

**UNITED STATES EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION**



**SHRM Guam Breakfast Briefing
June 8, 2016**

**Welcome to
Investigations 101**

Glory Gervacio Saure,
EEOC-Honolulu Local Office Director

OUR VISION
A Strong and Prosperous Nation
Secured Through a Fair
and Inclusive Workplace

OUR MISSION
We Promote Equality of
Opportunity in the Workplace and
Enforce Federal Laws Prohibiting
Employment Discrimination



Course Objectives

Keeping It In the House

- Establishing Credibility and Integrity
- Recognizing Potential EEO Violations
- Completing Investigations that Mirror EEOC's
 - Theories of Discrimination /Elements of Proof
 - Strategic case planning and development
 - Interviewing techniques
 - Reviewing and analyzing documentation gathered
 - Presenting investigative findings and remedies

Step # 1

Establish Credibility
and
Integrity

Step #2

In order to investigative and resolve discrimination complaints, you must understand the underlying causes of discrimination.

Underlying Causes of Discrimination

Greed
Laziness
Fear
Racism
Ignorance
Stereotypes
Bias
Intolerance
Prejudice
Low Self-Esteem
Bigotry

Stereotype

- Is an exaggerated belief, image or distorted truth about a person or group.
- A positive or negative generalization usually based on images in mass media, or reputations passed on by parents, peers and other members of society.

Bias

A strong inclination of the mind or a preconceived opinion about something or someone. A bias may be favorable or unfavorable

Two Types of Biases

- **Explicit** – Fully and clearly expressed or demonstrated, leaving nothing merely implied.
- **Implicit** – Implied, understood and recognized though not directly expressed. Unconscious Bias

Which is more dangerous?

Explicit



Implicit

**Bias Leads
to a
Behavior**

Stereotypes



Bias



Discrimination

Discrimination

Discrimination is behavior that treats people unequally because of their group memberships. Discriminatory behavior, ranging from slights to hate crimes, often begins with negative stereotypes and prejudices.

Step # 3

Determine the Appropriate
Statute
Theory of Discrimination
and/or
Elements of Proof

Statutes Enforced by EEOC

- Title VII of the Civil Rights Act of 1964, as amended.
- Age Discrimination Act of 1967, as amended
- Equal Pay Act (Ledbetter Fair Pay Act of 2009)
- Americans with Disabilities Act of 1990, as amended
- Genetic Information Non-Discrimination Act of 2008

The Theories of Discrimination

- Disparate Treatment
- Disparate Impact
- Harassment
- Religious Reasonable Accommodation
- Disability Reasonable Accommodation
- Retaliation

Disparate Treatment

Disparate Treatment Prima Facie Case

- Charging Party is a member of a protected group.
- Charging Party was harmed.
- Others not of Charging Party's class were not treated the same (i.e. discipline, discharge, lay off, terms and conditions) although they were similarly situated.

Hiring and Promotion Prima Facie Case

- Charging Party belongs to a protected class.
- A vacant position existed.
- Charging Party applied for the position.
- Charging Party was qualified for the position.
- Charging Party was not selected but a lesser qualified person not of Charging Party's class was selected.

Is the Management's Reason Legit or Pretext?

- Management has articulated a legitimate, non-discriminatory reason for the employment decision.
- The management's stated reason for the employment decision is pretext.
- Is there direct evidence that supports Charging Party's allegation?
- Were similarly situated employees outside of Charging Party's protected group treated more favorably? (Indirect or circumstantial evidence)

INDICATORS OF PRETEXT DURING INVESTIGATION

- False information
- No information and/or documentation
- Normal policy/practice not applied evenly
- Normal policy/practice arbitrarily changed
- Inconsistent or conflicting data
- Changing defenses in mid-stream

Disparate (Adverse) Impact

Disparate Impact



- Theory aimed at “practices fair in form, but discriminatory in operation” in that they operate as “built-in headwinds [for a protected class] and are unrelated to measuring job capability.” *Griggs v. Duke Power Co.*, 401 U.S. 424, 431-32 (1971).
- Three analytical steps:
 - Does policy or practice have significant disparate impact?
 - If so, has the employer proven that the policy or practice is job related and consistent with business necessity?
 - Is there a less discriminatory alternative that meets the business need?

Harassment

All Harassment in the
Workplace should cease
IMMEDIATELY

What will make an
employer liable for
workplace harassment?

