

# EEO Investigator Training



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# What laws are enforced by the EEOC?

- ▶ Equal Pay Act (EPA) of 1963
- ▶ Title VII of the Civil Rights Act (Title VII) of 1964
- ▶ Age Discrimination in Employment Act (ADEA) of 1967
- ▶ Americans with Disabilities Act (ADA) of 1990, amended in 2008
- ▶ Rehabilitation Act of 1973 (Sections 501 and 504)
- ▶ Genetic Information Nondiscrimination Act (GINA) of 2008



# Protected Bases

- ▶ The EEOC enforces federal laws that prohibit workplace discrimination on the basis of:
  - race, color, national origin, sex, sexual orientation, gender identity, pregnancy, religion, age (over 40), disability, genetic information, and retaliation
- ▶ All aspects of employment



# Discriminatory Practices

- ▶ Under the laws enforced by EEOC, it is illegal to discriminate in any aspect of employment
- ▶ Harassment based on a protected status is prohibited.
- ▶ Retaliation against an individual for filing a charge, participating in an investigation or opposing a discriminatory practice.
- ▶ Denying employment opportunities because of marriage to, or association with, an individual because of a protected status.





# Jurisdiction and Threshold Issues



# Basic Requirements-Threshold Questions

Is the complaint about employment under one or more of the laws we enforce?

Is the complaint timely?

Is the employer/entity complained of covered?

Is there something that makes the employer/entity exempt from coverage?

Is the complaining person covered by the laws we enforce?





# Theories of Discrimination



# Common Theories of Discrimination

Disparate  
Treatment

Disparate  
Impact

Harassment

Accommodation

Retaliation

EPA

ADA  
Accommodation

Religious  
Accommodation





# Disparate Treatment

- ▶ Focuses on whether there is evidence of intentional discrimination on a protected basis.
- ▶ Two types of evidence to use/two different models of proof :
  - Direct Evidence (smoking gun)-1 piece of evidence reveals discriminatory motive
  - Circumstantial Evidence—a combination of different pieces of information establish inference of discriminatory intent
    - Comparison of similarly situated workers to the CP
    - Testimony, Documents, Statistical Evidence



# Disparate treatment

- ▶ An employee or applicant is treated differently because of a protected status
- ▶ Employer defenses
  - Employer articulates a legitimate, nondiscriminatory reason for the action
  - The reason is not pretext to hide the discrimination



# Disparate impact

- ▶ **Facially neutral policy or practice that disproportionality excludes member of a protected group**
- ▶ **Employer defense:**
  - **ADEA only**
    - Policy or practice is based on reasonable factors other than age
  - **Title VII, ADA, GINA**
    - Job related and consistent with business necessity
    - No less discriminatory alternative



# Retaliation

- ▶ Individual opposed what they reasonably and in good faith believed to be an unlawful employment practice or they participated in the EEO process
- ▶ They were subjected to an adverse action that would likely discourage a reasonable person from opposing discrimination or participating in the EEO process
- ▶ There was a causal connection between the protected activity and the adverse treatment



# What is opposition?

- ▶ **Explicit or implicit communication**
- ▶ **Manner of the opposition must be reasonable**
- ▶ **CP must have reasonable and good faith belief that discrimination occurred**



# Participation in the EEO process

- ▶ An employer cannot punish an applicant or employee for filing an EEO complaint, serving as a witness, or participating in any other way in an EEO matter
  - EEOC's view: this protection extends to participation in employer's internal EEO complaint process, even if no EEOC charge filed yet
- ▶ This rule applies even if underlying discrimination allegation is unsuccessful or untimely



# What is an adverse action?

- ▶ Harassment or intimidation
- ▶ Negative Job Reference
- ▶ Denial of employment benefits
- ▶ Discharge, discipline, demotion, reassignment, transfer
- ▶ Unjustified evaluations/reports
- ▶ Accelerated disciplinary action
- ▶ Any adverse treatment likely to deter a reasonable person from engaging in protected conduct



# Retaliation

- ▶ Sometimes there is retaliation before any protected activity
- ▶ An employment policy itself could be unlawful if it discourages exercising EEO rights





# Retaliation laws are not a shield

- ▶ Even though anti-retaliation laws are very broad, employers remain free to discipline or terminate employees for poor performance or improper behavior, even if the employee made an EEO complaint.
- ▶ Whether employer's action was motivated by legitimate reasons or retaliation will depend on the facts of the case.





