EEOC/BOLI Administrative Process

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How to be creative and use the administrative process to your advantage.

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Written Materials

12½ Commandments to Appease the Employment Gods When You Receive an EEOC or Agency Charge of Discrimination

By Marc Alifanz and David Beavers

So the employment gods have frowned upon you, as you open the mail to find a discrimination charge from the EEOC or a state agency. You are now faced with a choice.

You can prostrate yourself in front of those gods and seek forgiveness for previous sins, blowing things off assuming your newfound penitence will make it go away (it has, in fact, been known to happen on rare occasion). *Alternatively*, you can take matters into your own hands and treat the charge seriously, recognizing that an adverse result like a "cause" or "substantial evidence" finding by the agency will increase the cost to defend or settle the complaint drastically.

Let me take a moment and recommend the *latter* course of action.

But don't fret! In most cases, following some simple rules can decrease the chances of such a finding. Whether this is your first charge, or your hundred and first, what follows are a series of best practices to minimize the risk of an adverse finding, which just might appease those fickle employment gods.

1. **THOU SHALT NOT Treat the Investigator as Your Enemy!**

After you've received the charge and come to terms with it, contact the investigator. Introduce yourself, let them know you received the charge, and that they can contact you with questions and requests. Don't "schmooze" the investigator, but let them know you are as interested at getting to the bottom of the allegations as they are (and you *should* be).

The investigator is a human being, doing a job. Just like you. Don't make their job harder, and they (generally) will return the favor.

2. **THOU SHALT Always Ask for An Extension of Time**

Even if you are certain you can make the (often short) deadline to provide a position statement (or any information requested), ask for an extension. Two-week extension requests are standard operating procedure for respondents, and it will not be held against you. Remember, even the best planned investigations can run into unforeseen delays, and it's always best to ask for more time in advance, rather than waiting until the day before the deadline.

3. **THOU SHALT Always Check the Relevant Statute of Limitations First**

You would be amazed at how often all or part of a charge can be disposed of immediately with a note to the investigator pointing out that it was filed after the statute of limitations expired.

4. **THOU SHALT Be Smart and Efficient with Your Interviews**

Even with an extension, you don't have much time to respond to a charge. Taking a little time to properly prepare at the outset of your investigation will save a lot of time later.

Collect relevant documents (this includes electronic documents!) and personnel files of all significant witnesses. Understand prior incidents/write-ups that might affect their credibility. And do this *before* you interview witnesses. If possible, interview the individual accused of making the discriminatory decision first. That will dictate the need to interview other witnesses…or settle fast. Make sure you interview enough people to get a complete picture of the story, but remember that there are usually diminishing returns on interviews.

5. **THOU SHALT Highlight the Best Parts of Your Relevant Policies in Your Position Statement (Especially if You've Followed them)**

Any position statement should play up the positive aspects of your company, whatever they are. In describing your company's identity, speak to your history of corporate responsibility and meaningful good works.

Specifically, if you have solid employment policies related to the charge at hand, highlight those and how they were communicated to employees as they can sometimes provide a defense. Include the relevant policies as exhibits, and call out any relevant comparator information/examples that are favorable.

6. **THOU SHALT Tell a Compelling, Credible and Concise Story in Your Position Statement**

A strong position statement is more art than science. In other words, focus on composing a compelling, persuasive story. Clear, concise, direct writing that makes sense to a skeptical reader is ideal.

Generally, laying out the facts chronologically with supporting exhibits works great, though don't lock yourself in if there's a good reason to break the timeline.

In the end, your goal is straight talk that convinces the investigator you're not full of it and you made the only rationale decision available to you.

6.5. **Dramatic Interlude: THOU SHALT OWN THY BAD FACTS**

We understand. It's really tempting to withhold bad facts from your position statement. What they don't know can't hurt you, right?

Wrong.

Withholding relevant bad facts is sure to offend the employment gods, so be wary of doing so. Remember, your position statement is not privileged, and if the case continues to litigation, is likely to be discovered and used as an exhibit down the line. You, or your witnesses may be subject to cross-examination on this document, and any bad facts are likely to come out. When they expose that you withheld those facts, you look like a deceitful jerk in front of a jury.

> *Side Note*: It always helps to have key witnesses verify the accuracy of your position statement in writing before you submit it.

But…how to handle the bad facts? There are two ways. First, provide context. Many facts can sound bad in a vacuum, but make sense in the context of what was going on. Be up front about your bad facts, but downplay their significance or explain why what looks like a bad fact is actually good. Second, if you have truly terrible, unexplainable, unmitigated bad facts, settle the case before they come out. See Commandment 9, below. Which, as discussed there, you should be doing anyway.

7. THOU SHALT Never Cite Case Law in Your Position Statement (Except When You Should)

While nearly all have a solid foundation in the legal principles around discrimination and retaliation, *most investigators are not attorneys*. Your statement should use plain, simple terms when discussing legal principles such as disparate treatment, protected classes or activities, and retaliation. There is simply no need at this stage to write a legal brief. Don't cite cases.

Except! You *should* cite a case to express complex, out of the ordinary, legal principles you feel the investigator is likely unfamiliar with (this is a rare occurrence!).

8. THOU SHALT Be Cooperative with Requests for Production and Information, But Preserve Your Rights

Requests for Production (RFPs) and Requests for Information (RFIs) can be burdensome, taking hours to prepare. But don't slack here. First, it can save loads of time down the road in litigation when you're asked to provide the same information in discovery. Second, it will make the investigator happy.

That said, protect your rights if you feel the requested information is unclear or outside the scope of what is reasonable. Don't open yourself up to future arguments that you've waived your right to object to evidence because you already provided it without objection. Object, and provide. And if you don't know what's objectionable, that's a good time to consult with an attorney.

9. THOU SHALT Make Use of the Agency's Free Mediation Program

The EEOC and most state agencies have free mediation programs aimed towards resolving cases quickly and efficiently. Sometimes the mediator is an actual mediator, but often it's simply the investigator assigned to your charge.

In many cases, *don't count on the mediator being overly competent*, but they are usually professional and capable of relaying numbers back and forth. While some might argue that participating in this

program shows weakness, that's baloney. The *worst* outcome that can happen with one of these programs is finding out how much the complainant wants, and seeing the process end when they walk away from your counteroffer.

