

**TRAINING FOR NORTH DAKOTA STATE UNIVERSITY**  
**DISCRIMINATION and HARASSMENT IN THE WORKPLACE**  
**TRAINING**  
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## **DISCRIMINATION IN THE WORK PLACE**

Virtually every employer in our modern society recognizes that discrimination in the work place is illegal. Most employers also understand that illegal discrimination in the employment context means according different and less favorable treatment to a person or persons because of a certain characteristic, trait or condition that is deemed "protected" by the law. What is more difficult, however, is keeping up with the ever-changing theories and interpretations in this area of law.

The following materials are intended to provide a basic "check list" of areas of concern for employers with respect to employment discrimination. Knowledge and awareness of these potential problem areas is the first step toward implementation of employment practices designed to limit liability for claims of unlawful discrimination. As Shakespeare observed, an ounce of prevention is worth a pound of cure. Perhaps more importantly, Shakespeare also recognized that what is done cannot be undone - at least not without expensive and time-consuming litigation.

### **I. GENERAL AREAS OF DISCRIMINATION - Protected Classifications**

Federal and state laws prohibit discrimination in the work place in connection with hiring, discharge, and virtually all other terms and conditions of employment, including promotion, discipline, compensation, work assignments and fringe benefits.

#### **A. FEDERAL LAW**

Federal law, encompassed in Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act ("ADEA"), the Rehabilitation Act ("Rehab"), the Americans with Disabilities Act of 1990 ("ADA"), the Equal Pay Act ("EPA"), and the Civil Rights Act of 1991, prohibits discrimination in the following areas:

1. **Race or Color (Title VII).**

These areas generally include discrimination against Blacks, American Indians, Asians, etc.

2. **National Origin (Title VII).**

Includes discrimination against Hispanics, Poles, Italians and any other discrimination based upon the person's nationality or heritage.

3. **Religion or Creed (Title VII).**

Includes discrimination against Jews, Catholics, Moslems, Jehovah's Witnesses, Seventh Day Adventists, etc.

4. Sex (Title VII).

This includes males as well as females. Sex discrimination includes related areas of pregnancy discrimination, sexual harassment, equal pay and comparable worth.

5. Age (ADEA).

This includes discrimination against anybody at least 40 years of age; an upper limit no longer exists.

6. Disability (ADA).

This includes discrimination against individuals with both physical and mental disabilities. The Rehabilitation Act prohibits discrimination against handicapped persons by government contractors and organizations receiving federal funds.

B. STATE LAW

In addition to the foregoing, the North Dakota Human Rights Act (N.D.C.C. § 14-02.4-03, prohibits discrimination in the following additional areas:

1. Race.

2. Color.

3. Religion.

4. Gender.

The North Dakota Human Rights Act prohibits discrimination with regard to pregnancy, childbirth, and disabilities related to pregnancy or childbirth.

5. National Origin.

The North Dakota Human Rights Act prohibits discrimination with regard to the place of birth of an individual or any of the individual's lineal ancestors.

6. Age.

The North Dakota Human Rights Act prohibits discrimination with regard to an individual at least the age of forty.

7. Mental or Physical Disability.

The North Dakota Human Rights Act prohibits discrimination with regard to a physical or mental impairment that substantially limits one or more major life activities, a record of this impairment, or being regarded as having this impairment.

8. Marital Status.

9. Status with Regard to Public Assistance.

The North Dakota Human Rights Act prohibits discrimination with regard to being a recipient of federal, state, or local assistance, including medical assistance, or of being a tenant receiving federal, state, or local subsidies, including rental assistance or rent supplements.

10. Participation in Lawful Activity Off the Employer's Premises During Non-Working Hours Which is Not in Direct Conflict with the Essential Business-Related Interests of the Employer.

C. NDSU

NDSU has a policy prohibiting discrimination in employment, including harassment. This policy mirrors those of the state law, but also prohibits discrimination on the basis of sexual or affectional orientation.

