YOU CAN’T MAKE A SILK PURSE
OUT OF A SOW’S EAR, OR CAN YOU?

HOW TO DEAL PROACTIVELY WITH TITLE VII CLAIMS’

I. Title VII

Title VII of the Civil Rights Act of 1964 makes it unlawful for an employer to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment on the basis of sex, race, color, national origin, and religion. It generally applies to employers with 15 or more employees, including federal, state, and local governments. Title VII also applies to private and public colleges and universities, employment agencies, and labor organizations. Areas that may give rise to violations include recruiting, hiring, promoting, transferring, training, disciplining, discharging, assigning work, measuring performance, or providing benefits.

This Article will assume the reader’s familiarity with Title VII’s substantive content, and the wealth of case law from every federal jurisdiction and appellate circuit interpreting and applying the law.

Every employer needs to have a plan to deal with these increasingly common claims. This presentation will cover a myriad of issues that in-house counsel face every day. Some of the questions that will be posed to the panelists are listed below, as well as the preliminary answers they provided in pre-seminar interviews. These will be just the start of more in depth discussion of these topics, with hard-earned "lessons learned" and war stories from the “front.”

What follows is some advice on how to conduct a thorough investigation, followed by some advice on best practices regarding: (1) Creating a corporate environment where the potential for Title VII claims is minimized; (2) Best practices for corporate processes for claimants to report Title VII claims; (3) Best practices for investigating Title VII claims; (4) Advice for dealing with the EEOC with Title VII claims; and (5) Litigation: expectations for outside counsel; interviewing company witnesses with counsel; discovery and depositions; and trial.
II. Investigating a Title VII Claim

A. What is a Thorough Investigation?

1. Selecting the Investigator. The person who conducts the investigation is critically important. Certainly, someone who has good interviewing skills and has a full appreciation of the legal requirements in this area should be selected. Moreover, it is essential that the company understand that the individual who conducts the investigation will likely be called as a witness at some point in time. The following factors should be considered in assigning an harassment investigation:

   a. Knowledge of company policies and procedures. The investigator must be knowledgeable of the company’s policies and procedures on anti-harassment.

   b. Gender issues. Will complainant feel more comfortable talking to person of same sex?

   c. Ethnicity language. Will there be language issues? Will an interpreter be needed?

   d. Effectiveness as an interviewer (i.e., the ability to develop rapport, as well as to press for admissions).

   e. Credibility within the company as being objective and impartial, and no history of past problems or incompetence.

   f. Ability to take thorough and accurate notes which can later be used as evidence.

   g. The ability to maintain confidentiality.

2. Role of Company Legal Counsel. If litigation arises, the employer will need to disclose fully the investigative process, the investigative report, and possibly even the legal advice rendered by counsel. As a result, in most instances, it is better to have legal counsel advise the company’s internal investigator in order to give the company the option of asserting attorney-client privilege. To do this, before the investigation is commenced, legal advice should be requested in writing prior to the commencement of the in-house investigation.

3. Preliminary steps to take before commencing investigation.

   a. Set Deadline. Determine the initial deadline for completing the investigation.
b. **Documents.** Identify key documents to be reviewed.

- Company policies and procedures.
- Copies of any complaints and the notes of the initial contact with the immediate supervisor and others in home office.
- Records of any prior investigations or complaints against the alleged harasser.
- Records of prior complaints by the complainant.
- Personnel files of the individuals involved.
- Statements written by or obtained from other employees or witnesses.
- Pertinent business records such as time cards, calendars, diaries, etc.

c. **Persons to be Interviewed.** Identify potential individuals to be interviewed.

- Complaining employee.
- Individual(s) who may have identified the alleged victim.
- Individual(s) who may have identified the person to be investigated.
- Supervisors of the individual(s) involved.
- Persons who observed any of the incidents.
- Persons who wrote any of the relevant documents.
- Co-workers of the persons involved.
- Other persons who reportedly have been subjected to similar activity.

d. **Order of Interviews.** Decide the order for conducting the interviews (i.e., should the alleged harasser be interviewed last, second, or in some other order. Is there any reason not
e. **Attorneys.** When a non-lawyer is conducting the investigation, you do not have to allow an attorney for the complaining employee or the alleged harasser to attend the interview. Explain that it is company policy to conduct the investigation without attorneys. You do not need to speak to an attorney for the complaining employee or alleged harasser; you should refer them to the company's attorney.

f. **Union.** If the accused harasser is a union member, s/he does have the right to have a union representative present, but they may not interrupt the interview; they are there to observe only.