Also, many agency mediators have exceedingly reasonable views of what appropriate settlement values are. Remember, at this stage of a case, many complainants are unrepresented, and the only guidance they have comes from the mediator. Many charges are settled at this stage – even ones with bad facts – for four figures or less. Far cheaper than litigation will cost you.

10. THOU SHALT Use Your Own Release When You Settle

Assuming you've settled cases before and you have your own release, insist on using that release when you settle your charge. Sometimes the EEOC or state agency will insist that you use their release, which typically is less complete than what you would desire. In those cases, the agency will often allow you to supplement their release with yours (though not always).

11. THOU SHALT Learn from Your Mistakes and Deal with Related Problems

The absolute best way to appease the employment gods is to prevent another charge by implementing better policies and procedures.

For example, if you learn of a policy violation during your investigation, deal with it ASAP with the proper discipline, training, or policy revision. Being proactive will give the impression that you actually care about doing things right. *Which you do.*

Further, take care to not retaliate (or create the appearance of retaliation) against involved parties – especially if the complaining is still employed.

12. THOU SHALT Consult with an Attorney about Grey Areas

Lastly, a final (unintentionally self-serving) piece of advice. If you're in HR or another non-legal position, and you're handling charges on your own, that's great. But if things get squirrely, or you are uncertain of any legal obligations, it is highly advisable to contact an attorney. Better to spend a few dollars now than tens of thousands later after you've thoroughly messed it all up.

Charge work is not rocket science. But it can be complicated. Follow these rules, and you'll simultaneously increase your chances of dismissal, and appease those fickle employment gods.

Marc Alifanz and David Beavers constitute the entirety of Four Peaks Employment Advisors in Portland, Oregon. They provide advice and counseling to Oregon employers on all manner of employment issues, and specialize in BOLI and EEOC agency charge responses for employers in Oregon and nationwide.

BEFORE THE OREGON BUREAU OF LABOR AND INDUSTRIES
Civil Rights Division Complaint of Unlawful Practice

COMPLAINT

COMPLAINANT : **Emmie Employer** REDACTED	Case # EEOC#	Attorney for Complainant: J. Ashlee Albies Whitney Stark Albies & Stark LLC 65 SW Yamhill St., #200 Portland, OR 97204 Telephone: (503)308.4770 Fax: (503)427.9292 whitney@albiesstark.com
RESPONDENT: **EVIL CORP** No. of employees: 1,000+	**Contact:** Corporate Counsel Corporate Headquarters	

Disability Discrimination: ORS 659A.112; 42 U.S.C. §12101 et seq.; Retaliation: ORS 659A.109; 42 U.S.C. §12203(a); Oregon Family Medical Leave Act-Failure to Comply and Retaliation, ORS 659A.150 et. seq.

I, Emmie Employer, do declare and state:

1. I was employed as a Customer Service Representative by Respondent E. Corp. at E. Corp.'s Tigard, Oregon facility from on or about April 2, 2009 until January 28, 2014, when I was terminated. E. Corp.'s stated termination reason was attendance/punctuality".
2. Respondent E. Corp. has its principal place of business in Dallas, Texas.
3. Respondent E. Corp. is a "covered employer" within the meaning of ORS 659A.001, 659A.106, and ORS 659A.153.
4. Before my termination, I suffered from the disabilities of severe migraines, a knee condition causing severe pain, and Psoriatic Arthritis preventing her from steadily working outside my

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home (jointly referred to as "disabilities"). Those disabilities continue to date, with the exacerbation of my joint pain.

5. My disabilities substantially limit one or more major life activities, including but not limited to eating, sleeping, concentrating, thinking, communicating, working, socializing, interacting with others, and employment.
6. I am able to perform the essential functions of my position with or without accommodation.
7. Prior to my termination, I took family medical leave related to my disabilities.
8. Prior to my termination, E. Corp. was aware of my disabilities and that I requested E. Corp. to reasonably accommodate those disabilities by allowing me to telecommute. However, E. Corp. failed to reasonably accommodate those disabilities or engage in an interactive process.
9. On January 27, 2014, E. Corp. terminated my employment because I requested and took family medical leave and requested accommodation of her disability.
10. On or about February 24, 2014, I received a telephone call from E. Corp. human resources representative, Humanity Scarcity, who told me that E. Corp. wanted to reinstate me to my job but, before doing so, it needed my physician to complete an "ADA Packet."
11. On or about March 18, 2014, my treating physician, Dr. Robot, submitted the ADA Packet. Dr. Robot stated that I had a long history of migraines and, in addition, has knee pain which has resulted in back and upper chest pain. According to Dr. Robot, those conditions have both physical and cognitive impacts. Dr. Robot recommended that E. Corp. provide me with a work place accommodation by allowing me to work from home, stating "I think you will find that she will be more productive and work more hours."
12. Despite Dr. Robot's March 18, 2014 recommendation, E. Corp. refused to provide me with a

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reasonable accommodation of telecommuting, even though E. Corp. has employed telecommuting customer services representatives.

13. Despite Dr. Robot's March 18, 2014 recommendation, E. Corp. failed to undertake an interactive process with a goal of reasonably accommodating my disabilities.

14. On July 15, 2014, Dr. Robot completed a second E. Corp. "ADA Packet", which was received by E. Corp. on July 28, 2014, in which she reiterated that I suffered from migraines, and joint pain caused by with Psoriatic Arthritis. Dr. Robot again recommended that I work from home.

15. On August 6, 2014, E. Corp. offered me a position which would allow me to work from home. E. Corp. stated that the new position would require additional training to meet certain technical qualifications and that the next available class would start in several weeks. On August 12, 2014, E. Corp. informed me that a class would start the next day at the Tigard worksite. E. Corp. further informed me that class would run for thirteen days from 7:00 a.m. to 4:00 p.m. and that I would be required to attend all thirteen days and be present at the location for the full time each day. However, E. Corp. offered me the alternative of virtual training, allowing me to train from home, but said that it may be several weeks before that opportunity arises.

16. Because of my disabilities, I was unable to undertake the training offered at the Tigard facility. Instead, I accepted E. Corp.'s offer to start the next virtual training.

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17. To date, E. Corp. has failed to provide me with virtual training, despite my repeated requests to start such training class. E. Corp. has also failed to reinstate me into a Customer Service Representative position with reasonable accommodations.

I, Emmie Employee, swear or affirm that the above complaint and that it is true to the best of my knowledge, information and belief.

