Responding to a Kansas Human Rights Commission Complaint:

From Frazzled to Functional





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Today's Presentation—See Your Handouts

Kansas Human Rights Commission
- Kansas Act Against Discrimination and Kansas Age Discrimination in Employment Act

Complaint Process, Notification and Initial Materials Request
- Voluntary Mediation
- Tips for Responding to a Complaint

Three Common Allegations and Their Pitfalls
- Retaliation
- Harassment
- Terminations

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KANSAS Human Rights Commission

Our Mission



The mission of the Kansas Human Rights Commission is to prevent and eliminate discrimination and assure equal opportunities in all employment relations, to eliminate and prevent discrimination, segregation or separation, and assure equal opportunities in all places of public accommodations and in housing.

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Kansas Act Against Discrimination

Prohibits discrimination in:

- *Employment,*
- *Housing, and*
- *Public Accommodations*





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Protected Classes

- Race
- Religion
- Color
- National Origin
- Ancestry
- Sex
- Disability
- Age (employment only)
- Family Status (housing only)
- Genetic Screening and Testing (employment only)

Other: Retaliation (for outwardly opposing discrimination)



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What is Discrimination?

- Any direct or indirect exclusion… segregation…denial, or any other differentiation … in the treatment of a person on the account of their… [**protected class**].

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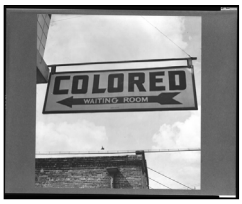
Discrimination happens when…

*An **adverse action** meets a **protected class**.*



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Two Types of Discrimination



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Two Types of Discrimination

1. **Disparate Treatment**- treating members of a protected class in a different and less favorable manner than others because of their protected class status.

   Overt discrimination is an intentional, purposeful act of discrimination based on an individual's protected class status.

   Example: *Refusing to hire women with pre-school children, while not applying the same standard to male applicants.*

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Two Types of Discrimination

2. **Adverse Impact** - conduct which, although applied equally to all, has significant adverse effect on protected class members as compared to others. That is, practices fair in form but discriminatory in operation.

   ***Example**: English tests when reading/writing is not an essential function of the job.*

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Harassment and Quid Pro Quo Sex Harassment

We'll review harassment under our common allegations on a later slide.

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Complaint Notification and Initial Materials Request

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Three Kinds of KHRC Employment Complaints

1. First-filed with the KHRC, dual-filed with the U.S. Equal Employment Opportunity Commission (EEOC)
2. First-filed with the EEOC, dual-filed with the KHRC
3. KHRC only (not filed with the EEOC)
   a. Usually because the employer does not have enough employees to qualify for EEOC coverage



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KHRC-EEOC Work Sharing Agreement

- The KHRC & U.S. Equal Employment Opportunity Commission (EEOC) have a work sharing agreement.
- If the KHRC receives the employment complaint first, the KHRC will automatically dual-file the complaint with the EEOC unless we know up front that the EEOC does not have jurisdiction. The KHRC will investigate complaints first-filed with the KHRC, make a KHRC determination, and forward our investigative findings to the EEOC for their determination.
- If the EEOC receives the employment complaint first:
  - If the EEOC complaint has a physical or electronic signature and falls within the KHRC jurisdiction, the KHRC will automatically dual-file the complaint with the KHRC.
  - If the EEOC complaint does not have a physical or electronic signature, the KHRC Intake Staff will contact the Complainant to see if they want to also file with the KHRC.
  - The EEOC will complete the investigation, make their determination and forward their findings to the KHRC for the KHRC determination.

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When the KHRC Receives a Completed Complaint

- Intake Staff will review the Complaint to ensure that it meets the legal requirements for filing:
  - K.S.A. 44-1005 (a) requires a written complaint articulating a *prima facie* case, that the complaint be signed and verified, and that it state the name and address of the person, employer, labor organization or employment agency alleged to have committed unlawful discrimination.
  - K.A.R. 21-41-3 requires the complaint to have the full name and address of the Complainant and the Respondent, the alleged unlawful employment/discriminatory practice and a statement of the nature thereof, the date(s) of incident or a range of date(s) for the alleged incidents, and a statement as to any other action initiated in any other forum based on the same incidents.

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When the KHRC Receives a Completed Complaint

- If the complaint contains the above required items, it is assigned a docket number and paperwork is prepared to notify the Complainant that we received the complaint and to notify the Respondent of the complaint and to request an initial response.