D. REPRISAL.

All of the foregoing laws prohibit an employer from retaliating against individuals for initiating, assisting or otherwise participating in an action to enforce any of the statutes, or for objecting to a practice made illegal under these laws.

## II. HARASSMENT

A. Introduction

For all significant legal purposes, harassment is simply another form of discrimination and therefore, carries the same penalties and is subject to the same enforcement authority. Because of its intense moral and personal overtones, as well as legal implications, harassment in the workplace has some extremely far-reaching ramifications.

While most employers are familiar with the basics of harassment, there have been some developments that have occurred over the past several years that may not be as familiar. The following is a review of the definition of harassment under both federal and state law, and an overview of the developments that have taken place over the past several years.

B. Harassment Cause of Action

1. Definitions.

a. Equal Employment Opportunity Commission

Although sexual harassment is not referred to directly in Title VII, it has been defined by the Equal Employment Opportunity Commission (EEOC) in its regulations as:

- i. Unwelcome sexual advances, requests for sexual favors and other verbal or physical conduct of a sexual nature where:
  - (a) Submission to the conduct is made a term or condition of employment, or
  - (b) Submission to or rejection of such conduct is used as a basis for employment decisions, or
  - (c) The conduct has a purpose or effect of unreasonably interfering with an individual's work performance, or
  - (d) The conduct has a purpose or effect of creating an intimidating, hostile or offensive working environment.

See 29 CFR §1604.11.

b. North Dakota Statutes. North Dakota Century Code, Ch. 14-02.4, Sec. 14-02.4-02 defines discriminatory practice as follows:

"Discriminatory practice" means an act or attempted act which because of race, color, religion, sex, national origin, age, physical or mental disability, status with regard to marriage or public assistance, or participation in lawful activity off the employer's premises during nonworking hours results in the unequal treatment or separation or segregation of any persons, or denies, prevents, limits, or otherwise adversely affects, or if accomplished would deny, prevent, limit, or otherwise adversely affect, the benefit of

enjoyment by any person of employment, labor union membership, public accommodations, public services, or credit transactions. The term "discriminate" includes segregate or separate and for purposes of discrimination based on sex, it includes sexual harassment. Sexual harassment includes unwelcome sexual advances, requests for sexual favors, sexually motivated physical conduct or other verbal or physical conduct or communication of a sexual nature when:

- a. Submission to that conduct or communication is made a term or condition, either explicitly or implicitly, of obtaining employment, public accommodations or public services, or education;
  - b. Submission to or rejection of that conduct or communication by an individual is used as a factor in decisions affecting that individual's employment, public accommodations or public services, education, or housing; or
  - c. That conduct or communication has the purpose or effect of substantially interfering with an individual's employment, public accommodations, public services, or educational environment; and in the case of employment, the employer is responsible for its acts and those of its supervisory employees if it knows or should know of the existence of the harassment and fails to take timely and appropriate action.
- c. North Dakota State University's Anti-Harassment Policy.

North Dakota State University is committed to providing a climate which fosters respect for students, staff and faculty as well as others who participate in programs and activities at the University. As part of that commitment, NDSU prohibits harassment based on gender, race, color, religion, national origin, age, disability, sexual orientation, or protected activity (such as reporting alleged harassment or providing information related to a grievance). This policy is in compliance with federal civil rights laws and agency regulations and guidance implementing these laws.

Harassment (based on an individual's membership in one or more of the groups identified above) is defined, for purposes of this policy, as unwelcome verbal or physical behavior which has the intent or effect of unreasonably interfering with the individual's employment or academic endeavors or creating a hostile, intimidating or offensive environment. Harassment may include (but is not limited to) jokes, derogatory comments, pictures, and/or direct physical advances. (Section 163.)