Dated _____ Signature _____

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June 27, 2014

Via email

Bureau of Labor and Industries
Civil Rights Division
Attention: Invested Investigator
800 NE Oregon Street, Suite 1045
Portland, Oregon 97232

RE: Emmie Employee v. Evil Corp; Case #, EEOC #

Dear Mx. Investigator:

I write to provide additional background and evidence in support of Emmie Employee's case.

1. Factual Background

A. E. Corp. Was Aware of Ms. Employee's Need for Reasonable Accommodations

Someother Corp, LLC (SCL) hired Ms. Employee to work as a customer care assistant in its Tigard call center in April 2009. E. Corp. acquired ACS in 2010 and Ms. Employee continued to work in the same position for E. Corp. As a customer care assistant, Ms. Employee responded to calls from Apple, AT&T or Verizon customers regarding technical questions about their smart phone or tablets. She provided customer assistance by accessing a database on a desktop computer. Ms. Employee's customer care duties were performed entirely over the phone and on her computer.

Ms. Employee suffers from several medical ailments, including migraines and knee problems. In 2013, Ms. Employee requested intermittent leave pursuant to the Family and Medical Leave Act ("FMLA") and the Oregon Family Leave Act ("OFLA") to accommodate her need for medical leave due to her migraines. As a result of her FMLA and OFLA request, E. Corp. provided her exactly six days per month of excused leave. If she was absent or tardy for *any* amount more than six days each month, even if it arose from her disability, her absence counted against her performance. In addition to requesting protected leave, Ms. Employee made several verbal requests to work from home to accommodate her disabilities.

Ms. Employee took a leave of absence for knee surgery from September 26, 2013 to November 4, 2013. E. Corp. placed Ms. Employee on performance improvement review (PIR) on November 5, 2013 and a final warning PIR on December 4, 2013 for excessive absenteeism. She also took a leave of absence for a follow up knee surgery from December 4, 2013 through January 6, 2014. She returned to work on January 6, 2014. When she returned to work in January, Ms. Employee submitted a new request for OFLA and FMLA medical leave for

anticipated absences arising from her recovery for knee surgery.

B. E. Corp. Terminated Ms. Employee, but Then Reinstated Her After Realizing Its Termination Was Unlawful

E. Corp. terminated Ms. Employee on January 28, 2014 for alleged excessive absenteeism. *See* Exhibit A. The recommendation to terminate Ms. Employee for absenteeism incorrectly stated that her accommodations "include no provision for absenteeism" and cited her use of her monthly allotment of FMLA in support of her dismissal. *Id*.

E. Corp. subsequently realized that by terminating Ms. Employee for being absent due to her disability it had failed to provide her with a reasonable accommodation. *See* Exhibit B (acknowledging that E. Corp. should not have terminated her because she had exhausted her allotment of FMLA time and recommending that she be immediately reinstated). Specifically, in an internal E. Corp. email from Humanity Scarcity, senior human resources consultant, Ms. Scarcity states that Ms. Employee's management team "knew her FML had been exhausted which is why they requested approval to terminate her." *See* Exhibit C. Ms. Scarcity then acknowledged that "when a person's FML is exhausted, they may have protection and rights under the ADA" and that she recommended reinstating Ms. Employee to permit E. Corp. to begin the interactive process. *Id*.

According to E. Corp., it "reinstated" Ms. Employee as an employee on March 4, 2014. *See* Exhibit C. E. Corp. told Ms. Employee that she needed to have her doctor complete an "ADA packet" to determine what accommodation she needed. Ms. Employee received that ADA packet from E. Corp. on or about March 5, 2014. When E. Corp. informed Ms. Employee that it was reinstating her as an employee, Ms. Employee indicated that she did not want to return to work until her request to be reasonably accommodated was resolved.

C. E. Corp. Failed to Engage in the Interactive Process or Accommodate Ms. Employee's Disability

Dr. Robot, Ms. Employee's treating physician, submitted a completed ADA packet to E. Corp. on March 18. *See* Exhibit D (March 18, 2014 Provider's Evaluation). Dr. Robot described Ms. Employee's disabilities, including her migraines and knee condition, and requested that she may able to work from home. Specifically, Dr. Robot stated that "you may find that [Ms. Employee] would be a more productive employee if you allow her to move into this position [working from home]." *Id*. Dr. Robot also requested continuing intermittent time off, but says if E. Corp. permitted Ms. Employee to work from home, "I anticipate she will not use all of these expected absences." *Id*.

After submitting her health provider's ADA packet on March 18, Ms. Employee was contacted by Christian Slater, E. Corp. human resources generalist, on or about April 29. Mr. Slater indicated to Ms. Employee that E. Corp. would not allow her to work from home. She called E. Corp. several times to inquire about the status of her request for an accommodation, but never received an official response from E. Corp. On or about June 16, Ms. Employee received a letter from E. Corp. stating that it needed medical documentation to support her "leave of absence" by June 19. *See* Exhibit E. On June 19, our firm responded on behalf of Ms.

Employee and reiterated her request to be reasonably accommodated by working from home. *See* Exhibit F. Ms. Employee provided additional medical documentation of her disability on June 23 and on July 15. *See* Exhibits G (June 23, 2014 consultation information) and H (July 15, 2014 Provider's evaluation). In her July 15 evaluation, Ms. Employee's physician, Dr. Robot, stated "I am requesting a work place accommodation. I would like Emmie [sic] be able to work from home." Dr. Robot further stated that allowing Ms. Employee to work from home "would, absolutely, enable her to be a more productive employee – if she could work even on the days she has migraines."

D. E. Corp. Continues to Fail to Accommodate Ms. Employee By Denying Her the Opportunity to Work From Home

Finally, on August 6, 2014, after many months of inexcusable delay E. Corp. granted Ms. Employee's request to be reasonably accommodated by working from home. *See* Exhibit I. To work from home, however, E. Corp. required that Ms. Employee attend a training, either in person or virtually. The in-person training class offered by E. Corp. was 13 full days. Ms. Employee elected to take the online version of the training for the same reason she needed the reasonable accommodation to work from home – she would not be able to attend 13 full days of training due to her disability. To date, E. Corp. has not provided her with an opportunity to take an online training course.

2. Legal Analysis

E. Corp. has acted unlawfully toward Ms. Employee in numerous ways, including terminating her because of her disability, failing to engage in the interactive process, failing to provide reasonable accommodations, and retaliating against her for asserting her rights to obtain medical leave.

