



*Knock Knock. What do you do when the Government (Rafiki) is at your door?*

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### The Main "Employment" Players




**Discrimination and Harassment**

- US Equal Employment Opportunity Commission (EEOC)
- Alaska State Human Rights Commission (HRC)
- Anchorage Equal Rights Commission (AERC)
- US DOL OFCCP

**Labor Issues**

- US DOL
  - OSHA
- Alaska DOLWD
  - AKOSH
- NLRB




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### Trends in Charges

- Agency investigations
  - Economy improving → filling agency positions
  - Systemic and targeted focus
- Discrimination & Harassment
  - Charges peaked in 2011 / 2012
  - Disability and retaliation are still trending up
- Wage & hour lawsuits on the rise
  - Increased 10% in 2013
  - 2014 - top 10 W&H class actions → \$215.3M
- OSHA – Increase in whistleblower efforts
- NLRB – Expanded reach over non-union workforces


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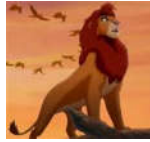
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### Hypothetical

- You are the Director of HR for *Jungle Out There, Inc.*
  - company with 1000 employees
  - trainers, facilitators, job coaches
- You receive a charge in the mail from the EEOC
- Complaint was made by a current employee



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### Hypothetical (cont'd)

- This is James ("Jim")
- He is a training coordinator/trainer
- Jim filed a complaint with the EEOC alleging discrimination and retaliation under the ADA



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### Hypothetical (cont'd)

- This is Jim's supervisor Brian
- Brian thinks he knows everything about everything – including HR



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### Hypothetical (cont'd)

Jim suffers from depression and requested a change in work schedule and job duties



Jim asked to:

- have the next 12 Friday's off while he receives additional treatment
- move his scheduled start from 8 to 9 a.m.
- provide fewer in person training sessions each month – moving from 15 to 8 sessions



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### Hypothetical

After several discussions with Brian and Jim, the resolution is:



- All but 2 of the Friday's can be accommodated, but not the other 2 because Jim was running scheduled conferences for a key customer
- Jim could change his arrival time for 3 months, but this will be reassessed
- 3 in-person trainings each month can be moved immediately to a co-worker, but more analysis is needed on the other 4 trainings



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### ADA crisis narrowly averted. Right?



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### Jim's complaint to the EEOC



- *Jungle Out There* won't accommodate:
  - *JOT* wouldn't give him time off for treatment
  - *JOT* refused to change his job schedule, even though it has with other employees
  - *JOT* wouldn't decrease in-person trainings – which exacerbate his depression
- Jim wasn't considered for a recent promotion
- Brian gave Jim a 'final warning' for missing one of the Fridays that weren't approved



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### Jim's complaint



- People are shunning him
  - Jim's co-workers are angry at him for having to 'pick up his slack'
  - Jim heard they are complaining about him on Facebook
- *JOT* employees make fun of people with mental disabilities
  - They send email 'jokes'
  - *JOT* doesn't do anything
- This has really impacted Jim's comfort in the workplace



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### Pre-Investigation



- Read the charge carefully
- Share it internally, as appropriate
  - Need-to-know only
  - In-house counsel
  - Claims manager
- Preservation Notice



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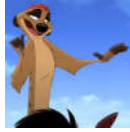
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### Pre-Investigation (cont'd)

- Consider acknowledging receipt of the claim by a letter to the claimant
  - Internal investigation
  - No retaliation
- Don't get emotional about it
- Don't let supervisor get emotional about it
- Begin to think through your response and what you need



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### Pre-Investigation (cont'd)

- Work collaboratively with the agency
- Establish a point of contact with the agency
- Request additional time to respond if needed
- Consider negotiating the 'discovery' request



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### Side Bar: Agency Drivers



- Understand the EEOC's strategic enforcement plan – 6 priorities
  - Eliminating barriers in recruiting and hiring
  - Protecting immigrant, migrant and other vulnerable workers
  - Enforcing equal pay laws
  - Preserving access to the legal system
  - Preventing harassment through systemic enforcement and targeted outreach



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## Internal Investigation

- Prompt, thorough, good faith investigation is critical
- Required even if one was conducted prior to discipline/request for reasonable accommodation
- No longer a minor dispute



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## Sidebar: Retaliation

- What is retaliation?
  - Independent cause of action
  - Employee was engaged in a protected activity
  - Employee suffered an adverse employment decision; and
  - Causal connection between the two
- Retaliation charges are on the rise
  - tripled since FY1992
  - top claim since FY2009
  - 43% of all EEOC charges in FY2014



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## Avoid Retaliation

- Take care after employee has made a claim
- Limit people who know about claim
- Counsel supervisors - be objective, exercise restraint, avoid knee-jerk reactions
- Educate supervisors how to spot where retaliation is a risk
- Treat charging employee the same as every other employee
- Take disciplinary action against any employee who retaliates



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## Who Investigates?

