

# EEOC Representative Provides Perspective on Sexual Harassment and Discrimination

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## How does the Equal Employment Opportunity Commission evaluate discrimination complaints?

What trends is it seeing in the cases it's reviewing? And how do investigators assess claims involving sexual harassment and equal pay violations?

Attendees at Ward and Smith's 2019 Employment Law Symposium got to hear about these issues from one of the

EEOC's senior-most administrators in North Carolina.

Thomas Colclough, deputy district director of the EEOC's Charlotte office, joined Jerry Sayre, an employment law counselor and litigator who advises employers, for a question-and-answer session on stage.

The Charlotte district office fields employment discrimination complaints across North Carolina, as well as a large part of Virginia and South Carolina.

Sayre noted that the EEOC seems to have gotten more willing, in recent years, to dismiss charges before employers are even asked to respond.

"What is the Commission looking for?" Sayre asked. "Is there some sort of a threshold foundation that they're looking for?"

Colclough said the agency is always trying to assess whether, if they investigate, they are likely to find a violation.

"The No. 1 question we should always ask is, 'Is it more likely than not?'" he said. "Are we going to find the violation here, based on the years of experience that we have and based on the story that the individual may give us at the intake phase?"

Sayre asked Colclough what he was seeing on the sexual harassment front, particularly given the rise of the #MeToo movement.

"Going into fiscal 2018, I thought, based on the #MeToo movement, that harassment cases would go down," Colclough said, anticipating that employers were getting smarter about harassment. But they haven't.

"Because of the #MeToo movement, people feel more empowered to speak about the situations they may

have encountered,” he said.

It’s become apparent, Colclough said, that the kind of harassment training that many employers conduct isn’t working well enough.

According to Colclough, the key question for employers to consider is: “How do we put respect back in the workplace?”

“The other thing that I think is important that employers should consider is emotional intelligence training,” Colclough said. “Sometimes, people just aren’t aware of their behavior or the things that come out of their mouth.”

Employers should also be active in monitoring for and taking action on inappropriate behavior.

“If you get a complaint and you act on a complaint by taking immediate and appropriate action by investigating it, that’s the best way to resolve these,” he said.

One of the most challenging situations an employer can face is when a senior executive — sometimes the CEO or owner of a company — faces a harassment complaint.

Colclough said that if he were the CEO of a company, “I need to have some way that all employees have an avenue to complain, even if it’s about me.”

That may mean designating an outside attorney, for example, as someone empowered to hear complaints and conduct investigations.

Another big issue for employers to be wary of, Sayre noted, is pay inequity.

“To me, pay discrimination is kind of the sleeping giant,” Sayre said. “The monetary exposure likely to arise can be extraordinary.”

He noted one case from a Fourth Circuit federal court that held a woman being paid less than just one male counterpart had a *prima facie* pay discrimination claim. Given this precedent, Sayre cautioned that if there are nine men and one woman doing similar jobs and the woman earns less than just one of her male colleagues (even if she’s the second-highest paid in the group), she would have a valid pay discrimination claim.

In the Charlotte district, Colclough said, when investigators look at a pay discrimination claim, they’re required to analyze it using four potential defenses: seniority, merit, incentive, and a reasonable factor other than sex.

The reasonable factor other than sex, Sayre said, “is often the key question, because often these cases boil down to that.”

Colclough said there are a number of potential reasonable factors than sex, including — sometimes — the fact that one employer had a lower salary in a previous role.

But he also noted that he doesn’t like the “he negotiated, she didn’t” argument that some companies make, because he doesn’t know the context of the negotiation or whether sex was a factor in that.

But he is more likely to view other factors, such as the education and skills someone brings to the job, as reasonable factors. A candidate’s relationships might also be a permitted factor.

“I think one of the most important things in business, in my opinion, is building relationships,” he said. “If

you're really connected to that community ... that might be why you get the job versus somebody else.”

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