A. E. Corp.'s Failed to Engage In the Interactive Process and Failed to Provide Accommodations Regarding Ms. Employee

Under the Americans with Disabilities Act (ADA) and Oregon's disability law, an employer is required to provide reasonable accommodations to disabled employees unless the employer can demonstrate the accommodation would impose an undue hardship on the operation of the employer's business. *Zivkovic v. S. Cal. Edison Co*., 302 F.2d 1080, 1089 (9th Cir. 2002) (citing 42 U.S.C. § 12112(b)(5)(A)); ORS § 659A.112. Once an employer is on notice of an employee's disability and that they may need an accommodation, the employer has a "mandatory obligation" to engage in the interactive process to determine the appropriate reasonable accommodation. *Davis v. Wal-Mart Stores, Inc*., 2011 WL 2729238, at *15 (D. Or. May 3, 2011) (citations omitted). E. Corp. failed to reasonably accommodate Ms. Employee when it did not engage in the interactive process to determine if she needed extended or additional leave to accommodate her disability. *See Nunes v. Wal-Mart Stores*, 164 F.3d 1243, 1247 (9th Cir. 1999) (recognizing that an "extended medical leave, or an extension of an existing leave" may be a reasonable accommodation if it does not pose an undue hardship on the employer). Indeed, there can be no dispute that E. Corp. violated the ADA where its own human resources representative admits as much. *See* Exhibits A & B (emails from Ms. Scarcity ordering Ms. Employee reinstated immediately to remedy Xerox's failure to accommodate).

B. E. Corp. Unlawfully Terminated Ms. Employee in Violation of the ADA

It is also unlawful for an employer to terminate an employee because of their disability. And the Ninth Circuit has recognized that "the consequence of the failure to accommodate is…frequently an unlawful termination." *Humphrey v. Memorial Hospitals Ass'n*, 239 F.3d 1128, 1139 (9th Cir. 2001) ("For the purposes of the ADA, with a few exceptions, ... conduct resulting from a disability is considered to be part of the disability, rather than a separate basis for termination."). In *Humphrey*, the court further recognized that the "link between the disability and termination is particularly strong where it is the employer's failure to reasonably accommodate a known disability" results in a discharge for performance problems arising from that disability. *Id*. at 1140 (finding that termination for absenteeism and tardiness may violate the ADA where the employer knew these performance issues arose from the employee's disability); *see also Davis*, 2011 WL 2729238 at *22 (denying request for summary judgment where evidence existed that plaintiffs' inability to comply with policies were caused by her disability). Here, as in *Humphrey*, E. Corp. unlawfully terminated Ms. Employee because of absenteeism arising from her disability.

C. Although Her Request Poses No Undue Burden On E. Corp., Ms. Employee Has Still Not Been Reasonably Accommodated

Further, even after E. Corp. technically "reinstated" Ms. Employee, it *continued* to fail in its obligation to engage in the interactive process and reasonably accommodate Ms. Employee. Between March 18 and August 6, E. Corp. not only refused to allow her to work from home, it also did not communicate with Ms. Employee regarding this request. *See Humphrey*, 239 F.3d at 1137 (finding that the interactive process requires "communication and good-faith exploration of possible accommodations between employers and individual employees"). Yet by granting Ms. Employee's accommodation to work remotely from home in August, E. Corp. admits that this request never imposed an undue burden on E. Corp. Moreover, it is *still* denying her the opportunity to work remotely by failing to provide online training, even though E. Corp. is on notice that she cannot attend an in person training due to her disability. In fact, consistent with its pattern of failing to provide reasonable accommodations, E. Corp. has not engaged in the interactive process regarding the training, nor provided evidence that it would be an undue burden to do so – especially where it admits that this training exists virtually. *See* Exhibit I; *see Nunes*, 164 F.3d at 1247 (recognizing that the determination of whether a proposed accommodation is reasonable, including whether it imposes an undue hardship on the employer, "requires a fact-specific, individualized inquiry").

D. E. Corp. Retaliated Against Ms. Employee for Using Protected Medical Leave

Finally, OFLA prohibits E. Corp. from retaliating against Ms. Employee for her use of medical leave. *See* ORS § 659A.183. To establish a claim for retaliation, Ms. Employee need only prove that taking protected leave "constituted a negative factor in the decision to terminate her." *Bachelder v. Am. W. Airlines, Inc*., 259 F.3d 1112, 1125 (9th Cir. 2001). E. Corp.'s

recommendation to terminate Ms. Employee references her use of her protected leave as a reason supporting her dismissal. *See* Exhibit A. As E. Corp. terminated her for use of protected leave, excessive absenteeism, and immediately after she requested additional protected leave, her leave was a "negative factor" contributing to her termination. In addition, E. Corp. also violated OFLA by strictly restricting her leave to six days per month.

I am available to discuss this matter if you have any questions or if you need additional supporting documentation. Thank you for your consideration.

Sincerely,

ALBIES & STARK, LLC

s/

Whitney Stark
WS:mm
Enclosures

cc: Emmie Employee (via email)

OREGON BUREAU OF LABOR AND INDUSTRIES
Civil Rights Division
Complaint of Unlawful Employment Practices

Case No.

_____

COMPLAINANT:

Jane Smith

COMPLAINANT'S ATTORNEYS:

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RESPONDENTS:

School District, Respondent

Superintendent Iggy Pop, Individual Respondent

LEGAL PROVISIONS INVOLVED:

42 U.S.C. §§ 12112 and 12203 and ORS 659A.109 and 659A.112 (prohibiting discrimination and retaliation based on disability under the federal Americans with Disabilities Act and Oregon law); ORS 659A.040, 659A.043, 659A.046 (prohibiting discrimination and retaliation against, and requiring reinstatement or reemployment of, injured workers); and ORS 659A.030(1)(g) (prohibiting aiding and abetting unlawful employment actions).

I, Jane Smith, being first duly sworn, depose and say as follows:

1. I am a member of a protected class because of my disability, because I sought disability-related employment rights, because I suffered a workplace injury, and because I applied for and received benefits under Oregon's workers compensation law.

2. I was an employee of Respondent School District ("Respondent") for over 30 years, starting in the fall of 1983. At the time of my termination, I was working full-time as the Lead Custodian at Respondent's Elementary School.