4. **Interviewing Complaining Persons.** This interview is one of the most critical parts of the entire process. If this person feels his/her concerns are taken seriously and will be addressed, then the company's chances are improved that there will be no subsequent lawsuit, even if the person disagrees with the action taken.

a. **Where to Begin.** Thank the employee for bringing his/her concerns forward so the company can address the issue. Always explain that the company is committed to compliance with the law and its policies and that it will conduct a prompt and thorough investigation. If inappropriate action has occurred, it will be stopped and appropriate corrective action will be taken. There will be no retaliation against an individual for making an honestly believed complaint under the company's procedures or to a government agency.

b. **Confidentiality.** Don't promise absolute confidentiality. Confirm with the individual that the information provided must be shared with those who have a need to know.

c. **Fairness Issue.** Attempt to place the employee at ease and make sure that they understand that you have been trained on how to conduct these types of investigations. Ask the employee if they have any reason to believe that you cannot be fair or objective in conducting the interview.

d. **Complete Information.** The individual should be told that they are expected to provide a thorough and truthful account of what has occurred and to identify all individuals who may have knowledge.
e. **Gender Issue.** If detailed sexual matters may be discussed, it may be desirable to have a female investigator interview the alleged victim because the disclosure of sensitive information may be limited if it is embarrassing to the alleged victim.

f. **Written Complaint.** As a general rule, it is appropriate and helpful to ask the complaining employee to write down, either before or at the start of the interview, every incident of improper conduct that has occurred, as well as the witnesses who have information regarding this conduct. Have this document signed and dated by the complainant. Alternatively, the investigator should take notes and prepare a memo that you show to the employee and ask him/her to sign as being accurate and complete.

g. **Fact-Specific Complaints.** Make sure that each act or each statement that is construed by the individual as offensive or harassing is thoroughly reviewed. Be specific in terms of slurs used, who was present, where, etc.

h. **Procedural Issues.** Make sure that you also cover basic procedural issues as well.

i. **Concluding Remarks.** Thank the employee for raising the issue. Reaffirm that the company will not tolerate retaliation or reprisal for making an honestly believed complaint. Provide the employee with contact information (telephone and mobile numbers) so s/he can bring new concerns or acts of retaliation to your attention or to another appropriate person in the home office. Request that the employee keep the investigation and the information provided during the interview confidential and advise the employee that you will likely be in touch with them from time to time and ask for the employee’s continued cooperation. Explain the procedures that will be followed and what type of follow-up documentation will be developed.

5. **Manner of Conducting Witness Interviews.** There are several suggestions that may prove helpful. As a practical matter, there is no one way to do an interview, but these suggestions in writing up the interview could be helpful.

a. **Tape Recordings.** The use of tape recordings presents difficult issues. First, tape recorders can frighten the person who is being interviewed and make the individual hesitant to
share the facts they have. Second, these types of recordings will not likely be able to be protected under a claim of privilege, and could provide fertile ground to criticize the investigator based on the tone of voice or failure to ask specific questions.

- If the decision is made to record the conversation, the recorder should be placed in plain view on the table in front of the witness. Expressly obtain the witness's consent before, and then again after, you turn on the tape recording. You should also indicate the date, time and place each time the recorder is turned on and off.

b. Outline. A detailed outline of key questions should be prepared in advance of the interview. All key incidents or matters that the witness needs to be asked should be laid out in advance.

c. Disclosures. Certain disclosures should be made at the outset of each interview. In some instances, it may be appropriate to have a written document that sets forth the following points to make sure it is reviewed with the individual before the interview begins. Items to be covered are:

- A brief statement as to why the interview is being taken.

- The role that the individual's interview may play in the investigation.

- A description of how the information that is provided will be used.

- An explanation that the information provided will be reported to others within and possibly outside the company who may have a "need to know."

- An explanation of the seriousness of the investigation and the necessity for accurate information. The individual should be told that they are obligated to provide truthful and complete information.

