEO Complaints Properly for Better Acceptance and Dismissal Decisions
Outline

• Framing the Claim: Introduction and Core Elements
• Framing the Disparate Treatment Claim
• Fragmentation
  – Framing a Pattern and Practice/Continuing Violation Claim
  – Framing a Hostile Work Environment Claim
• Timely Discrete Acts vs. Background Information
• Framing Claims with Multiple Responsible Management Officials and/or Multiple Theories of Discrimination
• Framing Disability Accommodation Claims and Equal Pay Act Claims
• Framing Per Se Violations
• Acceptance and Dismissal Best Practices
Elements of an EEO Claim

• There are two components to a claim:
  1. A policy or practice being challenged; and
  2. A basis or bases (race, color, religion, sex, national origin, age, disability, retaliation, or genetic information).

• It is important, when framing claims, to distinguish the claim from evidence that supports a claim.
Example One

- Ralph, a White employee, told the EEO counselor that his supervisor repeatedly denied Ralph’s requests for annual leave and required him to use leave without pay (LWOP) because he was tardy. However, his supervisor did not treat the unit’s Black coworkers the same way. Specifically coworker Jaime (Black) was granted annual leave three times in the last six months when he was tardy, and coworker Heather (Black) was granted annual leave eight times in the last three months when she was tardy.
- Frame the claim. What additional information do you need?
Example One – Draft Framing of the Claim

• Whether Ralph was discriminated against based on ______ (White) when his supervisor denied his requests for annual leave and required him to use leave without pay (LWOP) when he was tardy and permitted others who are not White to use annual leave when tardy.
Best Practices - Framing the Claim

• In addition to the claim(s) – “what happened” and basis(es) of discrimination “why” – a well-framed complaint for investigation will also:
  ➢ Identify the responsible management official(s) and their titles (who);
  ➢ Set forth when and where the alleged discrimination occurred;
  ➢ Make clear what theory or theories of discrimination is/are being alleged; and
  ➢ Provide any supporting information necessary to clarify the claim.
Best Practices - Framing the Claim

• Whether you were discriminated against based on race (White) when, between Jan. 1, 2019, and the present, John Smith, Branch Chief, Procurements, Office of Contract Management, Region II, denied your requests for annual leave and required you to use leave without pay (LWOP). You allege that Mr. Smith permitted your Black coworkers to use annual leave when tardy.
Fragmentation

- Fragmentation is the breaking up of a complainant’s legal claim into separate factual claims or incidents. A complainant’s ability to present an integrated and coherent claim of employment discrimination can thus be compromised.
- Fragmentation often occurs at the point where the agency identifies and defines the complainant’s claim, most commonly during the counseling and investigative stages.
- Fragmentation often results from a failure to distinguish between the claim the complainant is raising and the evidence (factual information) being offered in support of that claim.
Case Study # 1


  - Agency improperly dismissed claim one as untimely, and claims two and three as failing to state a claim.
  
  - Agency failed to recognize and frame as ongoing harassment.
  
  - The EEOC remanded the complaint to the Agency and reframed it as single hostile work environment claim.
Pattern and/or Practice Claims

• Terms appear to be used synonymously.
• Two types of pattern and practice claims:
  ➢ Claims that raise class-wide allegations of discrimination.
    ▪ **Best practice:** Counselors should look for evidence that a complainant purports to represent a class or group of employees (e.g., females GS-5 to GS-13 being denied promotions (glass ceiling)). The term pattern and/or practice can be a sign of a possible class complaint.
  ➢ Claims where a complainant alleges a pattern or practice of harassment or disparate treatment (which are often improperly fragmented).
Case Study # 2

• *Breanna S. v. Dep’t of Health and Human Services*, 118 LRP 7537, EEOC Appeal No. 0120180601 (Feb. 16, 2018).

• Agency improperly characterized and dismissed claim two as a singular event, thus ignoring the complainant’s allegation of an ongoing pattern of discriminatory harassment.

• Agency should not have singled out and dismissed it as untimely when one of the allegations of harassment fell within the 45-day time period.
Case Study # 2 Bonus Practice Tip

• Claim one was properly dismissed and affirmed on appeal.

  ➢ Agency properly dismissed claim one, noting that EEO complaints cannot be used to collaterally attack non-EEO processes (in this case the union grievance process).
  ➢ As a collateral attack, it does not fall within the ambit of the complainant’s hostile work environment claim.