3. On or around August 27, 2013, as part of my job duties as Lead Custodian, I spent approximately nine hours operating a hedge trimmer around one of the Respondent's buildings. The next day I awoke with excruciating pain in my head, neck, and shoulders. After several visits to my chiropractor, I received the results of an MRI on or around September 6, 2013, indicating that I had three bulging disks in my neck that needed medical attention. On or about this same day, I filed a workers compensation claim with the Respondent's insurer, SAIF Corporation ("SAIF"), which was eventually approved.

4. On or around February 10, 2014, I had surgery on my neck to help alleviate the ongoing pain and physical limitations caused by my workplace injury, which included a cervical sprain. Starting on that date and lasting for about 12 weeks, I took medical leave from Respondent. On or about July 15, 2014, my medical provider determined that I was medically stationary.

5. When I returned to work, I did so on restricted duty. Per the instructions of my medical provider, Dr. Neil Diamond ("Dr. Diamond"), for a short period, I was not to lift more than 25 pounds and was to avoid overhead work. As Dr. Diamond noted in his release to work form sent to Respondent, after a recovery period, I would have permanent restrictions based on the surgery that would require me to lift no more than 50-60 pounds.

6. Despite these restrictions, in the time that followed my return from leave until my eventual termination—a period lasting more than a year—I was able to complete all my duties as Lead Custodian. The job rarely required me to lift more than 50 pounds. In one of the few instances where I did need to lift heavy objects—specifically, full trash bags—I made sure never to let the bags become too full for me to lift. I also made use of a hand truck to lift and move heavy objects. These adjustments made me capable of performing all necessary aspects of my job without incident. No one at Respondent indicated during this time period that I was performing my job duties in anything but a satisfactory manner.

7. Although Respondent's job description for a Lead Custodian lists "Lifting 100 pounds maximum with frequent lifting and/or carrying of objects weighing up to 50 pounds" based on my experience as noted above, lifting 100 pounds was not an essential function of the Lead Custodian job. To the extent that it was an essential job function, I was capable of performing it with minor modifications.

8. In May 2015, Respondent Iggy Pop ("Mr. Pop"), Respondent's Superintendent, met individually with me to ask about my medical condition. I indicated that I was doing very well. Mr. Pop told me I was a valuable employee and that Respondent wanted to keep me employed.

9. On or around May 19, 2015, Stevie Nicks ("Ms. Nicks"), a consultant with SAIF, sent Mr. Pop an e-mail noting that my workers compensation claim was near closing, but that I would have permanent work restrictions. Those restrictions, according to Ms. Nicks, were that I could not lift, carry, push, or pull more than 50 pounds and that I would have limited use of my left arm for shoulder level and higher tasks, or for repetitive use.

10. In Ms. Nicks's e-mail, she also asked whether Respondent would be able to accommodate these restrictions on a permanent basis. "Because you have been providing [Ms. Smith] with work for many months now, we are hopeful that this is a possibility," she wrote. Ms. Nicks also notified Mr. Pop that I was eligible for the Oregon Preferred Worker Program, which would provide Respondent a 6-month, 50 percent wage subsidy for me, and up to $25,000 to pay for workplace modifications to help facilitate any needed accommodations.

11. On or around May 21, 2015, Mr. Pop sent me a letter indicating that I would be retained by Respondent as a Lead Custodian for the 2015-2016 school year.

12. Prompted by Ms. Nicks's e-mail of May 19, on or around June 3, 2015, Mr. Pop arranged a meeting with me, my union representative, and a few other employees of Respondent, to discuss my future employment with Respondent. In this meeting, I told Mr. Pop I had not received the specific medical limitations mentioned in Ms. Nicks's e-mail. I also stated that I believed I had full, unrestricted use of my left arm.

13. Mr. Pop informed me in this meeting that Respondent would make no accommodations of my physical limitations for the position as a Lead Custodian, despite the assistance available through the Preferred Worker Program. Instead, Mr. Pop raised the possibility of me re-training for another position, but noted that Respondent had few if any open positions, and that any such position would have lower pay. He did not offer me any specific position. Mr. Pop also told me that I would lose all of my seniority upon re-training for another position, and that Respondent would have to hire any recently laid off worker before hiring me if a position did become available. Mr. Pop told me that I had only two days to decide if I wanted to attempt to re-train for another position.

14. At the June 3 meeting, Mr. Pop also communicated that Respondent planned to terminate my employment as a custodian as soon as my workers compensation claim was closed.

15. One of my union representatives, Willie Nelson, tried over the next several weeks to persuade Respondent to keep me in my position, but Respondent refused because it believed doing so would require accommodations and Respondent was unwilling to modify my job in any way.

16. On or around July 7, 2015, Respondent sent me home from work because my workers compensation claim had closed. Respondent re-called me to work on July 8.

17. On or about July 9, 2015, Mr. Pop approached me while I was working using a hand truck. He asked me, "Should you be using that?" I indicated that there was no problem using the hand truck. At that point, Mr. Pop handed me a letter dated July 7, 2015. He told me that he did not feel comfortable speaking with me, and that if I had any questions about the letter, I should ask my union representative.

18. In Mr. Pop's letter dated July 7, he indicated that Respondent understood all the medical limitations I might have moving forward. As his letter specifically noted, those limitations were:

> No lifting, carrying, pushing, or pulling anything greater than fifty pounds . . .
> [and] You are restricted in how much you can use your left arm above shoulder level and higher tasks or repetitive use of the left arm.

19. Despite being aware of these limitations, and despite the requests of SAIF and my union to use the Preferred Worker Program to identify, implement, *and even pay for* workplace accommodations,

Respondent made no efforts to identify, or help identify, any proposed accommodations for my disability. Instead, as Mr. Pop's letter dated July 7 explained, Respondent required my doctor to unilaterally identify accommodations or Respondent would terminate my employment as of July 31.

20. After receiving Mr. Pop's letter dated July 7, I called Dr. Diamond's office to speak with him. Dr. Diamond's office told me that Dr. Diamond was on vacation through the rest of July.

21. On or around July 31, 2015, Keith Richards ("Mr. Richards"), the principal of Elementary School, told me that Mr. Pop would be coming later that day to take my keys. When Mr. Pop arrived later that day, Mr. Richards summoned me to his office. Mr. Pop then told me that my employment was "done," and told me that Respondent had not received sufficient information from my doctor. I told Mr. Pop that my doctor was on vacation through the end of the month, and that I had been unaware Respondent needed anything further from him until July 9. I also told Mr. Pop that my doctor had already provided Respondent with my medical limitations, but that my doctor believed it was up to Respondent to determine what if any adjustments would be needed to accommodate them. This did not change Mr. Pop's decision to terminate my employment.