BEHAVIORS THAT CAN BE CONSIDERED HARASSMENT

- Unwelcome teasing, jokes, remarks, that are sexual, derogatory based on a protected bases, or ethnic slurs.
- Unwelcome letters, telephone calls, e-mails or distribution of materials that are sexual or derogatory based on a protected bases.
- Physical assaults based on a protected bases.
- Demands for sexual favors for job benefits.
- Unwelcome and deliberate touching.
- Unwelcome sexually suggestive looks/gestures.
- Unwelcome pressure for sexual favors or dates.
- Favorable treatment for sexual favors.

DETERMINE IF UNWELCOME

- Harassment is unlawful only if it is unwelcome.
- Unwelcome-
 - Employee did not solicit or incite it and
 - Employee regarded the conduct as undesirable or offensive.



DETERMINING WHETHER BEHAVIOR IS HARASSMENT UNDER THE LAW

- Use "reasonable person" standard
- Primary criteria
 - Context
 - Severity
 - Frequency
- Isolated comments rarely create a hostile environment
- A single incident of physical sexual conduct can create a hostile environment

CO-WORKER/NON-EMPLOYEE HARASSMENT



- Liability is not automatic.
- Must establish the employer knew or should have known about the harassing conduct
- Employer must then show it took immediate and appropriate corrective action to correct harassment and prevent its recurrence

WAS HARASSMENT BY AN ALTER EGO OF THE EMPLOYER?

- Liability is automatic
- Alter ego-someone of sufficiently high rank to be treated as the employer's proxy.
- Examples-president, owner, partner, corporate officer.



HARASSMENT BY A SUPERVISOR

- Liability may or may not be automatic
- Types of supervisory harassment
 - Tangible employment action harassment
 - Automatic liability
 - Hostile environment harassment
 - Liability not automatic
 - Recourse to the affirmative defense



IS IT HOSTILE ENVIRONMENT HARASSMENT BY A SUPERVISOR?

The affirmative defense is available to the employer to avoid liability

- The employer has the burden and must prove both prongs of the affirmative defense
 - **First prong:** did the employer exercise reasonable care to prevent and correct the harassment?
 - **Second prong:** did the employee unreasonably fail to utilize the employer's complaint procedure or to avoid all harm otherwise?

Religious Reasonable Accommodation

ELEMENTS OF PROOF FOR RELIGIOUS ACCOMMODATION

- Did Charging Party request an accommodation for sincerely held religious belief or practice?
- Did management deny the request?
- If so, could respondent have provided a reasonable accommodation without undue hardship?

Disability Reasonable Accommodation

ELEMENTS OF PROOF FOR DISABILITY ACCOMMODATION

- Is Charging Party a qualified individual with a disability?
- Can Charging Party perform the essential functions of their position with or without a reasonable accommodation?
- Did Charging Party request an accommodation?
- Did the employer engage in the interactive process?
- Did Management deny the request?
- If so, could Management have provided a reasonable accommodation without undue hardship?

Retaliation

Retaliation

- OPPOSITION to discrimination or PARTICIPATION in covered proceedings
- ADVERSE ACTION
- CAUSAL CONNECTION between the opposition or participation and the adverse action

Evidence of Causal Connection May Include:

- Immediacy of retaliation.
- Contrast in treatment before and after opposition or participation.
- Disparate treatment of similarly situated persons not engaged in protected activity.
- Direct evidence of retaliatory motive.

Equal Pay

Elements of Proof

Equal Pay

- Management pays a lesser rate to one sex than to the opposite sex to perform substantially the same work.
- The work is performed in the same establishment.
- The work is performed under similar working conditions.
- The work requires equal skill.
- The work requires equal effort.
- The work requires equal responsibility.
- The wage differential is not attributed to, (a) a seniority system, (b) a merit system, (c) a system which measures differential based upon any factor other than sex.

Good Investigators Are

- Knowledgeable
- Inquisitive
- Focused
- Strategic
- Flexible
- Analytical
- Objective/ Open-minded
- Confident
- Persuasive

Investigative Plan

- Basis (s):
- Issue (s)
- Statute (s)
- Theory of Discrimination:
- Elements of Proof:

Step #4

Determine what information
(evidence) is needed
and where do you get it?

Now What?

The Investigative Plan

- What documents do we need and where do we get it?

Investigative Plan (cont.)

- Who do we need to talk to and why?

**When and how interviews
are conducted is important.**

The Purpose of an Interview

Why would you want to interview?

Collect Information

- Who
- What
- Where
- When
- Why
- How

Establish the Scope

- It's very easy for a conversation to go into a direction that has no bearing on the topic at hand. Try and stay focused on the reasons you are conducting the interview.
- Aside from establishing rapport, and maybe initial small talk to establish a sense of comfort understand that as the interviewer, you establish the pace of the interview.

