KHRC COMPLAINTS – EMPLOYER RESPONSES

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LEGAL FRAMEWORK



29 C.F.R. 1600, *et seq.* – Establishes the Equal Employment Opportunity Commission

K.S.A. 44-1001, et seq. – Kansas Act Against Discrimination
-180 days vs 300 days?

Also – State Employers should be aware of Governor Kelly's Executive Order 19-02, prohibiting discrimination of various types.

MCDONNEL DOUGLAS SHIFTING FRAMEWORK

FOUNDATIONAL DISCRIMINATION CASE

- McDonnel Douglas burden shifting framework for intentional discrimination under Title VI.
  - *McDonnell Douglas Corp. v. Green, 411 U.S. 792* (1973) established the legal framework that still is the predominant method of analyzing discrimination cases at the summary judgment level.
  - Widely adopted by Kansas and 10th circuit courts
  - Although this case originally dealt with racial discrimination, it has been applied more broadly in subsequent cases to deal with discrimination of other protected classes.



MCDONNEL DOUGLAS BURDEN SHIFTING FRAMEWORK

1.) Plaintiff must show the following to establish a prima facie case of discrimination:

- The person belongs to a protected class
- The person was eligible for a position and either was not hired, or during their employment was treated in an adverse manner
- Other similarly situated individuals were given different treatment (“disparate treatment”)



MCDONNEL DOUGLAS BURDEN SHIFTING FRAMEWORK

2.) If a prima facie case has been established by plaintiff, the burden shifts to Defendant to show:

- A legitimate, nondiscriminatory reason for the adverse treatment against the Plaintiff
- Example: This person was investigated and found they were in violation of our attendance and dependability polices on 8 different occasions, so discipline was not implemented for a discriminatory purpose, but for violation of the employer's policies.



MCDONNEL DOUGLAS BURDEN SHIFTING FRAMEWORK

- If Defendant articulates a legitimate, nondiscriminatory reason for the adverse treatment/action, the burden shifts back to Plaintiff to show:
  - That the Defendant's proffered reason is false – not the real reason why the adverse action was implemented and was actually a pretext for the exercise of the discriminatory intent
  - Example: 9 people have been late 30 times. 8 of them are men and one woman. The woman was disciplined but not any of the men. The woman would likely be able to defeat any claim by the employer that the discipline wasn't disparate treatment of the woman.

Source*: https://www.justice.gov/crt/fcs/T6Manual6#MD*



PREEMPTIVE ACTIONS PRIOR TO RECEIVING A KHRC COMPLAINT

PREEMPTIVE ACTIONS PRIOR TO RECEIVING KHRC COMPLAINT

- The best way to respond to a KHRC/EEOC complaint is to never get one in the first place
  - Internal questions to ask:
    - Are our policies clear about what conduct is prohibited?
    - Are our policies clear about what happens when an employee alleges they have been discriminated against?
      - Procedure
        - Investigations?
        - Notification(s) about the process?
        - Notifications about resolution?
        - Notifications about further conduct and/or the prohibition on retaliation?
        - Prohibitions of certain discussions under K.A.R. 1-13-1b?



PREEMPTIVE ACTIONS PRIOR TO RECEIVING KHRC COMPLAINT

Step 1 – **Review the Complaint**

- Oftentimes, the first time an employer will hear about a discrimination/retaliation complaint is by an employee complaint
  - When an employee complains about poor treatment, the employer should ask questions to determine whether the employee is complaining of general poor treatment or whether the employee is claiming discrimination/ retaliation?
  - After they ask the employee general questions, the employer should consider:
    - Is the employee issuing a complaint based on their protected status?
    - Is the employee claiming retaliation based on a previously submitted complaint regarding their protected status?



PREEMPTIVE ACTIONS PRIOR TO RECEIVING KHRC COMPLAINT

- Step 2 – **Look at your policies and procedures**
  - Are they up to date?
  - Are they detailed enough to provide clear guidance to the employee and employer as to the responsibilities of each party?
  - Are they clear as to what happens to these types of complaints?



PREEMPTIVE ACTIONS PRIOR TO RECEIVING KHRC COMPLAINT

- Step 3 – **Investigations**
  - Look at conduct and look at policies
  - Interview all witnesses and review all documentation
  - Look at “intent” through the course of the investigation

- *See note on “Complaints as Shields” in next slide*



PREEMPTIVE ACTIONS PRIOR TO RECEIVING KHRC COMPLAINT – NOTE ON "SHIELDS"

- Complaints as "shields"
  - Sometimes employees will complain about alleged discrimination as a "shield" against their own improper action
    - **Example: Greg has been sexually harassing Theresa, but knows that he will get in trouble for doing so, so he goes to HR first to complain that Theresa has actually been sexually harassing Greg in an attempt to preempt any finding against him. After a thorough investigation finds that Greg was sexually harassing Theresa, the employer disciplines Greg. Greg subsequently claims retaliation for issuing his complaint of sexual harassment. The key to responding to these claims is the fairness and thoroughness of the investigation conducted into these claims.**



PREEMPTIVE ACTIONS PRIOR TO RECEIVING KHRC COMPLAINT

- Look at supervisor's treatment of all employees under their supervision
  - Favoritism?
  - Is there any disparate treatment among different employees? Is it based on any protected class?
- Looking internally at precedent and finding comparators (including treatment of employees inside and outside of the same protected class) may be helpful when evaluating the situation