22. Mr. Pop sent me a later dated July 31, 2015, confirming that my employment had ended.

23. Respondent's actions were unlawful for one or more of the following reasons:

a. By subjecting me to different terms and conditions of employment and/or terminating my employment based on my disability, by failing to engage in a meaningful disability accommodations process, and by failing to make reasonable accommodations for my disability, Respondent engaged in unlawful discrimination in violation of 42 U.S.C. §§ 12112 and ORS 659A.112.

b. By subjecting me to different terms and conditions of employment, denying me reasonable disability accommodations, and/or terminating my employment based on my requests for disability accommodations, Respondent engaged in unlawful retaliation in violation of 42 U.S.C. § 12203 and 659A.109.

c. By subjecting me to different terms and conditions of employment and/or terminating my employment based on my injury or use of the workers compensation system, and by failing to reinstate me or make me a bona fide offer of re-employment me after the close of my workers compensation case, Respondent violated ORS 659A.040, 659A.043 and 659A.046.

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24. Mr. Pop's actions were unlawful because he aided, abetted, incited, compelled, or coerced one or more others to take unlawful actions against me in violation of ORS 659A.030(1)(g).

I hereby declare under penalty of perjury, that the above statement is true and correct to the best of my knowledge and belief, and that I understand it is made for use as evidence in an official proceeding. I understand that the above statement is a public record and that the information herein may be disclosed to any person, at any time.

DATED: _____ _____
Jane Smith

October 1, 2015

BOLI INVESTIGATOR
ADDRESS

RE: Employee v. AssistCo
BOLI Case No: 8675309-XYZ

Dear Ms./Mr. Investigator:

AssistCo provides nursing care services at locations through the United States. As set forth in detail below, Employee ("Claimant") was treated fairly by AssistCo, and her complaint of sex discrimination/sexual harassment is without merit.

AssistCo has a long-standing reputation as an Equal Opportunity Employer dedicated to the fair and equal treatment of all its employees and applicants regardless of race, color, creed, religion, sex, sexual orientation, national origin, disability, age, or any other characteristics protected by applicable law. A copy of AssistCo's EEO policy is enclosed for your review. (*See Exhibit #1*.) We pride ourselves on the fact that we are conscientious in ensuring that our employment practices have no adverse or disparate impact upon any individual or group of individuals. Claimant's situation was in no way an exception to our consistent practice of fair and equal treatment, and she was treated no differently than any other similarly situated employee.

SUMMARY OF RESPONSE

Claimant's allegations that she was subject to sexual harassment and a "hostile working environment" are baseless. On its face, Claimant's charge fails to state a claim. While Claimant's supervisor, Ms. Supervisor, admittedly made an offhand remark that was not appropriate for the workplace, it was an isolated incident and unrelated to gender or sex. Even if it was, it was neither severe nor pervasive enough to be considered unlawful. Furthermore, Ms. Supervisor's comment was directed at a group of individuals, not Claimant herself. Claimant was not singled out, or subject to any tangible, adverse employment action. Notwithstanding that, AssistCo considered Ms. Supervisor's remark to be inappropriate, and immediately took appropriate and remedial action.

FACTUAL BACKGROUND

AssistCo

AssistCo is a provider of nursing care services at locations around the United States. AssistCo's corporate offices are located in Sheboygan, Wisconsin. Daily operations are managed by a Location Director (LD). Specifically, a LD manages a particular location and reports to a District Manager (DM). LDs are assisted by and supervise Assistant Location Directors (ALD).

Claimant's employment with AssistCo

Claimant began employment with AssistCo as an Assistant Nurse on October 25, 2012. She worked at AssistCo location #3232 in Springfield, OR. In January 2014, Claimant completed a certification and received a pay rate increase from $22.71 per hour to $24.50 per hour. On February 24, 2014, Claimant's position title changed to "Nurse." Claimant most recently was supervised by ALD Assistant Supervisor, LD Supervisor and their DM, Ms. Manager.

In November - December 2014, Ms. Supervisor coached staff on facility cleanliness

In mid-November 2014, Ms. Supervisor noticed a decline in facility quality across the location. Objects were scattered on the floor, counters were cluttered with the employees' personal items and dirty dishes, and trash cans were overflowing. This produced an offensive odor in several locations. Ms. Supervisor verbally coached staff to resolve this issue; however, things did not improve. A consistent odor remained, which prompted Ms. Supervisor to inform staff, "it smells in here" and suggest that they "take out the trash." Ms. Supervisor also delivered Clorox wipes to the staff and continued to coach them on making the necessary improvements. Ms. Supervisor's comments and actions were not inappropriate or intended to be offensive, but simply part of her job.

On December 15, 2014, Ms. Supervisor was walking with Claimant and a co-worker and again discovered a strong odor in their responsible area. Claimant and her colleague suggested it was the onions they were eating. Ms. Supervisor replied, "No. I don't think it's the onions," and left the area. At no time on *this* occasion, did Ms. Supervisor comment that it "smelled like dirty vagina," as alleged in the Claimant's charge of discrimination.

On December 15, 2014, Ms. Supervisor told the staff that Claimant's area "smelled like dirty vagina"

Later that same day, Ms. Supervisor held a staff meeting. Cleanliness was a main topic for discussion as many of the areas were still in need of improvement. At the end of the meeting, Ms. Supervisor reiterated that certain areas remained dirty and disorganized. Ms. Supervisor further stated that the area/s "smelled like dirty vagina." Contrary to Claimant's charge, this was the *first* and *only* time Ms. Supervisor made this comment. Neither Claimant nor any of the other staff reported a concern with the comment at the time.

On December 18, 2014, Claimant left on break and did not return to work as scheduled

On December 18, 2014, Claimant went to the office and told Ms. Supervisor that she had just transitioned to a new area as assigned by the ALD but "it's a mess and I'm not cleaning it." Ms. Supervisor went to the area and observed it was, indeed, a mess. Ms. Supervisor coached the relevant staff accordingly and then began to tidy the area herself. Meanwhile, Claimant continued to comment, "I'm not cleaning this. I would never send anyone to live here. This place is a joke," and then left on her break. When Claimant failed to return from break as scheduled, Ms. Supervisor left a message on her cell phone. However, Claimant did not respond and failed to return to work at all that day.