- A caution to the individual not to attempt to influence the investigation, or to disclose confidential
information by discussing the nature of the interview with others. The exception would be a discussion with government officials who may later investigate for compliance.

- A clear statement that no retaliation for participating in the investigation will be tolerated.

- If the company has a union, review the collective bargaining agreement to determine whether or not an offer of union representation is required. Even if it is not required, if the employee requests union representation and has a reasonable belief that the interview might result in disciplinary action against him/her, a union representative should be present.

- Where appropriate, state that the purpose of the communication is to allow counsel to formulate legal advice for the corporation and that the interview is privileged and confidential.

- Advise the employee whether legal representation is encouraged or is permitted.

d. **Separate Interview Records.** Each interview should be in a separate document, even if the witness statement is only one page or less. At the beginning of each interview, get the individual's name and put the date, time and place of the interview, and then at the end of the interview, the interviewer should sign/initial and date the notes.

e. **Detailed Notes.** Make as detailed notes as possible. If a person who is being interviewed asks questions, try to record the questions asked as clearly as possible.

f. **Interpretations.** Do not include your own interpretations, beliefs, assumptions or conclusions about the facts stated. Instead of interpreting statements or intentions, specifically ask the individual for the reason for a particular event or statement and record the response.

g. **Confidentiality.** Always confirm with the individual that there are to be no threats or promises, and stress the importance of not disclosing the questions asked or the information given as part of the interview to others in order that the investigation can be handled in a thorough and impartial way. Ask the individual to contact you immediately if s/he
believes any acts of retaliation are occurring against anyone for participating in the investigation.

h. Credibility Issues. Credibility determinations are often critical in determining how to proceed. This is one area where you must be very careful about your notes. If you note things during an interview that could impact the credibility decision such as: evasiveness, contradictions in statements, facial expressions, signs of potential anxiety such as shaking, perspiration, defensiveness or other aspects of demeanor, it would be good to record these observations on a separate document. It would also be good to discuss how to record this information with counsel before commencing the interview in order that this type of information can be shielded, to the extent possible, by a claim of privilege.

i. Review. At the conclusion of the interview, review the points contained in your notes and confirm their accuracy with the witness. Always ask the individual if they have anything else they want to add or change.

j. Edit. After the individual leaves, review and finalize the notes to make sure they are legible and provide enough information to help you remember what was said. While it is not necessary to write in complete sentences, the notes should be as free as possible from misspellings and grammatical errors so that you are not discredited later in the litigation forum.

k. Recalcitrant Employee. There are times when an employee refuses to cooperate. If an individual refuses to participate in the interview, explain the consequences. If the individual is the accused harasser, it should be explained that the interview is designed to give the individual an opportunity to relate to management any information that should be considered before it finalizes its investigation. If the accused refuses to participate, management will have to base its decision on the other information gathered and will likely draw negative inferences from the unwillingness to cooperate with the interview.

6. Interviewing Alleged Wrongdoers.

This part of the interview is also very important. It is essential that the accused individual be provided a meaningful opportunity to respond to each of the alleged improper statements or actions. You must avoid claims of a "railroad" or "kangaroo court."
a. **Full Disclosure.** It is important to disclose each incident and statement in full detail so that the accused has an opportunity to refute or disprove them. If the facts are complicated, reduce them to writing in order to facilitate the understanding. (It is not necessary that you disclose the source of all of your information.)

b. **Background Information.**

(1) **Work Relationship.** What is the working relationship between the two?

(2) **Social Relationship.** Determine the nature and extent of the interactions between the accused and the alleged victim. Specifically ask: have there been gifts, cards or notes exchanged; has there been any type of dating, social or sexual relationship?

c. **Welcomeness Issues.** Has the alleged victim ever indicated any displeasure with anything that the accused has said or done? Has the alleged victim initiated or participated in any sexual discussions, jokes or gestures? Has the alleged victim ever asked the accused to stop doing anything?

d. **Explanations.** Make sure to give the accused the opportunity to provide alibis and mitigating circumstances. Ask the accused to identify all persons believed to have information who that individual would like to have interviewed as part of the investigation.