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KHRC Notification of the Filed (Docketed) Complaint

- **The Complainant Receives:**
  - A letter acknowledging receipt of the complaint, a copy of the filed (docketed) complaint, and a copy of the EEOC's dual-filed complaint, if applicable. The KHRC charge number in the upper right hand corner denotes that the KHRC complaint has been filed (docketed).
- **The Respondent Receives: (See Handouts)**
  - **Notification Letter**: The letter requests that initial materials be submitted within 14 days of the receipt of the mailing. It also advises that a response to the complaint allegations may be filed. The letter also advises of the voluntary mediation program through Kansas Legal Services/Midland Mediation. Also advises that any destruction of records or other acts, which would prevent, impede, or interfere with investigation of this complaint is forbidden by law. (K.S.A. 44-1013)
  - **A Copy of the KHRC Complaint**
  - **A Copy of the EEOC's Dual-Filed Complaint, if Applicable**
  - **Investigative Materials Request and Respondent Questions General Background**
  - **Mediation Notification**
  - **Retaliation is Unlawful**

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Voluntary Mediation through Kansas Legal Services / Midland Mediation

- See Handouts for Sample Letter from Kansas Legal Services/Midland Mediation.
- If mediation fails or is declined, then the case is assigned to a Special Investigator.
- If the Respondent is not interested in mediation, we ask that notify Kansas Legal Services/Midland Mediation so they can release the case back to KHRC for investigation.
- Mediation is routinely given high marks satisfaction with process and can be a quick way to resolve cases. Settlements do not always involve money.

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What does the KHRC Want to See in a Respondent Position Statement? (General Tips for a Respondent Response)

- We want to know your side of the situation. What are the legitimate, non-discriminatory reasons for the employer's actions towards the Complainant?
- If complaint allegations are too vague, contact us at khrc@ks.gov and we may be able to provide more information.
- We provide tools to assist in submitting formulating a Respondent Position Statement—See the Handouts for the Investigative Materials Request and Respondent Questions General Background.
- Provide a description of the organization: Include the organization's legal name and address, contact information for the person responsible for responding to the complaint, the general nature of the business, and the number of employees. An organization chart with employee names and titles may be helpful.
- Provide the number of employees.
- Provide specific, factual responses to every alleged discriminatory act in the complaint.
- The Response should clearly explain the Respondent's version of the facts (legitimate non-discriminatory reasons). Identify and submit any specific documents. Identify witnesses and include their statements regarding the allegations.
- Provide copies of any applicable practices, policies or procedures applicable to the complaint charges. (Do not need to submit the entire employee handbook.—Just submit the relevant parts.)

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General Tips for a Respondent Response-Continued

- Identify any other individuals, other than the Complainant, who was in a similar situation as the Complainant, and how the relevant practice, policy or procedure was applied.
- Describe any other circumstances where the practice, policy or procedure was applied.
- Explain why individuals in a similar situation as the Complainant were not similarly impacted.
- Identify supervisors/managers who made or took decisions regarding the allegations in the complaint. Be specific about dates, actions, and locations. Provide documentation of decisions and decision making process.
- Provide copies of any internal investigations, complaints or grievances.
- Provide a copy of the position description with essential functions denoted.

Do not feel that you are limited by the initial materials request. If you have explanations, witness statements, reports, etc. that document legitimate non-discriminatory reasons for the job actions, please feel free to submit those.



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General Tips for a Respondent Response

- Respondents may redact identifying information in documentation.
- Electronic information may be provided as an e-mail attachment. (We use Microsoft Office software.)
- Copies of text messages may also be provided.

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Common Allegations and Their Pitfalls

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Retaliation

- Retaliation is routinely the number one basis cited when filing complaints.
- 800, or 86%, of FY 2026 employment complaints allege retaliation.
- According to the EEOC, retaliation is the most common discrimination finding in federal sector cases.

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What is Retaliation?

- An employer may not fire, demote, harass or otherwise "retaliate" against an individual for complaining internally about discrimination or harassment, filing a charge of discrimination, participating in a discrimination proceeding, or otherwise opposing discrimination, which incudes requesting an accommodation of a disability or for a religious practice.
- Retaliation occurs when an employer, employment agency, or labor organization takes an adverse action against a covered individual because he or she engaged in a protected activity.
- Adverse Action--An adverse action is an action taken to try to keep someone from opposing a discriminatory practice, or from participating in an employment discrimination proceeding. Examples of adverse actions include: employment actions such as termination, refusal to hire, and denial of promotion, other actions affecting employment such as unjustified negative evaluations, unjustified negative references, or increased surveillance, and any other action such as unfounded civil or criminal charges that are likely to deter reasonable people from pursuing their rights.