- C. Coverage Extends to Same Sex Harassment. In March 1998 the Supreme Court settled a split among the circuits and held that an employer can be held liable for sexual harassment under Title VII when an employee is harassed by co-workers and/or supervisors of the same sex, *regardless of the parties' sexual orientation*. The Supreme Court stated that Title VII's prohibition of discrimination "because of . . . sex" protects men as well as women and does not specify the gender of the harasser or victim. As in other cases of sexual harassment, an employee must prove that the conduct at issue is not merely tinged with offensive sexual connotations, such as horseplay and flirtation, but actually constitutes "discrimina[tion] . . . because of . . . sex." *Oncale v. Sundowner Offshore Servs., Inc.*, 118 S. Ct. 998 (1998).
- D. Title VII Is Not Intended to Be a "General Civility Code" The Supreme Court clarified that Title VII should not be considered a "general civility code for the work place." The Court noted:
1. Title VII does not deal with genuine but innocuous ways men and women routinely interact with members of the same, and the opposite, sex.
  2. The prohibition of harassment forbids only behavior so objectively offensive as to alter the "conditions" of the victim's employment.
  3. The severity of the conduct should be judged from the standpoint of a reasonable person in the employee's position, considering all of the circumstances.
  4. To distinguish from "simple teasing or roughhousing" among members of the same sex, lower courts must apply "common sense" and "an appropriate sensitivity to the social context" by when contemplating same-sex sexual harassment cases in the future.
- E. Employer Liability: Changing Standards. An employer can be liable to a victimized employee for the sexually harassing conduct of one of its supervisors; the "new" standards recently established by the Supreme Court, discussed below, directly alter the circumstances under which an employer may be found liable for such conduct.

F. Comparison of Previous and Current Sexual Harassment Standards.

1. "Quid Pro Quo" Sexual Harassment. *Quid pro quo* harassment is conduct that forces a choice between complying with sexual demands or suffering the loss of a job or benefit of employment (e.g. promotion, wage increase, etc.). *Quid pro quo* harassment may take a number of forms. The harasser may threaten to postpone a benefit, change job conditions or take away benefits if the victim does not comply with his or her demands, or the harasser may promise a benefit in return for sexual consideration. The conduct does not need to be explicit. If the harasser implicitly promises benefits in exchange for sexual favors--or detriments in response to a negative response--the employee may be able to establish *quid pro quo* harassment. Examples of *quid pro quo* harassment include: requesting an employee to spend time socially with the supervisor accompanied by a reference to upcoming performance reviews, salary recommendations, or promotion determinations, or commenting that an employee will be treated better if she is "friendlier" or "nicer" to the supervisor.

a. Previous Standards. *Prior to* the 1998 Supreme Court Decisions, to establish a claim of *quid pro quo* harassment, a plaintiff had to prove the following elements:

- i. The employee belongs to a protected group;
- ii. The employee was subject to unwelcome sexual harassment;
- iii. The harassment complained of was based upon sex;
- iv. The employee's reaction to the alleged harassment *affected tangible aspects* of the employee's compensation, terms, conditions, or privileges of employment. The acceptance or rejection of the harassment by an employee must be an express or implied condition to the receipt of a job benefit or the cause of a tangible job detriment.

*Johnson v. Ramsey County*, 424 N.W.2d 800, 808 (Minn. Ct. App. 1988).

b. Employer Liability under Previous Standards. Under federal law, employers are held strictly liable for *quid pro quo* harassment by a supervisor. This means an employer will be liable for the wrongful acts of a supervisor or manager even if the employer did not know of the conduct. Prior to the 1998 Supreme Court session, in order to find liability for *quid pro quo* harassment, the plaintiff had to *demonstrate some tangible job detriment*. For example, one of the

grounds for dismissing Paula Jones' lawsuit against President Clinton last year was that she had failed to demonstrate that she suffered any tangible job detriment.

- c. Employer Liability — Current Standards. However, the Supreme Court recently held that an employee who refuses the unwelcome and threatening sexual advances of a supervisor, yet ***suffers no adverse, tangible job consequences, may still recover against the employer*** without showing the employer is negligent or otherwise at fault for the supervisor's actions, but the employer may interpose an affirmative defense. (In essence, a "*quid pro quo*" claim without any tangible consequences is simply treated as a "hostile work environment" claim, discussed below, for purposes of establishing employer liability.) *Burlington Indus., Inc. v. Ellerth*, 118 S. Ct. 2257 (1998).