- Ask the accused to provide all relevant documents.

e. **Motives.** If the individual denies any wrongdoing and claims that the person is lying, ask why the accuser would make up the claim. Make sure to see if there is anything that has happened between the two which might explain why the other person would bring a false claim.

f. **Conclusion.** Conclude by asking the accused what steps the individual believes should be taken to ensure a thorough investigation.
B. WRITING UP YOUR REPORT

The most important thing to remember is to "think before writing." The investigator’s objective is to be neutral and objective and precise.

1. **Planning Meeting.** Once the facts have been gathered and accurately recorded, the investigator should meet with the appropriate management representatives and perhaps legal counsel to discuss facts which are known and to identify any additional questions that should be asked and information obtained before the investigation is completed.

2. **Just the Facts.** Only place facts in your report. Avoid including opinions or conclusions, unless it is requested as part of the final assessment in order to weigh credibility.

3. **Proofread.** Review all notes promptly for factual, spelling and grammatical errors.

4. **Drafts.** Documents, other than working drafts of the investigator’s report, should not be destroyed once an investigation is commenced. Drafts of statements sent to a witness should not be destroyed when the next version is prepared. **However,** only the final version of the investigator’s report should be maintained -- all earlier drafts should be destroyed.

5. **Counsel Comments.** Make sure to avoid any mention of the content of any communication with counsel.

6. **Decision-Makers Only.** Only the core group of management should receive the investigation report. Those persons will consider the evidence and statements provided, as well as the reputation of the individuals, their motives and any other conduct as reported by eyewitnesses. If credibility is at issue, the decision-makers should read the actual notes and other important documents before making a decision.

III. **Advice from our Panelists**

A. **Creating a corporate environment where the potential for Title VII claims is minimized.**

   - Company values permeate;
     - At our company, it helps to have no alcohol
     - Don’t allow cursing
     - Uniforms are conservative
o Very robust training for managers; California requires more robust training

o Our company has a written culture statement which is stressed throughout the organization. The Culture Statement stresses: Dedication; Enthusiasm, Excellent Customer Service; Expense Control; Hard Work; Honesty; Professionalism; Respect; Safety/Wellness; Teamwork; and Win-Win Attitude.

o A strong HR presence in the field with continuous training is vital.

o Annual training for all employees, not just management. While the training differs some as it relates to the management versus non-management, we make sure employees feel valued and know the mechanisms to raise concerns.

o Top level management including CEOs etc., must buy into training and be in attendance or visible to the other employees at the training.

o Having a qualified HR person is critical, particularly having one that does not overreact or play favorites.

B. **Best practices for corporate processes for claimants to report Title VII claims.**

o Culture of reporting where everybody knows the processes; remind everyone all the time;
  ▪ Mandatory reporting
  ▪ Write management up if they don’t report
  ▪ In-house counsel is prepared to take the heat in litigation if it comes out that someone was disciplined for not reporting

o Our ER program is pretty sophisticated; regional investigations; they are the only ones who investigate; they are trained to do it; very robust
  ▪ Same people that train

o Claims have all gone down with arbitration

o Do a full day on Title II; role playing

o Looking at virtual reality training

o Multiple methods – electronic for more tech savvy

o Rewarding reports through positive feedback

o Status reports (high level) but indicating activity

o Publicity

o Leadership endorsement (local and corporate)
Our company has several policies which stress the importance of Team Members reporting claims of discrimination / harassment and which provide the different avenues for reporting same. The policies are: The EEO Policy; The Harassment, Sexual Harassment, Discrimination and Retaliation Free Work Environment Policy; and The Problem Solving Policy. These policies are provided to all new hires within their Handbook and also found on the company’s Intranet. In addition, we post “Sexual Harassment is Illegal” and Working Together T.I.P.S. Hotline posters in every location, which emphasize the reporting of discrimination, harassment and retaliation and provides the avenues for reporting same. The avenues are: your supervisor (unless they are the accused); any member of management; Human Resources; their Division Human Resources Manager, Team Member Relations; anonymously to the Company’s T.I.P.S Hotline; or by submitting through the Team Member Concern Form found on the company’s Intranet.

Make sure your “harassment policy” does not just refer to harassment claims. It is critical that it expressly refers to harassment, discrimination and retaliation.

Make sure the policies are in the appropriate languages for your workforce and if your workforce is younger, make sure it is understandable and in very basic English so that there cannot be any misunderstanding as to how to report a claim.

