

Investigations Training - 101

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Overview of Training

- Session A
 - Overview of MGO 39.03
 - Definition of Terms
 - Differences Between State Statutes, Federal Law and the MGO 39.03
 - Scenarios and Discussion
- Session B & C
 - Investigations
- Session D
 - Issuing Initial Determination No Probable Cause & Probable Cause (Draft Determination as Homework)
- Session E
 - Mediation
 - Conciliation

Session A



Overview of Session A

- Overview of MGO 39.03
- Definition of Terms
- Differences Between State Statutes, Federal Law and the MGO 39.03
- Scenarios and Discussion

Overview of MGO 39.03

- Madison Equal Opportunities Ordinance
- Now Department of Civil Rights – initially the Equal Opportunities Commission
 - Created in 1963, before the Federal Civil Rights Act was signed into law in 1964
- 20 protected classes
- Employment, Housing, Public Places of Accommodations, Credit

Overview of MGO 39.03

- Credit – very little authority in this area anymore
- Housing
 - Conviction Record
 - Roommates
 - “Nothing in this ordinance shall affect any person’s decision to share occupancy of a lodging room, apartment or dwelling unit with another person or persons.” (39.03(4)(e))

Overview of MGO 39.03

- Housing
 - Advertising
 - “For **any person** to post, print, broadcast or publish or cause to be posted, printed, broadcast or published, any notice or advertisement relating to the transfer, sale, rental or lease of any housing which expresses preference, limitation, specifications or discrimination as to ... [list of protected classes]” (39.03(4)(g))
 - NOTE – when in doubt go back to the Ordinance

Overview of MGO 39.03

- Employment
 - Arrest / Conviction Record
- Retaliation
 - Oppose a discriminatory practice
 - Made a complaint
 - Testified or Assisted
 - NOTE – word retaliation is not in the Ordinance

Definition of Terms

- Handicap / Disability
 - Same as Federal Government, different than State
- Religion
 - Is not limited to Christian, Muslim, Hindu, etc – not just religions that you may have heard of but any **sincerely held religious beliefs**
- Source of Income
 - Now specifically includes Section 8 funds

Differences Between State Statutes, Federal Law and the MGO 39.03

- See Handout
 - First one lists the 3 jurisdictions in a table
 - Second one explains some differences between the State of Wisconsin and MGO 39.03

Scenarios and Discussion

- Prima Facie case – The Complainant must allege
 - Suffered an adverse action
 - He/She belongs to a protected class
 - The adverse action was because of his/her membership in that protected class

Scenarios and Discussion

- A new supervisor is assigned to Department X. The new supervisor wants to provide the best service possible to the public. He noticed that some areas of the City have mostly a Hispanic population; others have mostly a Black population and others a mostly Asian population. When positions in the particular area come open, he assigns Hispanic workers to Hispanic areas, Black workers to areas populated mostly by Blacks and Asian workers to areas mostly populated by Asians.
- What do think?

Scenarios and Discussion

- Mary Charming and Malcolm Jamal Winston Jr. work as Customer Service Clerks for the Parks Division. Ms. Charming is White and Mr. Winston is Black. Mr. Winston has noticed that when some customers come in, Ms. Charming would not let him provide them with service. Even if she is busy, she will stop what she is doing and come to the front to take over. He has overheard some of these customers talking to Ms. Charming about how they “are not racist, but they are glad they don’t have to deal with the ‘African American guy’ because black people can be rude sometimes.” Mr. Winston knows the supervisor is aware of what is going on.
- What do think?

Scenarios and Discussion

- Mark Grand suffers from a permanent health condition. Because of his disability, he has requested, as a reasonable accommodation that his duties be modified. As a result, Mark does not have to work overtime. Sheila Patterson shares the same job with Mark. Sheila has noticed that Mark never works overtime, although she does not know why. Sheila's new religious beliefs prohibit her from working on a particular day of the weekend. Sheila asks the supervisor not to assign her for overtime on the particular day of the weekend and points out that Mark has not worked overtime in the last 6 months.
- What can the supervisor say about Mark?
- Does the supervisor have a duty to accommodate Mark? How about Sheila?
- What should the supervisor do about Sheila's request?

Thoughts, Questions, Concerns

Thank You !!!