• **Lesson:** Some allegations can properly be excluded from a hostile work environment claim.
Framing Claims with Multiple Theories and/or Parties

• Look closely at the language being used by a complainant.
• Look at all relevant documents (formal complaint, counselor report, emails, and documents submitted by Complainant).
  ➢ Is s/he using language implying hostility by one or more individuals (e.g., harassment)?
  ➢ Is s/he also using language suggesting that s/he is also being singled out and/or treated differently than others (e.g., disparate treatment)?
  ➢ Is s/he also raising other theories (e.g., failure to provide a reasonable accommodation or denial of equal pay)?
Case Study # 3

  - Agency improperly framed claim as two discrete incidents and dismissed for failure to state a claim.
  - The same day the dismissal was issued, the complainant submitted amendment listing 14 incidents of disparate treatment and harassment.
  - The agency informed the complainant it had already dismissed the complaint.
  - The Commission reversed and remanded, framing the claim as the complainant’s attorney had set forth in the amendment.
- Bonus case: **Gabriele G. v. National Archives and Record Administration**, 119 LRP 8034, EEOC Appeal No. 2019000612 (Feb. 6, 2019).
Case Study # 3 Lessons

• A very good example of setting forth the incidents chronologically and also articulating multiple theories (disparate treatment and harassment) in the acceptance of the complaint.

• Note the specificity provided by listing out and categorizing the types of incidents.

• Why is this specificity so important?
Best Practices in Framing Hostile Work Environment Claims for Investigation

• Problem: What if a complainant’s formal complaint or counselor report is vague as to the number of incidents or the dates/number of times when an incident occurred?
  
  ➢ Solution #1: Seek additional, clarifying information from the complainant.
  
  ➢ Solution #2: Use the term “among other things” in the text of the acceptance letter framing the claim.
  
  ➢ Solution #3: Use open-ended terms when an incident date cannot be pinpointed.
    
    ▪ Examples include: “on unspecified dates,” “on or around,” “approximately,” “between March and July, 2018…,” “from January 2018 to the present…,” and “on numerous (or several) occasions between….”
Best Practices in Framing Hostile Work Environment Claims for Investigation, Cont.

• Solutions 2 and 3 example: Whether you were subjected to disparate treatment and/or a hostile work environment on the basis of your gender (female) and age (DOB: May 1957) by Stan Smith, Director, Office of National Complaint Processing, Office of Inquiries (OI), Dep’t of the Gov’t, from January 2018 to the present, when, among other things:

  1. Between January and June of 2018, Mr. Smith criticized your work on several occasions during branch and division meetings in front of your coworkers. Mr. Smith would cut you off when presenting alternative viewpoints and constantly talk over you.

  2. On or around Feb. 25, 2018, Mr. Smith removed the more complex case assignments and reassigned them to Harry Park, a younger male in your workgroup.

  3. On an unspecified date sometime in the summer of 2018, you overheard Mr. Smith making a statement to Ms. Emma Jones, Director, OI, that you should be thinking about retirement soon.
Best Practices in Framing Hostile Work Environment Claims for Investigation, Cont.

• Question: On the previous slide, claim two was a discrete act. Was it timely? How do you account for untimely discrete acts when framing a hostile work environment claim?


• Example: Any discrete acts that occurred more than 45 days before you first contacted an EEO counselor will only be considered as part of the harassment claim. See *National Railroad Passenger Corp. v. Morgan*, 102 LRP 13910, 536 U.S. 101, 113 (2002) (holding that untimely discrete acts may be used as background evidence in support of a timely hostile work environment claim).
Framing an Equal Pay Act Claim

- Best practice tip: Any allegation involving compensation will likely implicate the Lilly Ledbetter Fair Pay Act of 2009.

- Counselor contact is usually timely in such cases, as each paycheck received starts the 45-day clock over again.


- Case Study # 5: *Morna H. v. Dep’t of Transportation*, 118 LRP 40053, EEOC Appeal No. 0120181745 (Sept. 13, 2018). Multiple theories (equal pay and hostile work environment).
Framing a Denial of Reasonable Accommodation Claim

• **Best practice tip:**
• Gather relevant documents during EEO counseling that will later assist with framing the claim (and can also be informative when considering alternative dispute resolution). Examples include:
  - Complainant’s written request for reasonable accommodation (and any information as to when an oral request was first made).
  - Agency’s written response granting or denying the accommodation.
  - Any request for reconsideration submitted (if agency policy provides for such).
  - Agency’s written response granting or denying the accommodation.
Framing a Denial of Reasonable Accommodation Claim, Cont.

• Example:

  Whether you were discriminated against on the basis of disability (physical) when on March 6, 2019, Susan Smith, Disability Program Manager, Office of Human Resources (OHR), Dep’t of the Exterior, denied your request for reasonable accommodation dated Feb. 19, 2019, for full-time telework.