2. Hostile Work Environment Sexual Harassment. This form of harassment involves no threat to a concrete job benefit, but may include verbal abuse or offensive jokes with sufficient severity and persistence to affect seriously the well-being of employees. In *Meritor Savings Bank v. Vinson*, 106 S. Ct. 2399 (1986), the United States Supreme Court held that a hostile or abusive work environment was sufficient to prove discrimination based on sex. The court did note, however, that not all work place conduct may be described as "harassment" which affects a "term, condition, or privilege" of employment within the meaning of Title VII. The court stated for sexual harassment to be actionable, it must be sufficiently severe or pervasive to "alter the conditions of [the victims] employment and create an abusive working environment."

- a. Elements under Previous Standards Prior to the 1998 session, the establishment of a prima facie case of hostile environment sexual harassment required proof of the following elements:
  - i. The employee belongs to a protected group;
  - ii. The employee was subject to unwelcome sexual harassment;
  - iii. The harassment complained of was based on sex;
  - iv. The harassment complained of affected a term, condition, or privilege of employment.

- b. Employer Liability Under Previous Standard. Prior to the 1998 session, an employer could only be found liable for hostile environment sexual harassment under federal and North Dakota law if;
  - i. The employer *knew or should have known* of the harassment; and
  - ii. failed to take timely and appropriate action.

An employer was liable when it had actual knowledge of the harassment and failed to take appropriate action. An employer could also be liable when it had "constructive knowledge" of the harassment. Constructive knowledge could be implied when the harassment was so pervasive that the employer was deemed to have knowledge of it, or when a supervisor knows of the conduct. Some courts had ruled that the employer had constructive knowledge of the harassment when the supervisor who knows of the harassment actually is the harasser.

- c. New Standards for Employer Liability. The Supreme Court also recently issued a decision which dramatically alters an employer's risk of liability for the conduct of a supervisor, ***recognizing liability even if the employer did not know about the harassment.*** *Faragher v. City of Boca Raton*, 118 S. Ct. 2275 (1998). The new standards apply to both claims of *quid pro quo* harassment and hostile environment harassment. A showing of "constructive knowledge" is not a necessary element for finding employer liability.

- 3. New Rule For Employer Liability Under Title VII Rather than focusing on the distinctions between *quid pro quo* and hostile environment harassment, or on the degree of knowledge attributable to an employer, in June 1998 the Supreme Court set forth the following **new standard** in the pair of cases (*Faragher* and *Ellerth*) cited above and handed down on the same day:

- a. An employer is subject to liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. (The Court reaffirmed its rule that for harassment to constitute a "hostile work environment," the allegedly harassing conduct must be so extreme as to amount to a change in the terms and conditions of employment.)

- b. When actionable sexual harassment is shown, but no tangible employment action is taken such as firing, demotion or an undesirable reassignment, a defending employer *may* raise a two-step defense. The two necessary elements of the defense are:
  - i. that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and
  - ii. that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.
- c. When the supervisor's conduct constitutes harassment and *does* culminate in a tangible negative employment action, no affirmative defense is available, and the employer will always be financially responsible for the unlawful harassment committed by its supervisors.

4. Employer Liability for Conduct of Non-supervisory Co-employees Unchanged Prior to the 1998 session, and probably currently, an employer can be held liable for the harassing conduct of a co-employee or harassment of an employee by a non-employee where the employer knows or should have known of the conduct, and fails to take "immediate and appropriate action." The new standard for employer liability specifically refers to liability for a *supervisor's* conduct — nothing in the Court's language suggests the new standard should be extended to assessing an employer's liability for the conduct of co-employees or non-employees. On the contrary, certain language used by the Court suggests that these standards remain unchanged and that the new standard is limited to a *supervisor's* conduct.