Session B



Overview of Session B

- Investigations Manual
- Evaluating Complaint
- Formulating Questions
- Review Actual Complaints

Investigations Manual

- Manual that gives directions for each step of investigation
- Where appropriate I have included the information from the Manual in this presentation

Evaluating a Complaint

- Prima Facie
 - Discussed yesterday – who remembers
- Type of Complaint
 - Employment
 - Public Accommodations
 - Housing

Evaluating a Complaint

- Protected Class or Classes checked
- Adverse Action
 - Termination
 - Failure to Hire
 - Refuse to Rent
- This is important because all of your questions will come back to this information

Formulating Questions

- Neutrality
 - Much harder to do than it seems – Nearly every time you read a complaint you will find yourself leaning one way or another – we are all human
- Purpose
 - Questions should be purposeful, clear, brief, limited in scope
 - Not to satisfy your curiosity

Formulating Questions

TYPE	USE	EXAMPLE
Open	Good way to get information important to the party	Could you describe the events leading up to your termination?
Closed	Get specific, limited answer	Were you ever absent? Did you employ the Complainant?
Factual	Asks for specific factual information, such as dates, names, etc	How many people work for this supervisor? How many of these people have been disciplined for the same or similar reason?
Opinion	Asks for the person's opinion	Why do you think your [protected class listed in complaint] was a reason for the Respondent's actions?
Direct	Gets a short specific answer	When did this policy go into effect?

Formulating Questions

- Respondent's Questionnaire
 - Use general questions as appropriate.
 - After reviewing the complaint of discrimination, add specific questions to obtain information necessary to determine if the Complainant was treated in a different manner than persons not of their protected class(es) and/or that the Complainant was treated in an adverse manner because of their membership in the protected class(es) marked on the Complaint Form.
 - The request may include specific documents, statements from witnesses, description of events and/or comparison data.

Formulating Questions

- Complainant's Questionnaire
 - After reviewing the complaint of discrimination, write questions necessary to obtain information as to the Complainant's position of what occurred.
 - The request may include specific documents, statements from witnesses, description of events and/or comparison data. (The MEOD does not search for witnesses, nor will former or current employers be asked to provide this information for the Complainant).

Formulating Questions

- Tips
 - Always have a reason for asking your question
 - Always keep in mind the law
 - Remember that your eventual determination will have to be supported by the information you gather during your investigation
 - Questions to support Complaint
 - Questions to Disprove Complaint

Actual Complaint - Jane

- PLEASE READ COMPLAINT
 - Type of Complaint: Employment, Housing, Public Accommodations?
 - Protected Class or Classes checked?
 - Adverse Action?
 - What kind of information do you need?
 - Types of Questions to ask?
 - At this point what do you think? Probable Cause or No Probable Cause

Actual Complaint - Jane

- PLEASE READ INITIAL DETERMINATION
 - Is the outcome what you expected?
 - Did you note who actually called the police?
 - Note the Respondent's response – it was able to distinguish each incident the Complainant mentioned, if it had not the outcome may have been different
 - Investigator's cannot determine credibility, must believe the Complainant

Actual Complaint - John

- PLEASE READ COMPLAINT
 - Type of Complaint: Employment, Housing, Public Accommodations?
 - Protected Class or Classes checked?
 - Adverse Action?
 - What kind of information do you need?
 - Types of Questions to ask?
 - At this point what do you think? Probable Cause or No Probable Cause

Actual Complaint - John

- PLEASE READ ADDITIONAL INFORMATION
 - This case settled before investigation was complete but we have answers to the questions
 - Note the different perspectives
 - I still believe this case was filed in good faith
 - Note the answers to the questions

Homework

- Actual Complaint – Elizabeth
- Please read complaint before tomorrow and draft possible questions to ask the Complainant and possible questions to ask the Respondent
- Questions about your assignment

Thoughts, Questions, Concerns

Thank You !!!

Session C



Overview of Session C

- Review homework
- Investigations – Evaluating Responses
 - Legitimate, Non-Discriminatory Business Reason
 - Pretext
 - Comparisons
 - Witness Statements
 - Credibility
 - Enough Information

Review Homework

- Discuss questions you drafted
- Review actual questions drafted for the Complaint of Discrimination

Investigations

- Discuss types of responses you may receive
- Legitimate, Non-Discriminatory Business Reason
- Pretext
- Comparisons
- Witness Statements
- Credibility
- Enough Information

Legitimate, Non-Discriminatory Business Reason

- The reason the Respondent gives for its actions unrelated to the protected class articulated by the Complainant
- Example:
 - Person was not hired because there was a better qualified candidate
 - Person was not disciplined because of her race but because of her poor attendance and/or poor performance

Pretext

- If the Respondent presents a reasonable reason for its actions then the burden shifts to the Complainant to show that the reason proffered is either not credible or is otherwise a pretext for discrimination.
 - In many cases, showing the Respondent provided a false reason for its actions would be enough to conclude that discrimination occurred.