Four choices:

- In house HR
- In house legal
- Outside consultant
- Outside counsel



Factors to consider:

- Attorney-client privilege
- Ability / skill
- Investigator as witness
- Cost
- Seriousness of claim
- Appearance of bias



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## Side Bar: Attorney-client privilege

- Reasons to maintain
- Reasons to not maintain
- Selective waiver



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## What Role Should the Investigator Serve?

- Fact collector
- Draw conclusions?
- Resolve credibility disputes?
- Offer recommendations?
- Issue report



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### Gather and Preserve



- Collect information requested by the agency
- Collect all written documentation which may be relevant
  - manager's notes; emails
  - personnel files of all involved
  - prior complaints
- Organize and review relevant documents
- Give documents to investigator




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### Gather Any Other Proceedings

- Were there EEO claims filed with other agencies (HRC or AERC)?
- Any other proceedings?
  - Workers' compensation
  - Unemployment claims
  - Unfair labor practice charge
- Check for consistency in positions:
  - Prior statements / incidents




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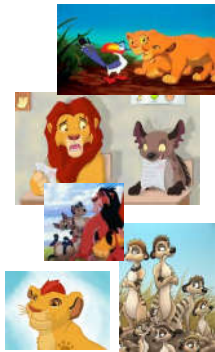
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### Interview Relevant Witnesses

- Identify interviewees – managers, supervisors, witnesses
- Identify the process:
  - Same set of questions?
  - Open ended vs. specific
  - Witness "statements"
- Investigator's Notes




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### Side Bar: Mediation

- Offered early in the process by most EEO agencies
- Certain cases 'selected' for mediation
- Mutual agreement to participate required
- Attempt to resolve any issues without having to participate in the agency investigation



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### Investigation Outcome

- Final Report
  - Consider documenting steps taken, decision made, supporting facts
  - Log investigator's actions
- Retain all written communications to persons
- Personnel file issues



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### Investigation Outcome (cont'd)

- Ensure key decision-makers consider results of investigation
- Consider mediation
- Consider any additional disciplinary issues
- Be prepared to correct mistakes, if any



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### Investigation Results -- Jim

- Allegation: failure to accommodate
  - Change Fridays and work hours
  - Provide fewer in person training sessions
- Results:
  - Accommodation is in process and well documented
  - Fridays accommodated, except 2
  - Consider 'fixing' final warning
  - Early schedule accommodated for 3 months, with review
  - Accommodated some change to job duties
  - Re-analyzing accommodation



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### Investigation Results -- Jim

- Allegation: Retaliation
  - Shunning him
- Results:
  - Not substantiated
  - Additional efforts
  - Manager counseling to spot and control



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### Investigation Results -- Jim

- Allegation: no promotion
- Results:
  - hire not well documented
  - Brian warned
- Allegation: hostile environment
- Results:
  - too vague to substantiate at this point



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### Preparing a Response Generally

- Respond to agency's specific requests
- Respond to allegations
- Highlight company's EEOC and anti-harassment policies, or other relevant policies
  - Discuss their importance
  - How employees are made aware



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### Response Generally

- On time
- Accurate
  - Trust but verify manager's statements
- Provide exhibits
  - Highlight specifics and describe their importance
- Include a statement reserving your right to modify or supplement



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### Response – Jurisdictional issues

- Know the law
- Review timeliness of the filing of the charge
- Does the complainant have the correct employer?
- Is the employer covered by the statute?



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### Response -- Facts

- Know the law
- Consider comparator information – same hiring, promotion, disciplinary decisions
- Provide, where helpful, summarized information rather than raw documents
- Refer to other relevant policies, explaining the company's actions



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### Strong Response

- This response can have serious consequences
  - Admissions
  - Future litigation if employee unhappy with result
- Ensure key decision-makers review the response prior to filing



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### Potential Next Steps – Jim's Complaint

- Reconsider mediation
  - clear up promotion issue
  - message of no retaliation
  - explain the accommodation process
  - discuss discipline re: missed "Friday"
  - learn more about environment ('jokes')
- Strong position statement



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## Agency Proceedings

- Agency may request additional information or documents
- Agency interviews
  - Management
  - Witnesses
  - General employees
- Agency will dismiss the charge or make a determination of cause



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## Summary

- Organized approach
- Early cooperation with agency
- Internal investigation
- Gather and preserve documentation
- On time, accurate response
- Avoid retaliation



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*Thank you!*

Melanie Osborne  
Chugach Alaska Corporation



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