- a. In its same-sex harassment decision in *Oncale*, the Court focused on the victim's reports of harassment and the employer's failure to take "prompt and remedial action" to end the harassment. (The harassment was by co-employees, not supervisors). Because this decision was issued during the same term as the two cases establishing the new standards for supervisory liability, to avoid an inconsistent reading of the law, harassment by co-employees is probably still assessed under the "knew or should have known" standard.

- b. The Court expressly stated that "it makes sense to hold an employer vicariously liable for some tortious conduct of a supervisor made possible by abuse of his supervisory authority," for "in a sense a supervisor is always assisted in his misconduct by the supervisory relationship." This reasoning does not logically extend to the relationship between co-employees.
- c. The Court defines a "tangible employment action" as making a significant change in employment status such as hiring, firing, demotion, failing to promote, etc. It then stated that "[a] tangible employment action in most cases inflicts direct economic harm. As a general proposition, only a supervisor, or other person acting with the authority of the company, can cause this sort of injury." (*Ellerth*, 118 S. Ct. at 2266).

Thus, unless and until the Supreme Court directly addresses the issue and provides new guidance, it is likely that the "knew or should have known" standard remains applicable to circumstances not involving a supervisor as the harasser.

5. Effects of the New Standards for Employer Liability

- a. On the one hand, the new liability standards will make it easier for employees to sue their employer for sexual harassment because they no longer need to establish the elements of employer knowledge and failure to take prompt action.
- b. There will also likely be increased litigation over the *meaning* of some of the terms and phrases, such as: what constitutes "common sense" and "appropriate sensitivity to the social context," in distinguishing illegal behavior from "simple teasing or roughhousing," and defining reasonable care by an employer vs. unreasonable failure to use available opportunities by an employee.
- c. The decisions also create a huge incentive for employers to take preventative steps to establish tough anti-harassment policies and internal grievance procedures, if they have not already done so. It would also be advisable for employers to review and update any existing policies and procedures that may already be in place, including refresher training on a regular basis, and reinforcing the employer's commitment to a harassment-free workplace.

- d. On the other hand, the practical effect on the employer might be less than it first appears. A likely effect of the new standards will be to simply shift the *focus* of litigation to the issue of whether the conduct is "severe or persuasive" enough or "so objectively offensive" as to alter the "conditions" of a victim's employment, and away from the adequacy of an employer's response to the conduct. This issue is particularly timely in light of the Supreme Court's admonition not to consider Title VII a "general civility code."
- e. The cases will likely have a slightly less dramatic impact on claims brought in North Dakota, because North Dakota courts have held that under state law, employers can be held responsible for certain actions of their supervisors regardless of whether the employer knew about the harassing activity.

G. Individual Liability for Discrimination

- 1. Not only can employers be held liable for harassment, but individual employees can also be sued for violating sexual harassment laws. Individual liability arises in North Dakota under the prohibition against aiding or abetting in discrimination. That means you will personally be responsible for any judgment
- 2. If an individual employee is sued for harassment or discrimination and NDSU determines that the employee was not acting within the scope of his/her employment, NDSU will not pay for cost of defense or for any damages that are ultimately awarded.
- 3. A claim of sexual assault or battery will also most likely be a claim against the individual. If you are alleged to have touched someone, a claim of assault or battery will be brought. NDSU will not pay for the cost of defense or any damages that are awarded because you are found to have assaulted someone.

H. Recommended Employer Action

1. Written policy

The employer should adopt and disseminate a written policy prohibiting sexual harassment. A written policy should:

- a. State clearly that sexual harassment will not be tolerated, and will be grounds for discipline;

- b. Define sexual harassment, and provide specific examples of prohibited conduct;
- c. Provide an internal system for resolving sexual harassment complaints, which includes:
  - i. Establishing a procedure for complete investigation, and notification of the employees regarding the disposition of the charge,
  - ii. Informing the perpetrator of the charge, and
  - iii. Providing alternatives to reporting complaints to the employee's immediate supervisor.
- d. Be communicative to the employees at the time of adoption and at regular intervals thereafter.