Comparisons

- The Complainant may prove pretext and/or show discrimination by offering evidence that similarly situated employees who are not in the Complainant's protected group were treated more favorably or did not receive the same adverse treatment.

Comparisons

- Similarly situated people are, or were, in a similar circumstance and the expectation is they would receive the same treatment.

Should know:

- Covered by the same policy and/or practice
- Engaged in similar conduct
- Who is the Decision-maker
- Are positions the same and/or similar

Comparisons

- If no one is, or was, similarly situated
Investigator should consider other information that may indicate a discriminatory motive
 - Biased behavior or statements
 - Suspicious timing – firing a female employee right after finding out she is pregnant
 - Statistical evidence
 - etc

Comparison - Example

- This employee, white, left his delivery truck unattended for five minutes, with the rear trailer doors locked, within 100 yards of the defendant's property, and under the surveillance of defendant's security cameras.
- Continued on next slide

Comparison - Example

- The Complainant, African-American, urinated in a public parking lot along a highway, temporarily abandoned his truck for roughly 20 minutes while he shopped in a sporting goods store, and did not secure the truck pursuant to defendant's protocols.
- Similarly Situated?
- Continued on next slide

Comparison - Example

- 2nd Circuit (Federal Court) – says NO they are not similarly situated because of the surrounding circumstances.

Witness Statements

- Responsibility of Complainant to gather
- Read carefully and remember what case is about (protected class, adverse action)
 - Does this witness statement speak to events articulated in complaint?
 - Generally at Investigation Stage if witness statement is on-point with the Complainant then it is often enough to reach a Probable Cause decision

Credibility

- If one party states certain things occurred and the other party makes conflicting statements to reasonably disputed facts, this may create a credibility issue. In that event, **the Investigator will assume the Complainant's statements are true for the purposes of the Investigation.** At a hearing where testimony is under oath, the Hearing Examiner will determine credibility of witnesses.

Thoughts, Questions, Concerns

Thank You !!!

Session D



Overview of Session D

- Prima Facie Case
- Issuing Initial Determinations
 - No Probable Cause
 - Probable Cause
 - No Probable Cause / Probable Cause

Prima Facie Case

- The Complainant must allege
 - Suffered an adverse action
 - He/She belongs to a protected class
 - The adverse action was because of his/her membership in that protected class

Prima Facie Case – Adverse Action

- Adverse employment action has been defined as "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."

Prima Facie Case – Adverse Action

- The employment action must be materially adverse, i.e. it must be more than mere inconvenience or an alteration of job responsibilities.
- Complainant must have an objective basis for demonstrating the change is adverse, rather than a mere subjective impression that it is.

Prima Facie Case – Adverse Action

- De minimus actions are not materially adverse. A change in employment conditions must be more disruptive than a mere inconvenience or an alteration of job responsibilities.

Prima Facie Case – Adverse Action

- A materially adverse action might be:
- Discharge

Prima Facie Case – Adverse Action

- Demotion or transfer accompanied by one or more of the following:
 - decreased wages or salary
 - a less distinguished job title
 - a material loss of benefits
 - significantly diminished material job responsibilities
 - loss of seniority

Prima Facie Case – Adverse Action

- Supervisor's decision not to take action to stop harassment by co-workers in retaliation for employee's opposition to civil rights violations.
- Permanent transfer to another shift, even where no change in salary or position occurred, where the change in work hours impacted employee's ability to continue her education.

Prima Facie Case – Adverse Action

- The following are generally NOT materially adverse employment actions:
 - Requiring employee to work at home while she was recovering from outpatient surgery.
 - Suspending a police chief with pay pending an investigation where there is no demotion or discharge, no loss of salary and benefits, and neither work hours nor material responsibilities are reduced.

Prima Facie Case – Adverse Action

- Giving satisfactory ratings in an overall evaluation, although lower than a previous evaluation, is not adverse where the employee receives a merit raise.
- Reassigning or transferring employee without salary, benefit or work hour changes is not ordinarily adverse.

