

Best Practices for Preparing a Response to a BOLI Complaint or EEOC Charge
(a.k.a., "Isn't this fun?!")

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- Who are these people, and do I have to be nice to them?
- Preparing your best response
- Don't forget the "extras" (documentation)
- Other issues
- Questions, a.k.a., "Stump the CIS Lawyers"




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Who are These People and Do I Have to be Nice to Them?

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Equal Employment Opportunity Commission

- Federal government agency
- Created in 1965
- Responsibility: eliminate discrimination in the workplace
- Accepts, investigates, conciliates, litigates **charges** of discrimination
- www.eeoc.gov



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Bureau of Labor and Industries

- Oregon state agency, created 1903
- Responsible for initial enforcement of many state laws
- Accepts, investigates, resolves, and litigates (administratively) **complaints** of discrimination
- www.boli.state.or.us



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Who enforces which employment laws?

BOLI	EEOC
Oregon civil rights laws (ORS 659A.030)	Title VII (includes Equal Pay Act and Age Discrimination in Employment Act claims)
Oregon disability discrimination laws	ADA/Rehabilitation Act
OFLA	
Oregon wage claims	
Oregon military service discrimination (includes veterans' preference)	



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BOLI is a “deferral agency”

- EEOC typically “defers” to BOLI
 - For 60 days, or
 - Until state agency terminates proceedings
- Federal and state agencies have “work-sharing agreements”



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When Litigation is on the Horizon...

- No administrative filing is required to precede litigation in Oregon court under Oregon law
 - Oregon: “an election of remedies” state
 - The employee gets to choose: Lawsuit in Oregon court or complaint with BOLI.
- Federal law requires an EEOC filing before litigation



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Filing Deadlines

- Federal
 - 300 days (really 240)
 - Title VII requires a 60-day waiting period for the state agency to do its job
- Oregon
 - 1 year (OAR 839-003-0020(5))
 - Note: Effective January 1, 2022, new deadline for safety complaint retaliation claims is one year (was 30 days)
 - Right to sue letter: 90 days from issuance



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The BOLI "deadline" You Need to Know

BOLI will issue a right to sue letter to the complainant "when a complaint is dismissed by the division or on the one-year anniversary of the complaint filing, whichever occurs first."

OAR 839-003-0020(4)



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First Things First

- What you'll receive from administrative agency
 - complaint +
- Timing for response and extensions
- Before you begin to write
 - Evaluate complaint
 - Consider complainant's status
 - Review and gather evidence
 - Determine who is responding
- CIS Member?



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Avoiding Temptations

Don't:

- Fail to respond or miss the deadline
- Treat response like a court pleading
- Just respond to allegations

TELL YOUR STORY



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It's Your Time to Shine

From BOLI:

*"The Response (or position statement) is the Respondent's instrument for rebutting the allegations in the Complaint, and to inform the Civil Rights Division of the **Respondent's version of events.**"*

The Response should include:

- a brief description of the Respondent's business,
- a narrative of events;
- Complainant's history with Respondent, including a rebuttal to the allegations, and/or any legitimate nondiscriminatory reason for the adverse action(s) alleged.



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Preparing Effective Responses – The Basics

- Be thorough
- Provide detail
- Explain what happened
- Provide backup documentation
- Address comparators
- Legal argument??



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Sample Structure – The Basics

- Introduction
- Factual Background
- Discussion Section (i.e. what actually happened)
- Response to Allegations
- Conclusion



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Response to Allegations

Respond to each individual allegation

- Do more than just deny; explain why
- OK to agree with some of the allegations, but deny others
- Your response to an allegation should never be “at-will employment”
- Consider whether to address weaknesses upfront



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Response to Allegations

For Example

Allegation:

“In June 2020, I reported my supervisor’s sexual harassment to Human Resources. No corrective action was taken.”

Response:

“Complainant reported allegations of sexual harassment to the Director of Human Resources on June 14, 2020. As mentioned in the discussion section above, the City retained a third-party investigator to review the allegations. Complainant’s allegations were not sustained by the investigation, but the City did provide additional training to Complainant’s entire Department.”



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Tone is Key

Remember your audience(s)!

- Who will see this response?
- What is/are your goal(s)?

Let those factors inform your tone.

Righteous indignation? Think twice.

Pound sand! ● I'm sorry they feel that way. ● We're blindsided, what can we do to help?



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Tone is Key

Real Life Examples:

- "This statement is patently false."
- In response to an allegation that someone said something, "Mr. Johnson says he would never say something like that."
 - Did he say it or not? Deny if you can!
- Relying on exhibits (a.k.a. no tone at all)



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Don't Forget The Extras:
Supporting Your Response With
Documentation

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Supporting Your Response

What documentation should I provide?

- Proof of the employee's poor performance
- Admissions made by the employee (text messages, emails, etc.)
- Proof the employee received the employee handbook or training (but not necessarily copies of the actual policies)



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Supporting Your Response

What about documentation re a comparator?