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What is Retaliation?

- Covered Individuals--Covered individuals are people who have opposed unlawful practices, participated in proceedings, or requested accommodations (disability or religion) related to employment discrimination based on race, color, sex, religion, national origin, ancestry, age, or disability. Individuals who have a close association with someone who has engaged in such protected activity also are covered individuals. For example, it is illegal to terminate an employee because his spouse participated in employment discrimination litigation.

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- Protected Activity—Includes informing an employer that you believe that he/she is engaging in prohibited discrimination, including harassment. Opposition is protected from retaliation as long as it is based on a reasonable, good-faith belief that the complained of practice violates anti-discrimination law; and the manner of the opposition is reasonable. A communication or act is protected opposition as long as the circumstances show that the individual is conveying resistance to a perceived potential EEO violation.
- Examples of protected opposition include:
  - Complaining to anyone about alleged discrimination against oneself or others;
  - Threatening to file a charge of discrimination;
  - Picketing in opposition to discrimination; or
  - Refusing to obey an order reasonably believed to be discriminatory.
- Participation in an employment discrimination proceeding.
  - Means taking part in an employment discrimination proceeding. Participation is protected activity even if the proceeding involved claims that ultimately were found to be invalid. Examples of participation include:
    - Filing a charge of employment discrimination;
    - Cooperating with an internal investigation of alleged discriminatory practices; or
    - Serving as a witness in an EEO investigation or litigation.
- A protected activity can also include requesting a reasonable accommodation based on religion or disability.

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Evaluating A Retaliation Charge

The Kansas Act Against Discrimination (KAAD) makes it unlawful to "discharge, expel or otherwise discriminate against any person because such person has opposed any practices or act forbidden under this act or because such person has filed a complaint, testified, or assisted in any proceeding under this act." K.S.A. 44-1009(a).

The Complainant must show that:
1) Complainant engaged in protected opposition to discrimination;
2) Complainant suffered an adverse employment action; and
3) there is a casual connection between the protected activity and the adverse act.

The United States Supreme Court has held that even actions outside the workplace can constitute retaliation. Burlington N. & S.F.R. Co. v. White, 126 S. Ct. 2405 (2006). The new standard for whether a particular action constitutes retaliation is whether the action is "harmful to the point that (it) could well dissuade a reasonable worker from making or supporting a charge of discrimination." Argo v. Blue Cross & Blue Shield of Kansas, Inc., 452 F. 3d 1193 (10th Cir. 2006) (A reasonable employee would have found the challenged action materially adverse.)

In June 2013 the United States Supreme Court revisited the burden of proof on the Complainant in a Title VII retaliation case and held that the Complainant must show that retaliation was the "but for" reason for the adverse action, and not just one of a number of reasons. See University of Texas Southwestern Medical Center v. Nassar, United State Supreme Court, No. 12-1084 (June 24, 2013).

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Retaliation Pitfalls



Not documenting legitimate non-discriminatory reasons for job actions taken, i.e. poor job performance, non-adherence to policies, such as attendance, not following safety practices, etc.



When an employee complains of harassment, the Complainant should not be involuntarily transferred, shifts changed, hours reduced, etc. The Employer should be careful about the appearance of retaliating against the Complainant.

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How Widespread is Harassment?

- How about Kansas?
  - 500, or 54%, of employment complaints alleged harassment in FY 2026.
  - 96 employment complaints alleged sexual harassment.
  - 404 employment complaints alleged harassment based on other protected classes.

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General Tips for a Respondent Response-Harassment Complaints

- Submit your anti-harassment policy and complaint procedure, any complaints made by the Complainant, complaints made against the Complainant, a copy of your investigation (including any witness statements), what steps were taken to provide immediate and corrective action, and documentation of follow up with the Complainant to make sure additional alleged harassment has not occurred.

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Harassment

It is illegal to harass an employee because of race, color, religion, sex (including pregnancy), ancestry, national origin, age (40 or over), disability, genetic information. It is also illegal to harass someone because they have complained about discrimination, filed a charge of discrimination, or participated in an employment discrimination investigation or lawsuit.

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Quid Pro Quo—Sexual Harassment

- Quid Pro Quo harassment occurs when a manager, supervisor, or person in a position of authority threatens an employee with a demotion or other negative consequence (or promises a benefit or promotion) in exchange for a sexual favor. Quid Pro Quo may also occur if an employee feels he/she must tolerate sexual advances, or other behavior of a sexual nature, because of a perceived threat by the person of authority.