Prima Facie Case – Adverse Action

- Transferring an employee whose pay, benefits, title and job duties remain the same but new position is in another county so employee will have to travel an additional 20 minutes to get to work.

Prima Facie Case – Retaliation Adverse Action

- Everything we have been discussing applies to most discrimination cases.
- These are all true for retaliation.

Prima Facie Case – Retaliation Adverse Action

- In addition, in retaliation cases treatment that is reasonably likely to deter protected activity is unlawful.
- There is no requirement that the adverse action materially affect the terms, conditions, or privileges of employment.

Prima Facie Case – Retaliation Adverse Action

- Adverse Actions Can Occur After the Employment Relationship Between the Complainant and the Respondent has ended.

Prima Facie Case – Retaliation Adverse Action

- Examples of post-employment retaliation include actions that are designed to interfere with the individual's prospects for employment.
 - unjustified negative job reference
 - refusing to provide a job reference
 - informing an individual's prospective employer about the individual's protected activity

Prima Facie Case – Retaliation Adverse Action

- Retaliatory acts designed to interfere with an individual's prospects for employment are unlawful regardless of whether they cause a prospective employer to refrain from hiring the individual.

Prima Facie Case – Retaliation Adverse Action

- The Third Circuit Court stated, "an employer who retaliates cannot escape liability merely because the retaliation falls short of its intended result."
- However, the fact that the reference did not affect the individual's job prospects may affect the relief that is due.

Initial Determination (ID)

- This is the report that goes to all the parties with the Investigator's findings.

Initial Determination (ID)

- The Respondent must be an employer, housing provider, place of public accommodation or other entity defined in the Equal Opportunities Ordinance or the Investigator will determine that they are not an appropriate Respondent. There may be several named Respondents.

Initial Determination (ID)

- The ID describes the events that the Complainant alleges were discriminatory. If available, it also describes how individuals not of the Complainant's protected class or classes were treated in similar situations. Such descriptions should include dates, names, specific events and witnesses.

Initial Determination (ID)

- If possible, documents such as payroll records, personnel files, termination documents, applications for rental, evictions, etc. should be referred to when describing such events.
- If witness statements are being used to verify events, direct quotes may be used from those statements.

Initial Determination (ID)

- If one party states certain things occurred and the other party makes conflicting statements to reasonably disputed facts, this may create a credibility issue. In that event, **the Investigator will assume the Complainant's statements are true for the purposes of the Investigation.** At a hearing where testimony is under oath, the Hearing Examiner will determine credibility of witnesses.

Initial Determination (ID)

- A finding should be made for each allegation made of No Probable Cause or Probable Cause.

Initial Determination (ID)

- Example: A person claims they were disciplined and terminated because of their age and religion would have four allegations.
 1. Discipline because of age
 2. Termination because of age
 3. Discipline because of religion
 4. Termination because of religion

No Probable Cause (NPC) Determination

- NPC exists when there is not enough information to cause a **reasonable person** to believe that discrimination may have occurred.

No Probable Cause (NPC) Determination

- To find NPC, the Investigator must determine that the Complainant was not subjected to an adverse action because of their membership in the claimed protected class(es).
- While an adverse action may have occurred, the Respondent may have shown a legitimate, non-discriminatory business reason for their action(s).

No Probable Cause (NPC) Determination

- For example: If the same action happened to other persons, who are not members of the same protected class(es) as the Complainant, it would appear that the Complainant's protected class(es) was(were) not a factor in the Respondent's actions.
 - Men and women are disciplined for absences.

No Probable Cause (NPC) Determination

- If it were found that the Complainant is not a member of a particular protected class, that issue(s) would be NPC.
 - For example: the Complainant claims retaliation but they never took any action (made a complaint, opposed a practice, assisted in an action, etc) that would place them in that protected class as defined by the MGO.

No Probable Cause (NPC) Determination

- If the Investigator finds that a particular Respondent is not the correct Respondent, the Investigator will make a reasonable effort to identify the proper Respondent before the ID is issued. The finding against the incorrect Respondent will be NPC.

Probable Cause (PC) Determination

- Probable cause exists when there is enough information to cause **a reasonable person** to believe that discrimination **may** have occurred.

Probable Cause (PC) Determination

- Note that a Probable Cause finding does **not** mean that discrimination **actually** occurred. That is not determined at the Investigation stage of the process.
- Oftentimes, a Complainant will believe they have prevailed when they receive a PC finding but they have only “won” the right to continue in the process.