Make sure an employee has multiple avenues to report claims and consider having an 800 number.

Do not include language in your policy that references good faith or bad faith belief on the part of the employee.

Make sure that the key discrimination and harassment policy is not only in the handbook, but that it is separately given to each and every new and existing employee along with an acknowledgement form that they have received that policy outside of a handbook. This is critical.

Once again, training is important as it relates to management and understanding what is “a complaint” or a “report of a complaint.”

C. **Best practices for investigating Title VII claims**

- Train interviewers
- Select appropriate interviewers
- Review and plan
- Privileged and non-privileged reports
- Uniformity/consistency in approach
- Effective but speed is important

- No magic here. The investigation should be prompt and thorough. Leave no stones unturned. Investigate all issues whether original to the complaint or those which arise during the investigation. And never discipline or terminate a Team Member without giving them the opportunity to address the finding against them, preferably in writing.

- Stop labeling investigations with hyper charged terms such as hostile environment investigation, harassment investigation or discrimination investigation. There is no need (usually) to put a title on the investigation. It is a workplace complaint or workplace conduct investigation. Why in the world does anyone want to put a label on the investigation for opposing counsel to use against you? When you first start the investigation, you have no idea whether it is harassment, discrimination or whatever. It is a workplace conduct complaint and should typically be worded that way. Leave the conclusions for a jury or judge to decide as to what to call the conduct.

- Peel back the layers of the onion. Employees are so willing to make broad sweeping accusations or allegations and the layers of the onion need to be peeled back to really get to the root of who, when, where, how, what, etc.

- Make sure the scope of the investigation is proportionate to what is going on. This is a delicate balance that needs to be thought through.

- Find out what the complainant is really seeking – not that you can always deliver it, but it is important to find out.

- My single biggest tip would be to be sure to follow up after the investigation. It sounds so simple, but it is rarely adequately done. Once and investigation has been conducted, the workplace becomes fertile territory for retaliation claims. It is of paramount importance that HR or whoever is involved in the process follow up with the complaining party on a regular basis for a year of more or whatever time is appropriate. This should be done in 30-60 day intervals or again, whatever is appropriate and should be documented. Again and again, the complaining party will say – no one ever followed up and things never got better or worse or whatever. This follow up can also be with the person accused. Documentation and follow up is critical in preventing as well as defeating retaliation claims.

- Assure all individuals involved in the investigation about their issues about retaliation.
D. Advice for dealing with the EEOC with Title VII claims

- Respect, Respect, Respect. Providing the Investigator with the respect they deserve and showing empathy for their job responsibilities goes a long way in garnering a relationship based upon mutual respect.

- Don’t fight every request
- Don’t “dial in” the position statement or investigation
- Prepare for mediation presentation
- Resolve where appropriate
- Streamline communication – EEO sends stuff everywhere in the org.

- If you have the opportunity, get to know the people in your local EEOC office. Visit them and get to know them. Relationships with the EEOC can be critical in certain cases, particularly with the Regional Attorney or EEOC Mediator. Your credibility is everything with these folks.

- Recognize that the EEOC will rely heavily on comparison data and to the extent it is beneficial, address that information in your Position Statement.

- Do not use flowery or aggressive language in your Position Statement. Tell your story and stick to the facts and let the facts provide the inference to be drawn for the EEOC.

- I don’t typically provide a lot of documents to the EEOC; it just depends on the case. The same is true for declarations or affidavits as those often trigger the office to want to investigate further.

- Recognize which types of charges will likely get the EEOC more interested – that is something you can only know by keeping in tune with legal developments and EEOC postings, etc.

- Be responsive and respectful.

- If you are not hearing anything from the EEOC, let sleeping dogs lie.

