

Responding to a Kansas Human Rights Commission Complaint:

From Frazzled to Functional



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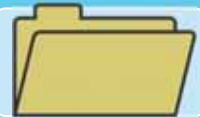
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Today's Presentation—See Your Handout



Kansas Human Rights Commission

- Kansas Act Against Discrimination and Kansas Age Discrimination in Employment Act
- By the Numbers



Complaint Process, Notification and Initial Materials Request

- Voluntary Mediation
- Tips for Responding to a Complaint



Three Common Allegations and Their Pitfalls

- Retaliation
- Harassment
- Terminations



New Developments/Where to Get Help

Kansas Human Rights Commission

KANSAS
*Human Rights
Commission*



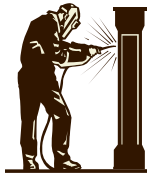
Our Mission

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.

Kansas Act Against Discrimination

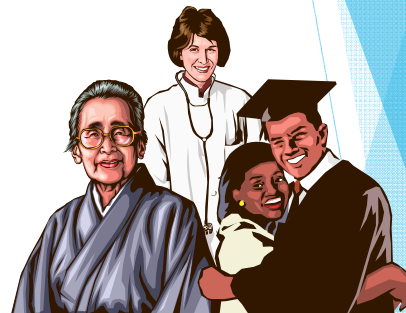
Prohibits discrimination in:

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



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)

What is Discrimination?

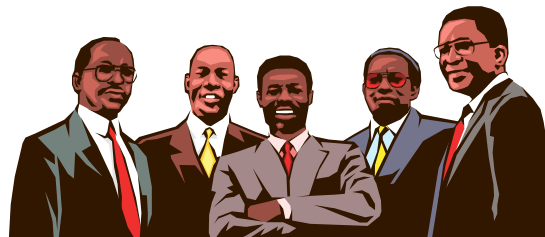
- ▶ Any direct or indirect exclusion... segregation...denial, or any other differentiation ... in the treatment of a person on the account of their... **[protected class]**.

KHRC Rules & Regulations

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Discrimination happens when...

*An adverse action meets
a protected class.*



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Two Types of Discrimination



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.

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.

Complaints Filed-FY 2014

AREA	COMPLAINTS	PERCENTAGE OF COMPLAINTS
Employment	747	95%
Housing	8	1%
Public Accommodation	32	4%
Total Charges Filed	787	100 %

BASIS OF COMPLAINT *versus* AREA IN WHICH COMPLAINT WAS ALLEGED-FY 2014

BASIS	EMPLOYMENT	HOUSING	PUBLIC ACCOM.	TOTAL
Retaliation	460		1	461
Race	248	1	24	273
Disability	253	5	7	265
Sex	230		2	232
Age*	211			211
National Origin/Ancestry	115	2		117
Color	42		2	44
Religion	36			36
Genetic Testing*	2			2
Familial Status%				
Total**	1,597	8	36	1,641

787 total complaints filed in FY 2014. 747 employment complaints.

% Familial Status is a basis only in housing complaints.

* Age and Genetic Testing are bases only in employment complaints.

** Total exceeds the actual number of complaints filed since many complaints contain multiple charges.

Simplified Bases	Alleged Bases	Total
Age	Age	211
Color	Color	42
Disability Total	Disability, Record of, Regarded As	253
Genetic Information	Genetic Information	2
Natl Origin	Natl Origin Arab, Afghani, Mid-Eastern	3
	Natl Origin East Indian	1
	Natl Origin Hispanic	50
	Natl Origin Mexican	12
	Natl Origin Other	49
Natl Origin Total		115
Race	Race	1
	Race Amer Indian, Alaskan Native	4
	Race Asian	7
	Race Black	208
	Race White	28
Race Total		248
Religion	Religion: Catholic	4
	Religion: Jewish	1
	Religion: Muslim	2
	Religion: Other	29
Religion Total		36
Retaliation Total		460
Sex	Sex Female	168
	Sex Male	60
	Sex Pregnancy	2
Sex Total		230

Detailed Alleged Bases for Employment Complaints- FY 2014

747 Employment Complaints Filed.

Total exceeds the actual number of complaints filed since many contain multiples bases.