Once they start talking

- Be an active listener.
- Be patient
- Listen for critical content (and always be open to revisiting a particular element of their story later on in the interview).
- Be mentally prepared for whatever information they may give you. Don't let your physical reactions impact their story.

Once they start talking

- Ask follow up questions
- Ask open-ended questions
- Get details
- Remember, this is a first hand account for them, try to get as comfortable with their facts as they are
- Avoid getting emotional

Question types

- Sequence Questions
- Open-ended questions
- Factual question
- Opinion Question
- Direct (yes/no)
- Leading

Sequence questions

- Start out big and work your way in.
- Pyramid theory.
- Tends to put the interviewee at ease
- Open ended question to gather the information to make you familiar enough with the situation that will empower you with the confidence to be able and derive conclusive answers from some direct and follow up open ended questions.

Open-ended questions

- Considered by many to be the best.
- These questions serve as the standard in getting full responses from the person being interviewed.
- Understand you may get some information that may not seem relevant, but it all plays an important part.
- EX: "So what can you tell me about the incident where Mike was allegedly being too touchy with Pam"

Factual questions

- Similar to yes/no, though usually used towards the end of the interview once the interviewer has a sense of familiarity and is seeking confirmation.
- When you need to get to the specifics.
- When you want to establish witnesses.
- When you need to substantiate particulars to the complaint.
- EX: "So then you do admit to saying it"

Opinion question

- When you want someone's opinion.
- Helps establish specifics with issues that seem subjective.
- I.E Interpretations of hiring/promotion criteria.
- Always remember the capacity of the individual whose opinion you are getting and its practical relevance to the situation at hand.

Direct questions

- When to use these?
- Pros?
- Cons?
- When an absolute answer is needed and nothing else.
Remember, an individual responding to this type of question may not be forthcoming with subsequent information.
- EX: "Did you say Randy was a"

Leading questions

- Be very careful with these.
- When used in conjunction with an admission, it could reflect poorly on the interviewer.
- Used mainly to introduce the scope of the complaint or transcend into a new realm of the interview.
- EX: "So tell me Sally, you were there when the incident with Ray and Sarah took place right?"

Recording

- Be familiar with company and State regulations with respect to consent when it comes to audio recordings.
- Always take notes.
- A team approach is a proven technique that allows for one to ask questions and the other to take detailed notes.

Capture/Summarize

- Someone somewhere is going to review your notes and what your notes contribute to with respects to a follow up report.
- You are essentially introducing someone new to the ordeal that you just became somewhat familiar with. Do what you can to share you sense of familiarity with the reader.
- Decision makers need to have confidence in those collecting the information at the interview stage.

Investigative Plan Update

- Basis (es):
- Issue (s):
- Statute (s):
- Theory of Discrimination:
- Elements of Proof:
- What documents are needed?
- Who should we talk to and why?

Investigative Strategy Decisions

- A. Review documents (i.e. job descriptions, job announcements, personnel files)
- B. Interview decision maker (s)
- C. Interview witnesses
- D. A combination of the above

Step #5

Investigative Analysis and
Findings

Step #6

Recommendations Corrective Actions Presentation

Presentation Tips

- Prepared
- Positive
- Persistent
- Persuasive
- Patient
- Practical

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EEOC Digital Charge System Release of Position Statements During Investigations

Glory Gervacio Saure,
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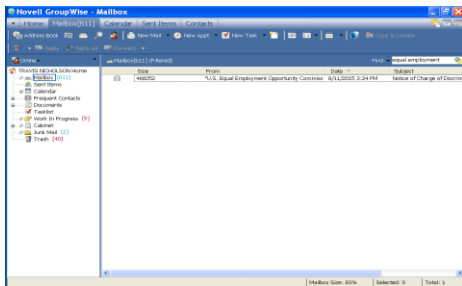
Overview of Phase I EEOC Digital Charge System (DCS)

- New Notice of Charge (email or paper)
- Secure Portal for Respondent to Log into
- View and download the charge
- Review an invitation to mediate and respond
- Submit a Position Statement to EEOC
- Provide/verify Respondent contact information
- Designate Legal Representative
- <https://www.eeoc.gov/employers/process.cfm>