- We agree to mediate everything
- Have to control the scope; Cooperate.
- When they ask for the handbook, give the part that’s relevant

E. Litigation:
a. **Expectations for outside counsel;**

- I want a litigator for outside counsel. One who has and is not afraid of trying a case. I cannot get the best results without one.
- Also, I want an attorney who will understand and respect the priorities of the Organization – it’s not litigation. I have encountered too many attorneys (mostly young associates) who want the operations team to drop what they are doing and gather evidence for them or ask for way more documentation than is relevant. I want an outside counsel who can work with our excellent paralegal team.
- Set budget expectations
- Define goals and strategy early
- Counsel need to understand relevant aspects of the business and the players – important for in house to be present in the beginning
- Counsel has to support your role with the company
- Counsel has to respect the culture and “fit in” instead of increasing the anxiety and gossip
- Can’t stand it if you approach it cookie cutter; discovery; then SJ;
- Wants us to fight but not be ridiculous
- Nothing makes me angrier than when one of my lawyers calls and says, “this is bad; you need to settle for $200k;”
  - Don’t say, “Let’s settle.” She smells weakness.

b. **Interviewing company witnesses with counsel.**

- Unless my outside counsel has already developed a relationship with a company witness, I want the first introduction to be made by the Company – normally one of the paralegals will contact the witness and advise them of the matter and introduce outside counsel to them.
- Once the contact is established, I want the outside counsel to form a relationship with that witness putting them at ease. However, I want outside counsel to be real with them and prepare them for a worse-case scenario with regard to deposition or testimony at trial.
- Case dependent and witness dependent
- Time best spent in prep of key witnesses and early fact review
o Important to provide enough background for fulsome questioning
o Speak their language and be humble

c. Discovery and Depositions:

o Think broadly – lay people don’t always think where evidence may be lurking
o Involve in-house – they often have a different view of where information is and in what form – often unaware of corporate recordkeeping systems
o Don’t forget social media
o Coworkers can be important
o Don’t limit your review to local sources

o One of my concerns is that outside counsel is often too willing to provide evidence I believe to be confidential or not relevant and wants too much of it to determine if there are comparators. I don’t want to expand discovery outside the decision makers even if doing so will provide more favorable comparators. That’s a slippery slope I don’t want to go down.

o My advice is in-house counsel oriented; I want comparator evidence on personnel decisions
o Make sure that whatever term code you use has helpful comparator evidence

d. Trial.

o I think trials are the best learning tool for both operations and HR in that it educates them as to how others outside the organization view their decisions and actions.

o I have found that juries just want the employer to be fair and treat the plaintiff as they would want to be treated. Having such insight normally changes the way they do things.

o As for my outside counsel, first and foremost, I want them to portray my company as a responsible citizen and while not perfect, one that tries to do the right thing.

o Forget the law; trial is a different animal – it is about fairness and equity
o Admit your mistakes – don’t fight for every point
o Tell your own story; don’t just plan to pick apart theirs
o Prepare witnesses carefully – they’ve often never been in a courtroom
o Engage them with your business – tell them who you are and what you do with pictures and tangible things that connect you to the jurors – make a corporate entity a person
o Keep the jury interested in your evidence; speak to them – they often aren’t intellectual peers so how do you relate
o Be judicious in efforts to preserve your record for appeal; don’t try the case for appeal – try it to win.

o Focus early and often on jury instructions and verdict forms – how does your case fit the things the jury will be asked to find.

o I do think it is important to get ahead of the case early. All too often we tend to be reactive on the defense, but it is better to be proactive.

o Getting your jury instructions ironed out very early, is incredibly helpful for summary judgement or just overall guiding your discovery efforts. It is incredible how many times people do not look at jury instructions until they are actually required to do so under the Court’s Scheduling Order – big mistake!

o Your discovery and how you approach the case needs to be proportionate to what is really at risk in the case and also what the case actually demands. One size does not fit all and you need to be flexible. You don’t have to turn over every single rock, but you need to get the case in the position either for summary judgment or to win at trial. As it relates to trial itself – this is where being creative reaps huge benefits because there are actual times when it serves no benefit to call any witnesses and simply rest after the plaintiff’s case. It takes a little guts, but sometimes it is the right decision. The point being you have to be able to modify, adjust on the fly and recognize how your jury is responding to the witnesses, etc. If the plaintiff is a turd and you believe you can expose that personality, then by all means do what you have to do to expose the plaintiff so that they jury gets a true sense of what that person is all about. Recognizing the type of witness a plaintiff will be is critical in determining whether you can prevail at trial. Likewise, recognizing how credible your key witnesses will be is almost equally important. There is much more I can say
about this, but these cases can be won at trial, you just have to know which are the right ones to take to trial!