National Origin includes Ancestry.

TYPE OF ALLEGATION	NUMBER FILED
Terms & Conditions	490
Discharge	457
Harassment	227
Discipline	120
Sexual Harassment	78
Suspension	75
Reasonable Accommodation	61
Constructive Discharge	54
Hiring	45
Wages	41
Promotion	40
Demotion	22
Training	18
Benefits	10
Layoff	7
Reference Unfavorable	7
Maternity	5
Retirement- Involuntary	4
Reinstatement	2
Union Representation	2
Severance Pay Denied	1
*Total	1,766

Types of Allegations of Unlawful Employment Practices-FY 2014

- 747 Employment Complaints Filed
- 305, or 41%, of employment complaints alleged harassment.
- 457, or 61%, allege discrimination in discharges.
- Total exceeds the actual number of complaints filed since many complaints contain multiple allegations

Complaint Notification and Initial Materials Request

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



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, 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.

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 (notarized), 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.

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.

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, Investigative Materials Request specific to the allegations (Termination) in this example, and Respondent Questions General Background
 - ▶ Mediation Notification
 - ▶ Retaliation is Unlawful

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 (Topeka, Wichita, or Dodge City).
- ▶ 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.

General Tips for a Respondent Response

- ▶ 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 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.
- ▶ The Respondent should submit quarterly payroll reports, quarterly unemployment reports, and documents similar to establish the number of employees. The EEOC requires that the Investigator request documentation showing the total number of employees for the year the allegation occurred and the prior year.
- ▶ 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.)

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.



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.

Common Allegations and Their Pitfalls

Retaliation

- Retaliation is routinely the number one basis cited when filing complaints.
- 460, or 62%, of the 747 employment complaints filed in FY 2014 alleged retaliation.
- According to the EEOC, retaliation is the most common discrimination finding in federal sector cases.

What is Retaliation?

- An employer may not fire, demote, harass or otherwise "retaliate" against an individual for filing a charge of discrimination, participating in a discrimination proceeding, or otherwise opposing discrimination.
- 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 threats, unjustified negative evaluations, unjustified negative references, or increased surveillance, and any other action such as an assault or unfounded civil or criminal charges that are likely to deter reasonable people from pursuing their rights.

What is Retaliation?

- Covered Individuals--Covered individuals are people who have opposed unlawful practices, participated in proceedings, or requested accommodations related to employment discrimination based on race, color, sex, religion, national origin, 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.

- 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.
- 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.

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) she engaged in protected opposition to discrimination;
- 2) she 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).

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.

How Widespread is Harassment?

- ▶ EEOC press release from January 14, 2015:
 - ▶ Approximately 30 percent of all charges filed with the EEOC allege workplace harassment.
 - ▶ One in four women face harassment in the workplace.
 - ▶ Specifically mentioned that individuals with disabilities are vulnerable to harassment.
- ▶ How about Kansas?
 - ▶ 41% of employment complaints filed with the KHRC in FY 2014 alleged harassment. (Of the 747 employment complaints filed, 305 alleged harassment. 78 alleged sexual harassment and 227 alleged harassment.)

Alleged Harassment in Kansas-FY 2014

Rank	Basis	Number
1	Disability	83
2	Sex (Sex Female-57, Sex Male-22, Sex Pregnancy-2)	81
3	Race	78
4	Age	64
5	National Origin/Ancestry	52
6	Religion	18
7	Color	17
	Total	393

305 complaints alleged harassment. Total above exceeds the actual number of complaints filed since many contain multiples bases.

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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).

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.

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.

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.

Harassment Pitfalls



Supervisors not recognizing when an employee is complaining of harassment and then failing to act upon the complaint or to forward it to HR.



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.

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.

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.)

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.

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.

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.

New Developments

The EEOC has begun releasing the initial Respondent position statement, with redactions, to the Complainant. See Handouts.

The KHRC will not release the Respondent position statement to the Complainant without a court order due to the confidentiality provision at K.S.A. 44-1005(e).

Where to Get Help

- ✓ www.khrc.net---Click on the Public Information Program Tab
- ✓ www.eeoc.gov

Thank You!

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