It's good information to provide!

- Redact the name(s) of the comparator(s) before producing.
- Specific information can be provided after you receive a subpoena to do so.

Let the comparator know that he/she may be contacted.



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Supporting Your Response

What if the employee "forgot" to mention something?

- Point it out. If it's important, do so several times to make sure the point is remembered.
- Provide proof. Documentation is key here. If no proof, do your best to explain the situation.

Basic rule: Documentation is your best friend. If you don't have a "best friend", do your best to provide the details, based on what your employees will say.



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Put Your Money Where Your Mouth Is

Some Rookie Mistakes

- “Employee is a liar”
- “Employee is a liar and his performance really sucked” (but you have no proof of that)
- “Employee can’t be right because we’ve never had a complaint against this supervisor before”

Basic rule: Provide proof, be reasonable



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Pack Some “Power” Into Your Response

Consider creative ways for presenting your evidence

- **Example: Charts**
 - shows how a candidate compared to the person who was hired.
 - shows which policies were violated and how the employee violated them.
 - shows the employer’s effort to work with the employee (e.g., evaluation and date, discipline and date).
- **Examples:** Photos, text messages, social media posts, examples of poor work



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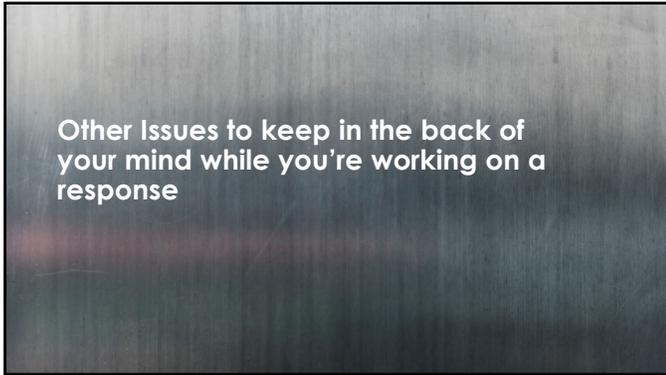
Should we provide witness statements?

You can, but . . .

- Written statements do not mean the agency will not do a personal interview
 - Credibility assessments
 - Follow-up questions
- The statements can be used for impeachment during a trial
 - Make sure that they are accurate before you send them!



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Interviews

- Prepare witnesses!
 - Think about privilege issues
 - Deposition-life
 - Logistics (especially in the age of COVID)
- Attorney's role at interviews.
- Follow up needed?



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What Happens If You Lose?

- Settlement or "conciliation"
 - "Conciliation should not result in inadequate remedies"
- Right to sue letter and private lawsuit
- Agency action
 - Contested case hearing (Oregon)
 - Lawsuit (federal)



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Access to Investigation File

- BOLI:
 - After complaint is closed, parties may obtain a copy of the file (for a fee)
 - Oregon Public Records law supersedes any employer designation
- EEOC:
 - Title VII prohibits making charges public
 - Charging party is entitled to see information in his/her file



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Protection of Confidential Information

- Your understanding of "confidential" is not necessarily the agency's understanding
- Some information might become available under the public records laws
 - Federal Freedom Of Information Act
 - Oregon Public Records Law
- Take steps to protect confidential information
 - Redact or summarize
 - Mark "confidential"
 - Ask for subpoena of personnel information



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What can the agency/plaintiff use as evidence at trial?

- Correspondence and position statements may be "admissions of party opponents"
- Witness statements (or tape recordings) may represent prior testimony or prior inconsistent statements
- Investigator summaries may be admissible
- Findings may be admissible, depending on whether EEOC or BOLI issues the finding!



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What evidence can the employer use at trial?

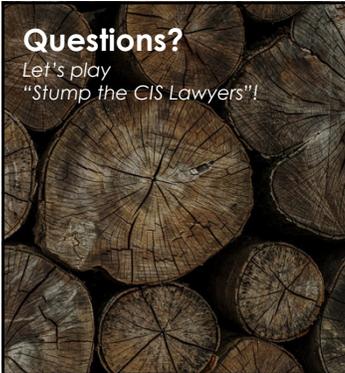
- The intake questionnaire
- The complaint (a sworn statement) and any drafts in file
- Correspondence or other documents submitted from the employee or the employee's attorney to the agency
- Witness statements
- Investigative interview summaries
- BOLI investigator's summary



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Questions?

Let's play
"Stump the CIS Lawyers"!



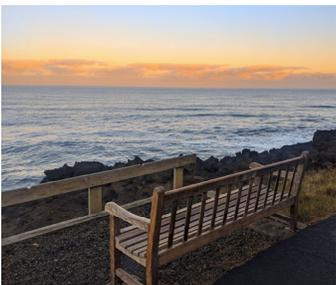
*What is defeat?
Nothing but education;
nothing but
the first step
to something better.*

Bruce Lee



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Thanks for listening!



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