2. Policy Review

A periodic review of the sexual harassment policy should be made with supervisors and employees. The scope of the review and its date should be documented.

3. Educate Supervisors

The dissemination and review of the policy should be supplemented with supervisor training. Supervisors must be informed of their obligations regarding sexual harassment and told that suspected acts of harassment must be reported immediately to the appropriate individual. In addition, the supervisors must understand that such activity on their part will not be tolerated. It is worth noting that the Civil Rights Act of 1991 required the EEOC to establish a commission which will provide technical assistance and training to employers concerning the laws it enforces.

NDSU's policy provides:

Anyone who feels she/he has been subjected to prohibited harassment is encouraged to report the situation before it becomes severe or pervasive. Individuals may make a report to the Director of Equal Opportunity, the University's General Counsel, the Office of Human Resources, the Counseling and Disability Services Office, the Associate Director for Student Rights and Responsibilities, or an appropriate administrator. Reports may be addressed on an informal basis at the request of the individual alleging harassment. The person alleging harassment may also

file a formal grievance in the Equal Opportunity Office using the Equal Opportunity Grievance Procedures described in NDSU Policy 156.

4. If a Sexual Harassment Claim is Made

NDSU's policy provides:

In each case of alleged harassment, the supervisor, in consultation with the Equal Opportunity Director, will determine whether an immediate fact-finding investigation is necessary. Although circumstances will affect the time needed to conduct such an investigation, response to an alleged violation of this policy should be handled in a timely manner and a determination reached as soon as possible. Whenever a violation of this policy is determined, immediate and corrective action, including discipline, will be taken.

- a. Act consistently with the company's published policy,
- b. Forward any information obtained from the complaining employee to the company official responsible for enforcing the policy,
- c. Reiterate to the charging employee that harassment is prohibited; that it is appreciated that the claim is raised; that there is a policy in effect to resolve this situation; encourage the employee to follow the procedure,
- d. Make no admission or accusations, or do anything that could impose liability on the company,
- e. Investigate the claim promptly, fairly and completely. A proper investigation includes:
  - i. A detailed written statement from the complainant,
  - ii. Interviews of and written statements from all witnesses concerning the incident (which cannot necessarily be kept confidential),
  - iii. A response and statement from the accused employee, whether it is merely a denial or an explanation, preferably signed and written, and
  - iv. Consideration of appropriate disciplinary action which may range from a written reprimand to suspension or termination.

The failure by an employer to investigate a claim of sexual harassment thoroughly and objectively exposes the employer to liability, not only to the victim of sexual harassment but, in some cases, to the alleged harasser as well. In a recent Minnesota defamation after the employer discharged the male employee for sexual harassment based upon the accusations of a female employee. The accusations were not investigated by the employer prior to the discharge and were subsequently found to be false, thus giving rise to the male employee's cause of action.

- f. Document all action taken in response to the claim.

Persons bringing sexual harassment claims often do so only as a last resort. They may feel embarrassed or reluctant to accuse a co-worker, or may believe that their job will be in jeopardy if they name a supervisor or member of management. In such instances, the employer's demonstration of care and concern for the employee, and consideration of the employee's feelings, may defuse a potentially explosive situation.

### **III. CONSEQUENCES OF DISCRIMINATION/HARASSMENT**

The consequences of engaging in illegal discrimination are varied and far-ranging. Each of the laws prohibiting employment discrimination contains substantial penalties that may be assessed against employers in the event that an employer is found to have discriminated. Moreover, the amount of time and energy expended in defending the claims, and the legal fees often incurred, constitute significant hardships upon the employer even if the defense is successful. The handling of a discrimination claim entails far more than merely explaining what occurred and waiting for the favorable decision. The following is a basic outline of the procedures that may be implemented by an applicant or employee claiming unlawful discrimination as well as the remedies and costs connected with defending those claims.