Later on December 18, 2014, Claimant filed a complaint with AssistCo's Human Resources department

After Claimant left the location, she contacted AssistCo's Human Resources (HR) department and reported that Ms. Supervisor came into their area and threw materials on the floor. She also reported that Ms. Supervisor said the area "smelled like dirty vagina" on December 15, 2014 and then repeated it at a staff meeting, implying that someone smelled bad.

On December 19, 2014, DM investigated Claimant's allegations and concluded that a written warning was warranted for Ms. Supervisor's violation of AssistCo's Code of Ethics

AssistCo's HR department informed the DM of the allegations and she went to the location to investigate. She met with Claimant and asked her what happened. Ms. Supervisor explained that she had been addressing cleanliness for several weeks and had gone into the Claimant's new area after she complained

it was a mess. She began cleaning out a drawer, but did not throw anything on the floor. Claimant further admitted that she made the "vagina" comment to some staff after the staff meeting. The DM immediately counseled that Ms. Supervisor had used extremely poor judgment and such comments are unacceptable in the workplace. Ms. Supervisor agreed and took full responsibility.

The DM also interviewed five staff members, four of whom were in area on December 15, 2014, and were involved in the discussion with Ms. Supervisor after the staff meeting. None corroborated that Ms. Supervisor had thrown anything on the floor, but confirmed that she had made the alleged "vagina" comment after the staff meeting.

Based on the results of the investigation, the DM concluded that Ms. Supervisor had violated AssistCo's Code of Ethics and Employee Handbook guidelines for basic professional responsibilities and respecting others. The DM informed Claimant that Ms. Supervisor would receive a written warning, which was formally issued to her subsequently. Additionally, Ms. Supervisor and her ALD will receive retraining. *(See Exhibit #2.)*

Ms. Supervisor's comment does not constitute harassment

To ensure a thorough investigation of the facts, AssistCo continued the investigation and interviewed additional staff at the location. The feedback received was consistent with the feedback shared with the DM. Additionally, staff confirmed that Ms. Supervisor made the "vagina" comment on only *one* occasion, and that her comment was not directed at anyone in particular.

Either way, on its face, the comment simply doesn't constitute harassment. To be actionable under Title VII, a complainant must show that the conduct at issue was not merely sexual in nature, but actually constituted discrimination or harassment because of sex." To start off with, Ms. Supervisor's comment does not meet this standard, as it was not related specifically to Claimant, or her sex or gender.

Moreover, offhand comments and isolated incidents generally do not amount to discrimination such that it alters the terms and conditions of employment. Merely saying something offensive is not enough to create a hostile work environment. Again, even if it was targeted directly at Claimant and based on her sex, which it was not, Ms. Supervisor's sole offhand and isolated comment does not even approach this standard.

CONCLUSION

AssistCo did not discriminate against or harass Claimant. AssistCo took appropriate action to address an inappropriate comment. AssistCo supported Claimant through this situation by approving her recent request to transfer to another location. Since she made that request, however, the DM has offered Claimant two different transfer opportunities, both of which she declined. Claimant has since been offered a third opportunity, which she also declined. AssistCo values its employees, and respectful communication is a key part of building trust and working well together. Conduct that does not reflect these expectations is promptly investigated and addressed, as evidenced by the actions taken with Ms. Supervisor. However, the fact of the matter is, Ms. Supervisor's conduct was not unlawful and Claimant's complaint of harassment has no merit.

I am confident that the foregoing information and supporting documentation are sufficient to conclude this investigation and result in a no cause determination. If I can be of further assistance, please feel free to call me at (123) 456-7890.

Sincerely,

Jane Smith
HR Director

ENCLOSED SUPPORTING DOCUMENTS

Exhibit 1 AssistCo's policy on Equal Opportunity
Exhibit 2 Employee Memorandum issued to Ms. Supervisor

Issue Outline for BOLI/EEOC Process

1. **What factors should be considered in deciding whether or not to make a claim with BOLI?**
    a. Federal vs. state claims
        i. State claims – no exhaustion requirement (OAR 839-003-0020(2)(a))
        ii. Federal claims – exhaustion requirement (e.g. Title VII, ADA)
        iii. Substantial evidence finding may be admissible by some judges if the case is in federal court – but considered inadmissible hearsay in state court
            1. BOLI substantial evidence finding considered hearsay in state court: *Sleigh v. Jenny Craig Weight Loss Ctrs., Inc.,* 161 Or.App. 262, 984 P.2d 8 91 (1999), *decision modified on reconsideration on other grounds by* 163 Or.App. 20, 988 P.2d 916 (1999).
            2. Substantial evidence finding potentially admissible in federal court: *Grassmueck v. Johnson Controls Battery Grp., Inc.*, CIV. 06-526-ST, 2007 WL 1989579 (D Or July 2, 2007).
    b. Other considerations
        i. Benefits to filing with BOLI:
            1. Tolling of the statute of limitations (ORS 659A.875(2))
            2. BOLI claim allows for early discovery in the case. Obtaining BOLI's investigation file after it completes its investigation allows employee's counsel to see the employer's position statement and supporting evidence that was submitted to BOLI. There also may be notes from interviews that BOLI did with the employer's witnesses. For the employee's counsel, these documents can be valuable in determining the strengths and weaknesses of your client's case prior to filing a lawsuit.
        ii. Downside to filing with BOLI
            1. Delays the case from being filed in court. BOLI takes up to a year to complete its investigation.
                a. One possible strategy is to voluntarily dismiss the BOLI charge prior to the completion of the investigation if BOLI does not appear to be doing much on the file. Regular follow up with the investigator will allow you to determine if the investigator is diligently working the file such as doing interviews or document requests. If so, consider keeping it in BOLI to get the benefits of that work. If not, consider withdrawing.
            2. BOLI usually finds against the employee – by finding that the employee has not established substantial evidence of discrimination. The employer is sometimes emboldened by a BOLI finding in its favor, despite the fact that it means little to the ultimate result at trial.

2. **Are there advantages to filing with BOLI vs. EEOC?**
    a. BOLI is generally quicker than EEOC to complete its investigation (usually 1 year from filing unless OSHA retaliation claim which requires an investigation to be completed within 90 days).

b. EEOC takes much longer to assign an investigator and complete its investigation.
c. Note: If employee needs to exhaust on a federal claim and also has a state law claim, then the employee can file with BOLI and dual file with EEOC if there are federal claims within EEOC's jurisdiction. If filing with BOLI and there are both federal and state claims, make sure all state and federal claims and statutes are listed so the case is dual filed with EEOC. Make sure to specifically request dual filing.
    i. (Note - Workers compensation retaliation claim made with BOLI does not trigger dual filing – must make a disability discrimination claim (ADA) or other federal claim to trigger dual filing.)