# Harassment



# Harassment theory of discrimination

- ▶ Person was subjected to comments or conduct based upon their protected class/status
- ▶ The comments or conduct were unwelcome
- ▶ The conduct resulted in an actual change in the conditions of employment, or was sufficiently severe or pervasive to create a hostile work environment (measured by standard of reasonable person in that situation and by that person's subjective experience)
- ▶ A basis exists for holding R liable for harassment



# Hostile Work Environment Standard

- ▶ Conduct must have been sufficiently severe OR pervasive to create an objectively (to a reasonable person in the Charging Party's position) and subjectively (to the victim) abusive work environment (i.e., a hostile work environment)
- ▶ **Severe:** the conduct/comment only needed to happen once to cause any reasonable person to be offended.
- ▶ **Pervasive:** a series of things eventually added up enough to make the environment hostile.



# Determining Liability

▶ Owner/High Level Official



▶ Automatic Liability

▶ Supervisor



▶ Affirmative Defense:

- Employer exercised reasonable care to prevent and correct, promptly, any harassing behavior; and
- The employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise

▶ Other (co-worker, peer, customer, client, etc)



▶ Negligence Standard- the employer knew or should have known of the harassment and failed to take corrective action



# TIPS –Investigating Hostile Work Environment Cases

- ▶ Get the explicit/detailed information
- ▶ Don't gloss over egregious stuff out of discomfort
- ▶ Record the details/ don't give only conclusionary descriptions in your notes (ok for a charge)
- ▶ Be sensitive, not judgmental or overly sympathetic