Probable Cause (PC) Determination

- To find PC, the Investigator must determine that the Complainant was a member of a protected class(es), suffered an adverse action and that there is a connection between the Complainant's membership in the protected class(es) and the adverse action.

Probable Cause (PC) Determination

- The Investigator looks at the Respondent's reasons for its actions and whether persons not of that protected class(es) were treated in a more favorable manner than the Complainant.

Probable Cause / No Probable Cause Determination

- The results of an investigation may be mixed. PC may be found for some issues and NPC for other issues.

Probable Cause / No Probable Cause Determination

- Look at our earlier example: A person who claims they were disciplined and terminated because of their age and religion would have four allegations.
 1. Discipline because of age
 2. Termination because of age
 3. Discipline because of religion
 4. Termination because of religion

Probable Cause / No Probable Cause Determination

- The Investigator determines that age may have been a factor in the Respondent's decisions, but not religion.
- The Determination would be Probable Cause for discipline and termination because of age.
- The Determination would be No Probable Cause for discipline and termination because of religion.

Probable Cause / No Probable Cause Determination

- The reason for the decision for each issue should be explained in the ID.

Format of an Initial Determination

- There are two basic approaches to drafting an ID.
 1. By Party
 - Used for simpler, few allegation determinations
 2. By Allegation
 - Used for more complex, multiple allegation and/or protected classes determinations.

Format of an Initial Determination

- For example - by Party
 1. The Complainant's information
 2. The Respondent's information
 3. The Investigator's conclusions

Format of an Initial Determination

- For example - by Allegation
 1. The Complainant's information regarding the discipline
 2. The Respondent's information regarding the discipline
 3. The Investigator's conclusions regarding the discipline

Format of an Initial Determination

4. The Complainant's information regarding the termination
5. The Respondent's information regarding the termination
6. The Investigator's conclusions regarding the termination

Thoughts, Questions, Concerns

Thank You !!!

Session E



Overview of Session E

- Initial Determination – Review Homework
- Mediation
- Conciliation
 - Note – the terms “Mediation” & “Conciliation” identify different stages in our process but are very similar in implementation.

Initial Determination - Review Homework

- How was it?
- What do you think?
- Questions?
- What was your decision? Why?

Mediation Basics

- Mediation – an assisted negotiation
- Key qualities
 - Voluntary – you can leave at any time for any reason
 - Collaborative – encouraged to work together to solve the problem(s) and to reach what the parties perceive as their best agreement

Mediation Basics

- Confidential – discussions are separate from the Investigation and/or Hearing process. This is done in order to encourage settlement.
- Impartial, Neutral, Balanced & Safe – mediator should be neutral and not represent or advocate for either party.

Mediation / Conciliation

- These titles simply identify different places in our process.
- Early Mediation is offered when a complaint is first filed and runs at the same time as the Investigation.
- Conciliation is offered after an Investigation is complete and a finding of Probable Cause.

Mediation / Conciliation

- Becoming a successful negotiator takes time and experience.
- There are not hard and fast rules – each person must find a style that works best with their personality.
- Negotiation requires flexibility, creativity, imagination and patience.

Mediation / Conciliation

- Some cases do not settle because people are looking at their options in 2 completely different worldviews.
 - Barring outside pressures it may be very difficult to get a party to consider changing their position.
- If parties have similar views of the case then these will often settle.

Mediation / Conciliation

- In the EOC process it is important that those who come to the table have 2 things:
 - Settlement Authority
 - A willingness to do something

Mediation / Conciliation

- Reasons why a Complainant might settle:
 - Believe they have a good deal
 - They want to move on with their life
 - Need the money for something
 - Do not want to go to a Hearing
 - etc

Mediation / Conciliation

- Reasons why a Respondent might settle:
 - Believe they have a good deal
 - They want to move on with their life
 - Business decision
 - Case is costing so much in staff time, attorney's fees, etc
 - Avoid adverse publicity
 - etc

Mediation / Conciliation

- We may never know why people may or may not settle – never make an assumption about the outcome without giving the parties a chance to respond
 - A mediation is like a photograph and we do not know the entire movie
 - Be aware of multiple negotiations going on
 - The people at the table have to negotiate and/or justify the decision with others not in the room

Thoughts, Questions, Concerns

Thank You !!!

The End

Thank You !!!