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Harassment Overview

- Although the law does not prohibit simple teasing, offhand comments, or isolated incidents that are not very serious, harassment is illegal if it is so frequent or severe that it creates a hostile or offensive work environment or if it results in an adverse employment decision (such as the victim being fired or demoted).

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Evaluating a Harassment Charge-The Six Components of Harassment (Hostile Work Environment)

1. Related to employment
2. Unwelcome, uninvited, offensive
3. Sufficiently severe to affect the terms and conditions of employment
4. Pervasive, not isolated
5. Of a prohibited nature (broadly interpreted)

   (Race, Religion, Color, National Origin, Ancestry, Sex, Disability, Age, Family Status, Genetic Information)
6. Creates an intimidating, hostile, abusive environment in the workplace.

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Evaluating a Harassment Charge—Harassment by a Co-Worker

An employer can be directly liable if its negligence causes a hostile work environment to exist. In particular, an employer may only be liable if it allowed its employees to take part in harassment and it "had actual or constructive knowledge of the hostile work environment but did not adequately respond to the notice of harassment." Ford v. West, 222 F. 3d 767,776 (10th Cir. 2000). To establish constructive knowledge, the acts must be "so egregious, numerous and concentrated as to add up to a campaign of harassment". Id. Where the employer has knowledge of misconduct and does not take action, "the combined knowledge and inaction may be seen as demonstrable negligence, or as the employer's adoption of the offending conduct and its results, quite as if they had been authorized affirmatively as the employer's policy". See Faragher v. City of Boca Raton, 524 U.S. 775, 789 (1998).

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Evaluating a Harassment Charge—Supervisor

The standard of liability for harassment by supervisors holds that an employer is always liable for unlawful harassment by a supervisor if it culminates in a tangible employment action.

Complainant carries the burden of establishing that a tangible employment action occurred and that Respondent did not act appropriately to dispel the alleged harassment. A tangible employment action is any significant change in employment status such as hiring, promotion, firing, etc.

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Evaluating a Harassment Charge—Supervisor

Definition of a "Supervisor" for Purpose of Evaluating Harassment Cases:
The United States Supreme Court in *Vance* determined that the definition of a supervisor is limited to an individual employee who can take "tangible employment actions" against the employee alleging to have been harassed. The Court notes that the ability to take tangible employment actions generally involves the ability "to effect a 'significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits'". See *Vance*, 133 S. Ct. 2443.

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Employer's Defense When There is No Tangible Employment Action—Must Prove Both Prongs

- Employer must prove that it exercised reasonable care to prevent and promptly correct harassing behavior.
  - Employer must establish, disseminate, and enforce an anti-harassment policy and complaint procedure and to take other reasonable steps to prevent and correct harassment.
  - See Handouts.
- Employer must prove that the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer, or to avoid the harm otherwise.

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Effective Anti-Harassment and Complaint Procedure

- A clear explanation of prohibited conduct;
- Assurances that employees who make complaints of harassment or provide information related to such complaints will be protected against retaliation;
- A clearly described complaint process that provides accessible and multiple avenues of complaint. The policy should not mandate the employee report the harassment to the immediate supervisor (in case the supervisor is the alleged harasser) or one sole contact. Make sure employees in outlying offices or 2nd or 3rd shifts have access to file complaints.
- Assurance the employer will protect the confidentiality of harassment complaints to the extent possible;
- A complaint process that provides a prompt, thorough, and impartial investigation; and
- Assurance that the employer will take immediate and appropriate corrective action when it determines that harassment has occurred.
- The policy should prohibit harassment by everyone in the workplace and non-employees who come into contact with employees (customers, delivery personnel).
- The policy should prohibit harassment by employees in work-related situations outside the normal workplace (training, conventions, travel status).
- The policy should prohibit harassment by employees in social settings away from work (i.e. holiday parties or other celebrations

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Effective Investigation Process

- As soon as management learns about alleged harassment, it should determine whether a detailed fact finding investigation is necessary. Be open to where the investigation may lead you.
- The investigation, if necessary, should be launched immediately.
- The Complainant may ask you to keep the complaint to yourself or not proceed with an investigation. The Employer has been put on notice about the alleged harassment and has a responsibility to investigate.
- Select an investigator who will be unbiased and will base recommendations on the investigative facts. It is recommended that the investigator be independent of the chain of command for the alleged incidents.
- If possible, select someone with experience in this area. Did the proposed investigator previously know about the alleged harassment (and did nothing about it)? If so, select someone else.
- Conclude the investigation in a timely manner. Investigations lasting more than a week will be scrutinized.