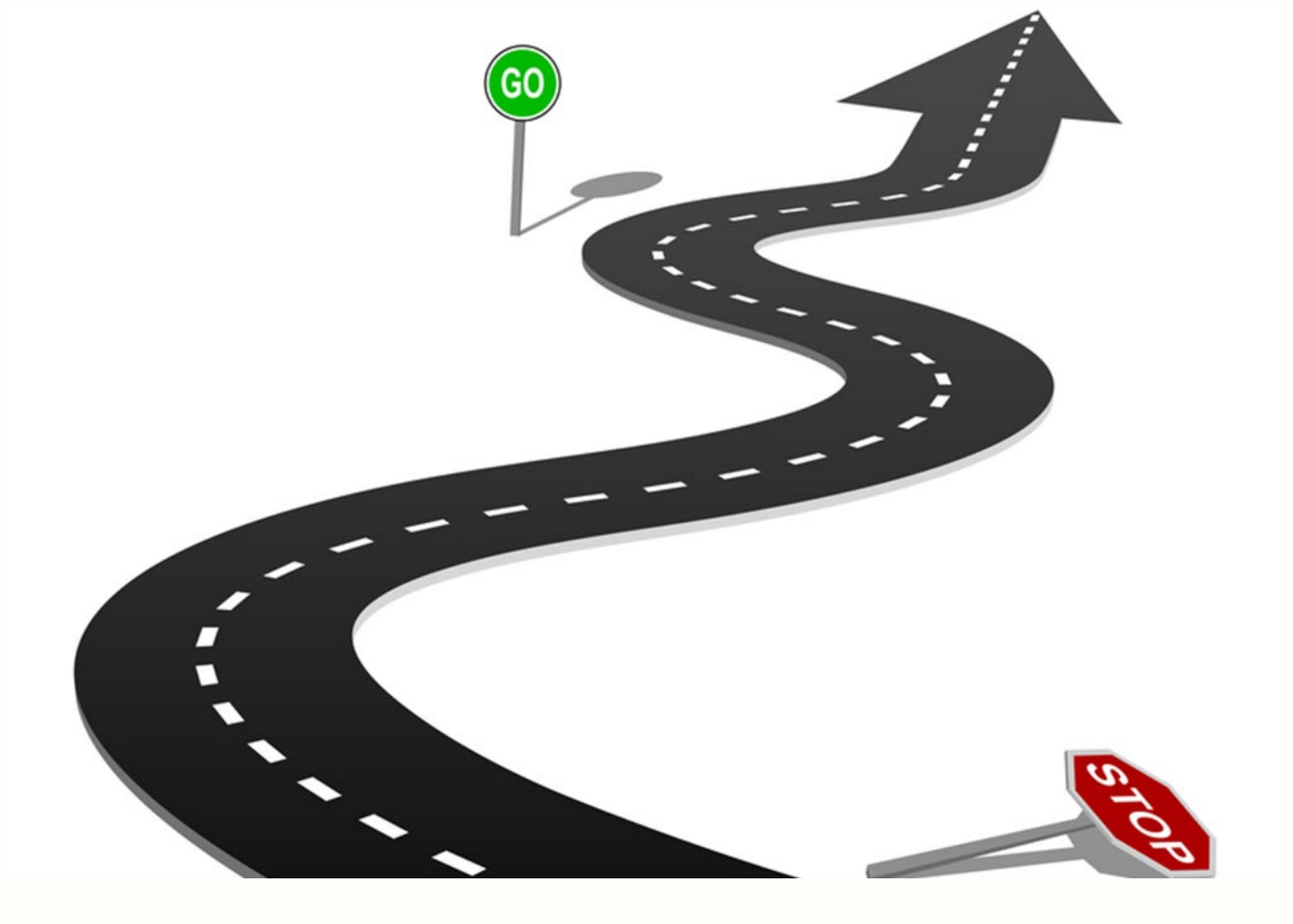


# Investigations



# Using the Investigative Plan

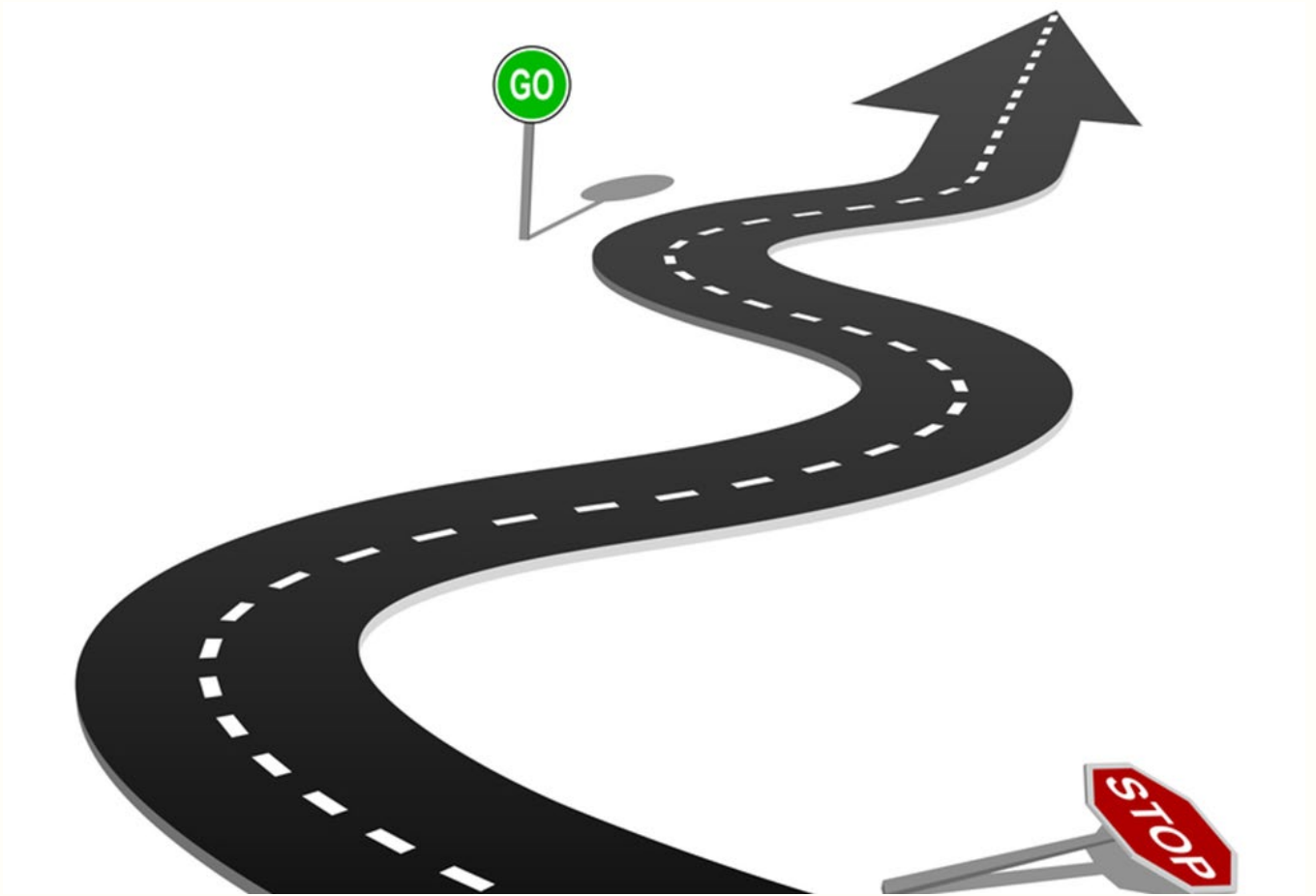
- ▶ What do I have?
- ▶ What do I need?
- ▶ How am I going to get it?