#### **A. THE ADMINISTRATIVE AGENCIES**

As noted earlier, persons claiming to be aggrieved of illegal discrimination may seek the assistance, without personal expense, of the various administrative agencies created to enforce their employment laws. The Equal Employment Opportunity Commission, the federal agency enforcing Title VII of the Civil Rights Act of 1964, is the most well-known of these agencies. The North Dakota Department of Human Rights enforces the North Dakota Human Rights Act, the state law counterpart to Title VII. This agency has a work-sharing agreement with EEOC and will investigate many charges filed with that agency.

The following is a description of the investigative and enforcement procedure under Title VII as implemented by EEOC.

1. Procedure - Pre-Determination.

a. Charge Filing.

The EEOC investigative procedure ordinarily is triggered by the filing of a charge of discrimination by the allegedly aggrieved individual. Occasionally, the EEOC itself will file a charge of its own volition when it has reason to believe that discriminatory practices have occurred. An individual charge must be filed within 300 days of the occurrence of the alleged discriminatory act in order to comply with the procedural requirements of Title VII.

The charge will be served upon the company with notice that investigation will ensue.

b. Position Statement.

The first thing that EEOC requests of charged employers is the submission of a complete position statement. Many such charges arise over matters of which employers' personnel departments or upper management may not be aware, such as alleged harassment by a supervisor, denied training or promotional opportunities, or discriminatory job assignment. Accordingly, the person handling the charge for the employer will have to engage in substantial investigation of the facts even in order to know what the company's position is and respond to the request for a position statement.

c. Witness Interviews.

For most charges, the EEOC investigator will wish to conduct extensive interviews of employer's personnel. Manager and supervisors involved in the personnel action complained of certainly will be the subject of extensive interviews. In a discharge case, for example, all managers and supervisors connected with the decision to discharge will be interviewed regarding the decisional process, other similar discharges in the past and comparisons of the treatment of other employees in the past committing the same offense. Moreover, co-workers, former co-workers and other witnesses to the conduct alleged in the charge will be interviewed extensively as to their impressions of the legitimacy of the employer's position, their knowledge of the facts of the case and their impressions of management generally.

d. Documentation Review.

EEOC has the right to request and review all documents pertaining to the circumstances of the charge. Often, they will request the opportunity to review numerous personnel files; at other times they will require production of vast number of documents including performance reviews, applications, disciplinary notices, written policies and procedures, supervisor's notes, etc. Moreover, EEOC has the power to subpoena such documents from recalcitrant employers.

During the 1989-1990 term, the United States Supreme Court decided University of Pennsylvania v. EEOC, 110 S.Ct. 577 (1990). In this case the University denied tenure to a female Asian-American. She brought suit under Title VII claiming discrimination on the basis of sex and national origin. While the case was being investigated by the EEOC, the Agency requested access to the school's tenure review files. The University refused access, claiming the files were confidential and privileged. The Court held that because of the remedial nature of Title VII actions, and because of the broad investigatory powers of the EEOC, the school was required to turn over the files.

e. Statistical Analysis.

In virtually all cases, EEOC requests the employer to submit statistical information regarding the makeup of its workforce. In a typical race discrimination claim, for example, the employer will be required to submit statistics showing the racial makeup of the entire workforce for a certain number of years, broken down by department, job classification, shift or any other delineation requested by the agency. Moreover, the agency often demands that other identifying information be provided, such as names, addresses and telephone numbers, job classification, starting date, rate of pay, date of discharge if applicable and reason for discharge. Needless to say, compilation of such information is enormously time-consuming.

f. Fact Finding Conferences.

Where credibility disputes must be resolved, or where the EEOC investigator believes that the process is warranted, a fact finding conference will be held. This entails a meeting wherein the investigator calls both parties into the office for the purpose of asking more in-depth questions of each party, reviewing additional documents and resolving disputed issues of fact.