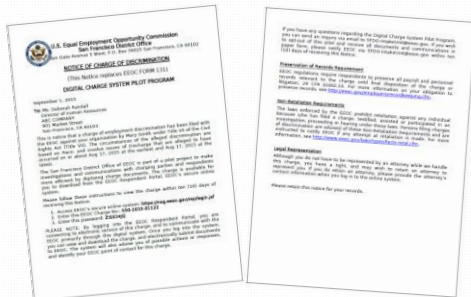
Benefits to the Public

- Increases responsiveness to our customers
- Streamlines the enforcement system
- Saves resources
- Provides improved management of workflow, and increased accountability and coordination
- Protects integrity, security, and storage of documents in online system

Email Notification



Notice of Charge of Discrimination



Link to Respondent Portal

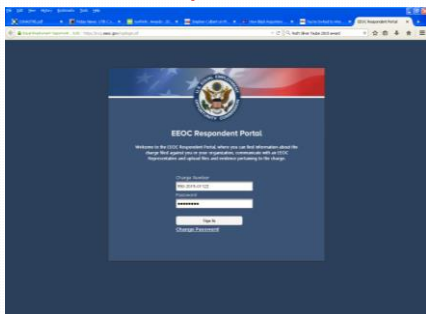
The San Francisco District Office of EEOC is part of a pilot project to make investigations and communications with charging parties and respondents more efficient by digitizing charge documents. The charge is available for you to download from the EEOC Respondent Portal, EEOC's secure online system.

Please follow these instructions to view the charge within ten (10) days of receiving this Notice:

1. Access EEOC's secure online system: <https://nxcg.eeoc.gov/rsp/login.jsf>
2. Enter this EEOC Charge No.: **550-2015-01122**
3. Enter this password: **Z15014jq**

PLEASE NOTE: By logging into the EEOC Respondent Portal, you are consenting to electronic service of this charge, and to communicate with the EEOC primarily through this digital system. Once you log into the system, you can view and download the charge, and electronically submit documents to EEOC. The system will also advise you of possible actions or responses, and identify your EEOC point of contact for this charge.

EEOC Respondent Portal



EEOC Respondent Portal



Verifying Organization Contact Information

The screenshot shows the EEOC Respondent Portal login page. The page has a header with the EEOC logo and the text "EEOC Respondent Portal". Below the header, there is a section titled "Authentication Information" with a list of fields: "FIVE Digits", "NEWB ID#" (with a red asterisk), "LAST Name", "Title", "Organization", "Email", "ADDRESS Line 1", "ADDRESS Line 2", "City", "State" (with a dropdown arrow), "Zip", and "Password". A "Log In" button is at the bottom. A sidebar on the left contains links for "Home", "My Case", "My Case History", "My Case Documents", "My Case Comments", "My Case Notifications", "My Case Alerts", "My Case Settings", "My Case Help", "My Case Feedback", "My Case Support", "My Case Contact Us", "My Case Privacy Policy", "My Case Terms of Service", "My Case About Us".

The Charge of Discrimination Page

[illegible][illegible]

Viewing the Charge of Discrimination

County of Declaration <small>I, the undersigned, declare that the foregoing is a true and correct copy of the original document, and that the same is a true and correct copy of the original document.</small>		Declaration <small>(Signature of Declarant)</small>	Signature Date <small>(Date of Signature)</small>
Dr. Mary Buck <small>Dr. Mary Buck, MD, MS, San Francisco, CA 94103</small>			09/15/2013 <small>09/15/2013</small>
WITNESSES <small>(Signature of Witnesses)</small>			
WITNESS 1 <small>WITNESS 1, San Francisco, CA 94103</small>			09/15/2013 <small>09/15/2013</small>
WITNESS 2 <small>WITNESS 2, San Francisco, CA 94103</small>			09/15/2013 <small>09/15/2013</small>
NOTARIAL CERTIFICATE <small>(Signature of Notary Public)</small>			
NOTARY PUBLIC <small>NOTARY PUBLIC, San Francisco, CA 94103</small>			09/15/2013 <small>09/15/2013</small>
NOTARIAL SEAL <small>(Notary Seal)</small>			
NOTARIAL CERTIFICATE <small>(Signature of Notary Public)</small>			
NOTARY PUBLIC <small>NOTARY PUBLIC, San Francisco, CA 94103</small>			09/15/2013 <small>09/15/2013</small>
NOTARIAL SEAL <small>(Notary Seal)</small>			

Invitation to Mediation

[illegible]

Yes to Mediation

[illegible]