• It is not necessary to list the actual physical or mental impairment (the diagnosis) in the acceptance letter.
Framing a Denial of Reasonable Accommodation Claim, Cont.

• Best practice tip: Does the complainant allege other theories of discrimination in combination with a denial of reasonable accommodation theory?
  
  ➢ The EEO counselor should explore all arguments being raised by the complainant to ensure that the claim is properly framed.
  
  ➢ The specialist charged with drafting an acceptance/dismissal letter should carefully review paperwork and look for any indication that the complainant is alleging more than simply a denial of reasonable accommodation theory.
Framing a Denial of Reasonable Accommodation Claim, Cont.

- Case Study # 6 - *Lyda F. v. Dep’t of Veterans Affairs*, 118 LRP 50147, EEOC Appeal No. 0120172109 (Nov. 30, 2018).

- The complainant alleged three theories:
  - Disparate treatment;
  - Hostile work environment; and
  - Denial of reasonable accommodation.

- Final agency decision properly analyzed each of the complainant’s theories.
Per Se Violations

- Under Title VII, per se violations can include anything reasonably likely to deter an employee from engaging in protected EEO activity.
- Per se reprisal violations do not require intent.
- However, to obtain damages, the action itself must be intentional.
- Case Study #7 - *Ludie M. v. U.S. Postal Serv.*, EEOC Appeal No. 0120170459 (May 9, 2019).
  - AJ found per-se reprisal based on evidence developed at hearing that manager’s letter to Complainant dissuaded individual from engaging in EEO activity.
  - AJ awarded damages for intentional act, but no attorney fees, and EEOC affirmed.
Per Se Violations, Cont.

  - Inadvertent disclosure of EEO activity still constitutes per se reprisal.
  - Reprisal under the Age Discrimination in Employment Act (ADEA) means that the complainant cannot recover compensatory damages or attorney’s fees.
Per Se Violations, Cont.

- Unlawful disclosure of medical information constitutes a per se violation of the Rehabilitation Act.
- Case Study # 8: Becki P. v. Dep’t of Transportation, 118 LRP 48504, EEOC Appeal No. 0720180004 (Nov. 15, 2018).
- Best practice tip: If you identify any allegation that medical information or EEO activity was improperly disclosed to others, it should be framed as a separate claim.
- A per se violation could also be alleged as part of a hostile work environment claim. If so, explain in the acceptance letter that this allegation is a separate allegation so the investigator develops a record as to what occurred and, more importantly, it is properly identified so a final agency decision can independently address the claim.
Acceptance/Dismissal 10 Best Practice Tips

1. Ensure that record is fully developed and that documents are provided to EEOC on appeal and/or attached to the acceptance/dismissal letter.

2. Work closely with Complainant and EEO Counselors to properly frame a claim and obtain critical relevant information (what, when, and why); and to ensure that Counselor’s reports are thorough.

3. If the formal EEO Complaint is unclear or is missing relevant information, the EEO Office should follow up with Complainant and/or his/her representative to obtain relevant information.
Acceptance/Dismissal 10 Best Practice Tips, Cont.

4. Preserve records of all correspondence and use appropriate tracking mechanisms for email or mail correspondence. Include such records in the complaint file.

5. Ensure that you apply recent EEOC precedent and proper legal standards when dismissing a complaint in part or whole.

6. Establish mechanisms for legal sufficiency review of acceptance/dismissal letters by qualified attorneys.
7. Write in plain English, for everyone to understand; but also include appropriate citations to the regulations, MD-110 and EEOC decisions to provide the legal authority in order to support the dismissal.

8. Acceptance/Dismissal letters should not analyze the elements of a claim or offer reasons why actions occurred, as such discussions improperly focus on the merits of the claim(s) at issue.

9. Claims by contractors require careful treatment, consideration and development of the record in order to properly analyze such an EEO complaint.
10. Recognize, based on viewing EEOC decisions, that the EEOC will generally err on the side of accepting and investigating if there is not a clear, justified and well-documented reason to justify the dismissal of an EEO complaint.

11. Recognize that the threshold for stating a claim of reprisal is more liberal.

12. Only claims that truly comprise a separate complaint about another process (e.g., workers compensation) can be properly dismissed as a collateral attack.
13. When dismissing for untimeliness the burden is on the Agency, and appropriate documentation must be in the record to support such a dismissal.

14. In calculating the 45-day time period, consideration must be given to when Complainant developed a reasonable suspicion.

15. Waiver, equitable tolling or estoppel, while unusual, can apply in certain situations. Be cognizant of these possibilities anytime confusion exists about time frames and/or medical issues impact Complainant’s ability to proceed.
Conclusion

Questions?

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