



Preparation: The Key to Defending Against an Equal Employment Opportunity Complaint

By Debra L. Roth

What does it mean to a manager when an Equal Employment Opportunity (EEO) complaint goes to a hearing or trial and he/she is called to testify?

I've written two columns for *The Federal Manager* about a manager's role in the EEO process if he/she is ever accused of employment discrimination. My first column provided some advice on how the accused management official should deal with the informal EEO process when the EEO complaint is still in the "counseling" phase. My second column addressed the manager's role after the counseling phase ends and a formal EEO complaint is filed. That article offered advice and insight into being an effective witness in the EEO investigation interview process. I wrote both articles because of my belief, based on experience, that there is insufficient information and resources available to federal managers about their role in the EEO process. As a result, the EEO process is hampered for both the EEO complainant and for management when the official accused of discrimination lacks a clear understanding of his/her role.

In this article, I move to the final phase of the EEO complaint process – the hearing or trial. I offer some insight and guidance about what can be expected in this final phase of the complaint process.

But first, let's back up. As I explained in my last article, if the employee proceeds to file a "formal" complaint form after the EEO "counseling" period ends, then the agency is required by EEOC regulation to conduct an investigation into the formal complaint and issue the report of investigation (ROI) to the complainant within 180 days of when the complaint was filed. Most agencies meet this deadline.

Every manager should know that even though he/she was interviewed by the EEO investigator and was required to provide a sworn statement for the ROI, he/she will not be notified that the investigation has been completed or that the ROI was issued to the complainant. I recommend that, with one exception, the accused manager not ask anyone if the

investigation is still ongoing or if the ROI was issued. The current state of the law says that it's none of your business, and inquiring can create the appearance that your interest is one of ill-motive as opposed to basic curiosity. My exception is for those complaints in which an agency attorney was assigned to the complaint during the investigation and the manager had contact with the attorney in the preparation of his/her investigation affidavit. I usually see no downside to directly asking the attorney for a status update.

When the ROI is issued to the complainant, it will contain a notice to the complainant with what we in the legal business call an "election of forums." That means the complainant will be notified of his/her right to either elect to proceed to the EEOC for a hearing before an administrative judge, file a civil action in federal court for a trial before a jury, or to send the ROI to the agency's EEO office for a Final Agency Decision (FAD) without either a hearing before the EEOC or trial in court. The FAD is issued by the agency based simply on the ROI and no other evidence, and its purpose is to decide whether discrimination occurred. After the FAD is issued, a complainant can then proceed either to the EEOC for a strictly paper appeal or to federal court for a jury trial.

Many complainants will bypass seeking a FAD and choose to proceed to the EEOC for a hearing or file a civil action in federal court for a jury trial. If the complainant elects the EEOC, the agency will assign an agency attorney to defend the agency. If the complainant files a civil action in federal court, an attorney from the local U.S. Attorney's Office will be assigned to defend the agency. While neither attorney technically defends the management official accused of discrimination, most of the manager's dealings with the attorney will feel as if they are in fact defending him/her since he/she may very well be the key witness the government needs to successfully defend the claim.

However, be aware that a hearing or trial is not automatic. The complainant and the agency will first engage in

moderate to intense "discovery," after which the agency will most likely file a motion with the EEOC administrative judge or the federal judge asking that the complaint be dismissed without a hearing or trial merely on the evidence collected in discovery. Winning such a motion in most cases puts an end to the complaint. So discovery in an EEO case, like in most civil cases, is where the action is. The management official accused of discrimination should expect to spend some time dealing with discovery – a lot more time than was spent in the EEO investigation process.

Discovery can take the form of written questions from one side to the other, requiring the opposite side to answer the questions in writing and under oath. These are called interrogatory requests. Either party can also send the other side requests for the production of documents, which usually takes the form of a list of documents the party is seeking. The manager may be called upon by the agency attorney or Assistant United States Attorney (AUSA) to assist in answering the questions or collecting the documents. While this sounds relatively simple, it is sometimes surprising how intensive the interrogatories and document requests can become.

But the most strenuous aspect of discovery for the accused management official will be his/her deposition – the live questioning by the complainant's attorney, under oath, and in front of a court reporter who is taking down every word the manager says. In my view, an agency's case can be won or lost through the management official's deposition. The agency will be citing testimony in the manager's deposition transcript to support its motion to dismiss the complaint without a hearing or trial to show the action he/she took was not because of discrimination, but for some legitimate reason. On the other hand, the complainant will be looking for aspects of the manager's deposition testimony to support his/her belief that the so-called legitimate reason was created to hide his/her real motive of discrimination. So preparing for the deposition should be

*Equal Employment Opportunity Complaint
continued from page 29*

strenuous to ensure the manager is ready, since every word uttered counts.

Usually, the deposition will occur within two years after the accused was interviewed by the EEO investigator. That's a long time and memories of the events forming the basis for the complaint are likely to be foggy. Preparation should clear up the fog, teach the tactics attorneys use on deponents, and explain the complainant's theory of the case and the agency's defenses to ensure the manager understands how he/she fits into the case. That kind of preparation takes many hours, should span the course of multiple days, and cannot be done effectively in only a few days prior to the actual deposition. The manager will be learning a lot and will need time to fully process all of the information, strategy, and testimonial techniques. The accused manager should be well-heeled before sitting down in front of the complainant's attorney, and my experience is that agency attorneys don't usually believe this kind of preparation is necessary. I respectfully disagree.

So how does a manager ensure that the agency attorney or AUSA commits the necessary time needed before being deposed? First, stay involved in the litigation once it is filed at the EEOC or in court by regularly contacting the agency attorney and getting detailed updates. Insist on knowing as soon as possible the date the deposition is set to occur, and then insist on meeting with the agency attorney or AUSA well in advance for an initial preparation session. At that initial session, the manager should inquire about the preparation plan. If it sounds cursory, object loudly and clearly. Frankly, there are very few individuals who are "a natural" at being deposed, and having significant practice sessions in which the deposition is acted out is the key to being a successful witness.

In any case, having the most prepared attorney is usually a huge litigation advantage, as he/she will know the evidence and law better than the others,

and thus be in a better position to effectively advance the accused's side. That's also true for the witness. Being well-prepared is a must. The manager must invest in his/her role in an EEO case that is filed with the EEOC or in federal court. A lack of preparation can result in problematic deposition testimony from which the agency will become concerned about whether it can win its case. As with so many matters, preparation is the key to success. ■

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In her practice, Ms. Roth represents federal employees and law enforcement officers in Inspector General, internal, and Congressional investigations. When those investigations result in personnel actions, she represents employees in disciplinary and performance-based proceedings at the agency level and then before the Merit Systems Protection Board and the U.S. Court of Appeals for the Federal Circuit. Additionally, Ms. Roth's agency practice includes representation of federal employees, applicants, and contractors in security clearance and suitability proceedings. Ms. Roth has a Top Secret security clearance and represents federal employees in national security agencies in connection with internal and external investigations. She has also provided legal advice and representation to several small agencies on a multitude of federal personnel law and employment discrimination matters.

Ms. Roth is the consulting attorney to FEDagent, a free weekly on-line newsletter published by SBVR for 1811s and other federal employees engaged in law enforcement and homeland security functions. Along with the other SBVR attorneys, Ms. Roth co-hosts FEDtalk, a weekly radio show produced by SBVR on Fridays, 11:00 A.M. to noon (Eastern Time), on the all-federal employee internet radio station, www.federalnewsradio.com.

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