# The Investigative Plan

- ▶ Planning Tool
- ▶ Working document throughout the Investigation
- ▶ Efficient
- ▶ Works with the models of proof
- ▶ Use to draft recommenda





# Interviewing

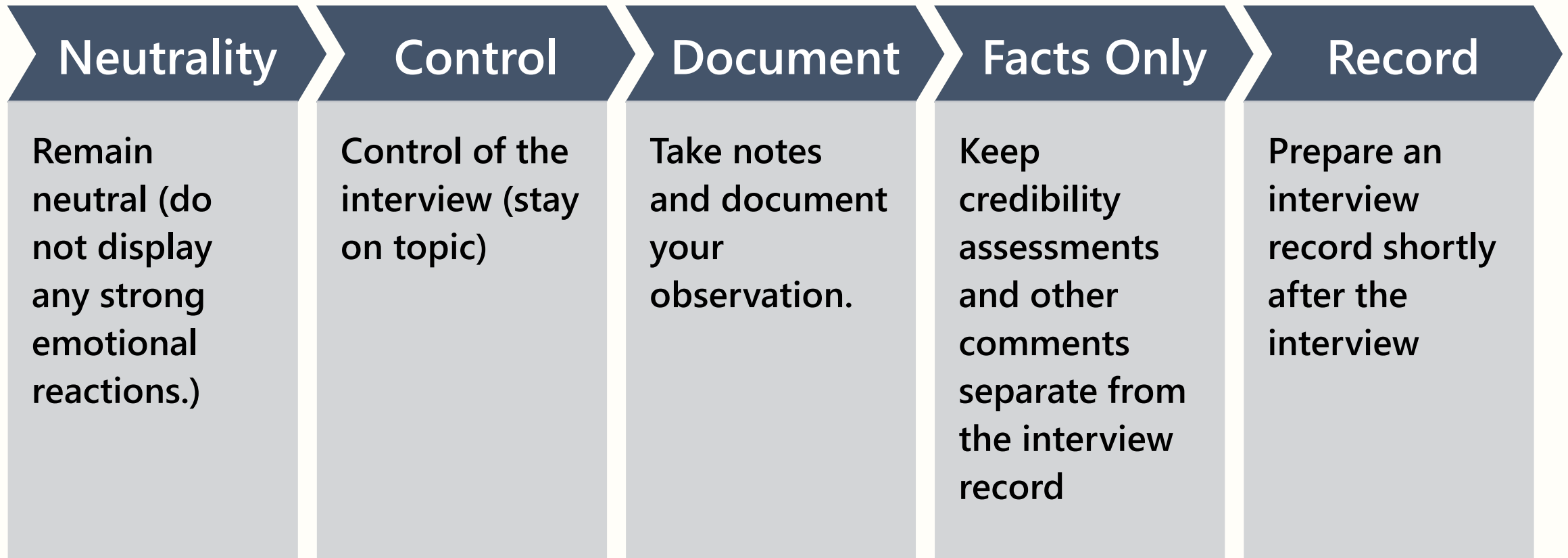


# Traditional Interviews

- ▶ We use this method most often.
- ▶ Develop questions by using the theories of discrimination



# Traditional interview



# Interviewing Tips

- ▶ Introduction/Explain Process
- ▶ Start with Broad Questions (i.e. policies/practices/procedures/ employer training(s), etc.)
- ▶ Ask narrow questions directly related to the CP and their allegations.
- ▶ Ask one question at a time
- ▶ If appropriate, ask about other employees/comparators
- ▶ Allow witness to add, if they would like to at the end.
- ▶ Before commencing the interview, explain that your role is to gather facts and evidence. Do not allow the attorney to control the interview.
- ▶ Difficult attorneys may represent either the charging party or the respondent. Deflate the attorney's outbursts.
  - Acknowledge concerns;
  - Agree with him/her wherever appropriate;
  - Express your understanding of his/her concerns;
- ▶ Remind the attorney of his/her limited role.



# Credibility

- ▶ Is the person believable?
- ▶ Does this story seem feasible?
- ▶ What Cues Are You Looking For?
  - Eye contact
  - Fluidity with Responses
  - Details like dates, times
  - Tone
  - Volume
  - Speed of answers
  - Evidence/documents/etc.



# More on Credibility

- ▶ Consider potential observations of the victim's demeanor before/after the incident of harassment
- ▶ Many times harassers have a reputation, testimony of others may be useful to show the harasser has a track record of similar conduct
- ▶ Consider past discipline of the harasser. Did the employer take the appropriate action on previous complaints and were they effective?
- ▶ Cannot determine credibility by physical appearance, dress, or personal hygiene, or other characteristics.
- ▶ Poor management or skills are not harassment unless CP was targeted because of a protected characteristic.







# Reporting on the Investigation

Use the Models of Proof as your guide





# What needs to be in an investigative memo?

- I. Jurisdictional Justification
  - a. Dates of harm, Respondent size, Statutes, Basis, Issue
- II. Background
- III. Charging Party Allegations
- IV. Respondent Contentions
- V. Analysis of Evidence
  - a. Theory of Discrimination
  - b. Elements of Proof
- VI. Conclusion and Recommendation



# Questions?





# Thank You!

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