PREEMPTIVE ACTIONS PRIOR TO RECEIVING KHRC COMPLAINT

- Step 4 - **<u>Document Document Document</u>**
  - This investigation may end up being the best basis for defending a claim of discrimination/retaliation by an employee
  - Ensuring a proper and thorough investigation has been conducted is key to defending all subsequent complaints and possible future litigation
  - Retaining all records pertaining to the investigation will assist in the event that a KHRC/EEOC complaint is issued
    - This includes emails/screenshots/documents created that may or may not be included in the investigation itself but may be relevant to a subsequent response to a complaint or possible litigation



PREEMPTIVE ACTIONS PRIOR TO RECEIVING KHRC COMPLAINT

- ***Note on Timeliness of investigations***
  - Courts and the KHRC/EEOC will scrutinize any complaint of discrimination and/or retaliation that is not promptly investigated.
    - This includes initiation of the investigation as well as completion of the investigation
    - Possible KOSE MOA implications to be aware of as well
  - If conduct is substantiated, were reasonable measures put in place in a timely manner to prevent the conduct from happening again? (i.e., proper disciplinary action for sexual harassment and/or discrimination)
  - Follow up with the complainant to see if the behavior has continued or if any retaliation has since occurred after their complaint.



RECEIVING A KHRC COMPLAINT



RECEIVING A KHRC/EEOC COMPLAINT

- For purposes of this CLE, this will mainly address KHRC complaints, as they are often the investigatory entity for all K.A.A.D. and EEOC complaints



RECEIVING A KHRC/EEOC COMPLAINT

- Review all assertions made by the complainant against all documentation in control or possession of the employer
  - What is the complaint based on?
    - Discrimination?
      - Which protected class are they asserting?
    - Retaliation?
  - Is the complaint clear as to time/date/party responsible?



RECEIVING A KHRC/EEOC COMPLAINT

- Is receiving the KHRC complaint first time you're hearing about this matter or did the employee file a complaint previously with the employer?
  - If the employee filed a complaint with the employer first, was an investigation done?
    - Does the employer stand by that investigation and subsequent action (if any)?
  - If the employee has not previously filed a complaint, consider contacting the KHRC to request an extension to perform an internal investigation to form a basis for your response.

RESPONDING TO A KHRC COMPLAINT



RESPONDING TO A KHRC COMPLAINT

- Review all documentation received by the KHRC
- Review all internal documents
  - Investigations
  - Disciplinary actions against the complainant (if any)
  - Disciplinary actions against similarly situated employees (if any)
    - If disciplinary action was implemented against the employee, is there precedent to support this decision?
    - If the supervisor deviated from precedent, was there a legitimate, non-discriminatory and non-retaliatory purpose for doing so?
      - Aggravating or mitigating factors to differentiate from past precedent?



RESPONDING TO A KHRC COMPLAINT

- Drafting Responses to KHRC Complaints
  - Separate all claims into sections and thoroughly address every assertion made in the complaint
  - Provide context to the complaint, if needed
    - Complaints will oftentimes only assert a small picture of the entire situation that the employer is aware of, so presenting the entire situation may help provide clarity to any defense proffered by the Employer



RESPONDING TO A KHRC COMPLAINT

- If the employee previously issued a complaint internally, show what the employer did with the complaint (i.e., investigations, disciplinary actions)
- Show how similarly situated employees were treated who performed the same or similar conduct, and if deviation, the reason for the deviation
- Provide clear timelines, dates, and parties implicated in the complaint and response



RESPONDING TO A KHRC COMPLAINT

- Cite to and provide all documentation as exhibits to support the employer's response to give the KHRC a clear and complete explanation of the situation
  - Investigations
  - Policies
  - Supporting documents (emails, etc.)
- If an employer was preempted from doing something because of an external reason (i.e., the Kansas Organization of State Employee's Memorandum of Agreement's 30 days to proposed disciplinary action), state such reasoning

- *Sample response to a KHRC complaint is in your handouts*



RESPONDING TO A KHRC COMPLAINT

- Summary
  - Look at policies and procedures about what could possibly be implicated
  - Do investigations
    - Review whether complainant is possibly making a claim as a “shield”?
    - Valid claim?
    - Witnesses?
    - Credibility analyses?
    - **Document document document!**
  - If discipline is implemented:
    - Look to past precedent to verify no disparate treatment
    - Is it a reasonable step to keep the conduct from reoccurring?

MEDIATION

MEDIATION

- After submitting the employer's response, the KHRC will often ask whether the parties wish to mediate the matter
- Mediating provides an avenue for a pre-investigation settlement of the matter
- Provides both the complainant and the respondent the opportunity to have a third party to hear both sides and propose a solution that is amenable to both parties





MEDIATION

- Benefits of mediation
  - Resolves the matter prior to any finding by the KHRC
  - May prevent future litigation costs for both parties
  - Education on where the other party is coming from and allows both sides to be heard by a neutral third party
  - Confidentiality and possible risk exposure (if mistakes were made)

LITIGATION



LITIGATION

- Regardless of whether the KHRC/EEOC find probable cause that the employer engaged in discriminatory/retaliatory behavior, the employee will have the right to sue the employer
- In the event that the employee decides to sue the employer, all of the work done prior to litigation (i.e. investigations, responding to the KHRC/EEOC complaint) provides a roadmap for defense counsel to use going forward to defend against the claim



QUESTIONS?

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