2. Determination.

Ultimately, EEOC collects all the information that it deems relevant and issues a determination of cause or no cause to credit the allegations of discrimination. Where a no cause determination is issued, the agency issues what it calls its "Right to Sue Letter", said letter informing the parties of the dismissal of the case and of the claimant's right to bring a private civil action against the employer within 90 days of the receipt of that letter. Failure to bring the civil action within that time bars the individual from thereafter suing the employer for illegal discrimination.

Where EEOC issues a cause finding, they will invite the parties to attempt a voluntary conciliation of the matter. This is a process whereby the parties meet with the EEOC in an effort to resolve the charge without the necessity of resorting to litigation. At this stage, the parties are free to discuss a negotiated settlement that does not necessarily encompass the complete remedies available to the complainant under the law.

3. Enforcement.

If voluntary conciliation efforts do not result in a settlement agreement, EEOC may either issue a Right to Sue Letter and dismiss the case or refer the matter to the Department of Justice for litigation. If the EEOC chooses not to pursue the matter, the Right to Sue Letter is issued and the claimant has 90 days in which to hire a private attorney and initiate a civil action. Where EEOC chooses to pursue the matter, a formal lawsuit is instituted free of charge to the claimant and will be pursued on behalf of the claimant as appropriate. Moreover, the enforcement litigation can be expanded to seek relief for more than merely the complainant if appropriate (see "class actions" below).

4. Other Agency.

As noted above, charges may also be filed with the North Dakota Department of Human Rights. This agency employs essentially the same investigative procedures as EEOC and has the same authority to compel production of witnesses and documents. Upon findings of cause, however, this agency differs slightly in that each such case will in fact be referred for enforcement on behalf of the complaining party.

5. Remedies.

In the event that the agency ultimately finds the employer to have discriminated, and if that finding is upheld in the courts, the complainant is entitled to certain remedies. Under any of the various laws, those remedies will include:

- a. Reinstatement or other injunctive relief placing the individual in the job to which he or she is entitled.
- b. Back pay from the date of discrimination until the date of reinstatement or other equitable relief (in North Dakota, limited to two years from the date of the charge or complaint) (N.D.C.C. 14-02.4-20).
- c. Back benefits from the date of discrimination, including back pension and profit sharing contributions, insurance premiums, vacation, etc.

Under Title VII, a plaintiff is not entitled to a jury trial. In addition, prior to the Civil Rights Act of 1991, only victims of intentional racial or ethnic bias could obtain compensatory and punitive damages. The Civil Rights Act of 1991, however, provided for increased damages and jury trials in cases of intentional sex, religious, and disability discrimination. In addition, the Act reversed the 1991 United States Supreme Court decision in West Virginia University Hospitals v. Casey, which held that attorney fees and expert witnesses are separate elements of litigation costs. Therefore, under the Act, expert witness fees may be included as part of attorney fees in Title VII cases and cases to which the Civil Rights Attorneys' Fees Awards Act of 1976 applies.

Compensatory damages under the Civil Rights Act of 1991 include future pain and suffering, inconvenience, mental anguish, loss of enjoyment of life, and other non-pecuniary losses. Punitive damages may also be recovered when the employer acts with malice or with reckless indifference to a victim's rights. When compensatory or punitive damages are sought, any party to the case can demand a jury trial. The Act does limit the amount of damages which may be recovered depending upon the size of the employer's work force:

- a. \$50,000 for employers with 15 to 100 employees
- b. \$100,000 for employers with 101 to 200 employees
- c. \$200,000 for employers with 201 to 500 employees
- d. \$300,000 for employers with more than 500 employees.

Courts are prohibited from informing the jury about the cap on damage awards. It must be emphasized that these maximums do not apply to backpay, interest on backpay, front pay, and other past pecuniary losses such as medical bills. In those claims, there are no "caps."

Many of the relevant statutes contain additional remedial provisions as well.

In addition to all of the foregoing remedies, successful claimants may be awarded their attorney's fees if and when private counsel is retained, and offending employers will be ordered to pay a civil penalty to the State.