3. What are the time limitations related to making a BOLI charge?

a. In order to make sure a BOLI charge containing <u>both state and federal claims</u> is dual-filed with the EEOC, you should file the charge with BOLI within 240 days of the adverse action.
    i. Note: If you file state and federal charges with BOLI within 240 and 300 days, pursuant to its work-sharing agreement, BOLI will immediately terminate its proceedings and relinquish jurisdiction to the EEOC, thereby providing for constructive filing with the EEOC at any time up to 300 days.
b. Within 1 year of the adverse act for BOLI charges with <u>only</u> state claims (ORS 659A.875(1)).
    i. Exception - 90-day time limit to make OSHA retaliation claims with BOLI (but one year to make them in court) (ORS 654.062(6)(a), OAR 839-003-0031(3)).
c. Hostile work environment claims. If a continuing violation, one year from the last act. (OAR 839-003-0025(6)). However, for harassment claims with multiple comments/acts it is best practice to file to include as much of the wrongful conduct as possible within the SOL.
d. For claims against a public entity, note there is a separate 180-day Tort Claims Act notice requirement. TCN is a separate requirement and should be sent directly to the appropriate contact at the public entity (or their lawyer if they agree to accept service). BOLI charge, even if employer receives it timely, does <u>not</u> satisfy TCN requirements. (ORS 30.275(1)(b), OAR 839-003-0020(6)). Note – new OR Equal Pay Act may allow a longer TCN period.
e. BOLI only tolls the statute of limitations for claims made at BOLI (ORS 659A.875(2))
    i. For example, often if BOLI has prepared the complaint for workers' compensation retaliation there may be a claim for OFLA retaliation and disability discrimination (state and federal) that BOLI failed to make. If you do not amend within the 300 days for federal claims, then even if you get a substantial evidence finding you cannot file in federal court where it would be admissible.
f. Amendments - OAR 839-003-0040(2) "(2) The division may amend a complaint to correct technical defects and to add additional persons as respondents…at any time prior to the issuance of formal charges, except that respondents may only be added during the course of investigation. Examples of technical defects include: clerical errors, additions or deletions, name and address corrections, and statute or rule citation errors."

i. As amendments are only allowed in narrow circumstances, most of the time an additional charge will need to be filed within the applicable SOL.

4. **What can the employee's counsel do to increase the likelihood of BOLI finding in your client's favor?**
    a. The more you put into your client's case at BOLI (e.g. evidence such as key documents and witness statements) the more likely you'll get a substantial evidence finding
    b. **Charge** Put enough detail in the BOLI charge for the investigator to understand the case. Make it easy for the investigator (often not a lawyer) to see the legal violation.
    c. Respond to BOLI's document requests with any supporting evidence
    d. Prepare your client well for BOLI interview
    e. Provide BOLI with witnesses to support your client's case
    f. Consider sending BOLI short legal memoranda on difficult legal issues presented by the case
    g. Consider obtaining affidavits from witnesses and providing them to BOLI
        i. However, it is a strategy decision whether you want to provide witness affidavits you obtained to BOLI. Remember anything you provide is likely to be discovered by the other side when they request the BOLI file. If you provide a witness affidavit to BOLI, you may be giving up a document to the other side that you could have otherwise withheld as work product in litigation.

5. **What can the employer's counsel do to increase the likelihood of BOLI finding in your client's favor?**
    a. **Position statements** should make your client's strongest arguments and avoid meritless arguments (e.g. if you have a strong causation defense – decided to terminate before learning about disability - do not waste the investigator's time by arguing initially that you never employed the client)
        i. **Note –** when drafting a position statement keep in mind that your audience is not just the BOLI investigator, but the plaintiff's attorney who will ultimately evaluate your position statement after the case is closed. If you make arguments that are not credible, that may hurt your credibility with plaintiff's counsel.
    b. Briefly explain the company's business and then get to the heart of your argument. Do not spend three pages going over irrelevant facts about the company or company policies that are not directly implicated by the claims. Even the EEO policy could be mentioned in a footnote.
    c. Make sure to include key documents that support the defense.
    d. Employer witness interviews or affidavits. Prepare your witnesses for BOLI interviews as if it is a deposition because it can have huge implications for the case. BOLI investigators may find in favor of the employee if they feel that your key witnesses were dishonest or evasive during an interview.

6. **BOLI has found that the claimant did not present enough evidence to support a finding of substantial evidence. Now what?**
    a. Employee counsel – don't be discouraged. There are many examples of cases dismissed by BOLI for "lack of evidence" that are settled for substantial amounts and/or won at trial.
        i. Decide whether to pursue a lawsuit based on your investigation and assessment – do not just take BOLI's word for it.
        ii. Request the BOLI file and scrutinize it, including the position statement and the interviews. Did BOLI fail to interview witnesses favorable to the employee that you could depose? Did BOLI obtain necessary documents from the employer that would be available to you in litigation.
    b. Employer's counsel – don't rest on your laurels. Are there things BOLI did not see about the case that would be damaging to your client once discovered in litigation (as much more will be discovered once a lawsuit is filed.) Consider settling the matter pre-litigation as it may be a good window (employee may be discouraged) to get the case resolved for a reasonable amount. Consider obtaining the BOLI file to evaluate exposure.
7. **BOLI has found substantial evidence in favor of the employee. Now what?**
    a. Employee's counsel – Is there a way to file in federal court so that the substantial evidence finding may be found to be admissible (look at various judge's decisions on this issue)
    b. Employer's counsel – Consider whether the case can be filed in federal court. Even if it cannot, this may be a good opportunity to settle at conciliation. If you do not want to use BOLI to shuttle offers, consider getting a private mediator experienced in employment law to assist the parties at this point. Remember, as prevailing party attorney fees are available to plaintiffs under most state and federal discrimination claims, a strong effort should be made to resolve a case that your client may be liable early to avoid it becoming an attorney-fee case (e.g. low dollar damages case that fails to settle early can turn into a large exposure for your client if the amount of attorney fees incurred by the plaintiff rises to a point where you cannot cut them off with an offer of judgment)