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The Investigation

- Explain the complaint. Remind participants of confidentiality expectations and non-retaliation provision. Thank for participating. Explain that you are a neutral investigator.
- Remember the who, what, when, where, why, and how.
- Who did it?
- What happened?
- When did it happen?
- Where did it happen?
- Why did it happen?
- How did it happen? How often?
- Is there evidence? (text messages, social media posts, copies of "jokes")
- Was there touching involved?
- Witnesses?
- Do you know of others who were harassed by the same person?
- Remember to ask witnesses, and the alleged harasser the same information.
- Be sure to use open-ended questions and follow-up questions when interviewing the complainant, the alleged harasser, and witnesses. The purpose is to facilitate the gathering of information.

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Immediate and Appropriate Corrective Action and Final Steps

- Assurance of Immediate and Appropriate Corrective Action
  - When a violation has occurred the alleged harasser should receive appropriate corrective action in accordance with any disciplinary policies or harassment policies.
  - Measures should then be put into place which are designed to stop the harassment. Be sure that any actions taken are not considered retaliation against the Complainant.
  - Management should keep in mind that the employer is liable if the harassment does not stop.
- Final Steps
  - Report back to the Complainant that the investigation has concluded. (It may not be appropriate to discuss all parts of the final report, such as disciplinary action.)
  - Follow up with the Complainant in the future to make sure any harassing behavior has not continued.
  - Document! Document! Document! Document your receipt, investigation, and resolution of any complaints received! (It is easier to document at each point in the process, instead of waiting until the end.)

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Harassment Pitfalls



Supervisors or others not recognizing when an employee is complaining of harassment and then failing to act upon the complaint or to forward it to HR, Legal, or other appropriate contact.



Supervisors know of harassment , but ignore it. Thereby, failing to protect the employee (and the organization) from harassing behavior.



Mandating that the harassment complaint be submitted in writing before taking action to initiate an investigation.



Not conducting a thorough investigation or concluding it in a timely manner.

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Harassment-#MeToo Considerations



The public expects quick, decisive action, which means employees expect quick, decisive action.



Harassment allegations have a wide range of severity. The KHRC often receives harassment complaints involving less severe behavior.



Bystanders witnessing bad behavior have the ability to speak up. If you see something, say something.



Employers have the ability to set a standard higher than harassment free. Employers may have Code of Conduct, Ethics Policy, Professional Conduct Policy, etc.

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Terminations

Complainant must show all of the following elements to establish a prima facie case of disparate treatment based on a protected class:

1) Complainant was a member of a protected class;
2) Complainant was qualified and satisfactorily performing his job;
3) Complainant was subjected to an adverse action; and
4) Circumstances surrounding the adverse action raise an inference of discrimination.

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Terminations

A Complainant can establish evidence of the fourth element in various ways, such as "actions or remarks made by the decision makers", "preferential treatment given to employees outside the protected class", or "more generally, upon the timing or sequence of events leading to plaintiff's (adverse action)". See *Plotke v. White*, 405 F. 3d 1092, 1100 (10th Circ. 2005) (The critical *prima facie* inquiry in all cases is whether the plaintiff has demonstrated that the adverse employment action occurred under circumstances which give rise to an inference of unlawful discrimination.)

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Terminations

Only after a Complainant has demonstrated that he has established a prima facie case of discrimination, the burden shifts to the Respondent to prove a legitimate, nondiscriminatory reason for the adverse employment action. Once the Respondent has met that burden, Complainant may come forth with evidence of pretext or he may show that Respondent's legitimate, nondiscriminatory reasons are not worthy of belief.

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Similarly Situated

In determining whether employees are truly similarly situated, the employees must be similarly situated in "all material respects". See *Shumway v. United Parcel Service, Inc.*, 118 F. 3d 60, 64 (2nd Cir. 1997). The Courts have stated that:

> Not every difference in treatment, of course, will establish a discriminatory intent. (Federal discrimination law) does not make unexplained difference in treatment *per se* illegal nor does it make inconsistent or irrational employment practices illegal. It prohibits only intentional discrimination based upon an employee's protected class characteristics. See *Vega v. Spring Corp.*, No. 03-2589-KHV, 2004 WL 2414100, *13-14 (D. Kan. October 25, 2004).

Complaint's allegations must be compared to similarly situated employees who are assigned to the same supervisor and subject to the same standards governing performance.

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Termination Pitfalls



Not documenting legitimate non-discriminatory reasons for termination (or other adverse employment actions).



Not making sure that similar types of poor job performance or non-adherence to policies receive similar consequences.

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Thank You!

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