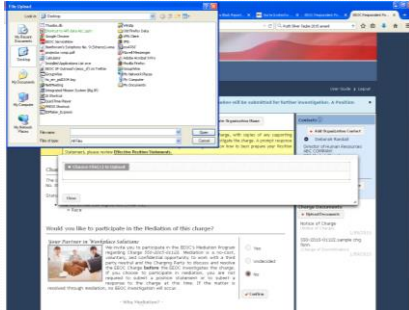
No to Mediation

[illegible]

Uploading Position Statement



Uploading Position Statement



Uploading Position Statement



Uploading Position Statement



Release Position Statements During Investigations

Overview:

- Nationwide procedure in all EEOC offices
- Upon request of the Charging Party
- Includes release of non-confidential attachments
- Effective 1/1/2016
- Notice to Respondent to segregate confidential info

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Purpose of New Procedure

- Providing the position statement to the Charging Party may advance the investigation
- Providing non-confidential attachments when likely to facilitate a more informed, pointed or thorough response from Charging Party

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Digital Request for Position Statement

- Automatically notifies Respondent of Request for Position Statement with digital Notice of Charge
- Sets due date at 30 days from date of notice
- Links to “Effective Position Statement” guide
- Instructs Respondent to upload Position Statement and attachments in the Respondent Portal

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Request for Position Statement



U.S. Equal Employment Opportunity Commission

FEDERAL INVESTIGATION REQUEST FOR POSITION STATEMENT AND SUPPORTING DOCUMENTARY EVIDENCE

EEOC hereby requests that your organization submit within 30 days a Position Statement setting forth all facts which pertain to the allegations in the charge of discrimination under investigation in the requests for information herein, as well as any other facts which you deem relevant to EEOC's consideration.

You are requested to review EEOC's resource guide on "Effective Position Statements" as you prepare your response to this request.

Fact-Based Position Statement
This is your opportunity to state any and all defenses, legal or factual, in response to each of the allegations in the charge. The position statement should set forth all of the facts relevant to respond to the allegations in the charge, as well as any other facts the Respondent deems pertinent to EEOC's consideration. The position statement should only refer to, but not identify information that the Respondent asserts is sensitive medical information, or confidential commercial or financial information.

EEOC also requests that you submit all documentary evidence you believe is responsive to the allegations of the charge. (See examples below.) If you submit only an affidavit statement, unsupported by documentary evidence, EEOC may conclude that Respondent has no evidence to support its defense to the allegations of the charge.

EEOC may release your position statement and non-confidential attachments to the Charging Party and her representative and allow them to respond to enable the EEOC to assess the credibility of the information provided by both parties. It is in the Respondent's interest to provide an effective position statement that focuses on the facts. EEOC will not release the Charging Party's response, if any, to the Respondent.

If no response is received to this request, EEOC may proceed directly to a determination on the merits of the charge based on the information at its disposal.

Signed by an Authorized Representative
The Position Statement should be signed by an officer or agent of Respondent authorized to speak officially on its behalf in this federal investigation. Unsigned statements of position, or those signed only by individuals, are not evidence. EEOC will duly consider arguments raised by Respondent, but will not consider them as evidence.

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Request for Position Statement

Designate Confidential Information into Separately Designated Attachments

If you rely on confidential medical or commercial information in the position statement, you should provide such information in separate attachments to the position statement labeled "Sensitive Medical Information," "Confidential Commercial or Financial Information," or "Trade Secret Information" as appropriate.

Provide an explanatory letter to the confidential nature of the information contained in the attachments. Material information about the Charging Party is not sensitive or confidential medical information in relation to EEOC's investigation.

Designate the following information into separate attachments and designate them as follows:

- Sensitive medical information (except for the Charging Party's medical only).
- Confidential commercial information.
- Trade secret information.
- Non-confidential documents describing information of witnesses, consultants or third parties, for example, state security records, date of hire or non-hire date, home address and personal phone numbers, etc.
- Any references to other charges filed against the Respondent or to other charging parties, unless the other charges are to the Charging Party.

Response for an Extension

• **Respond to the Request for Position Statement:** If you believe that the Respondent's response is subject to the 30-day deadline, you may request an extension of time to answer by filing a written request for extension, setting forth good cause for the extension and the amount of additional time requested. Extension of time request for extension of time must be filed with the charging party, which the EEOC will consider in its determination. Extension of time request must be filed with the charging party, which the EEOC will consider in its determination. Extension of time request must be filed with the charging party, which the EEOC will consider in its determination. Extension of time request must be filed with the charging party, which the EEOC will consider in its determination.

• **Should be Made as Early as Possible:** If Respondent believes it requires additional time to respond, it may, at its option, provide notice of a request of the due date, make a written request for extension, setting forth good cause for the extension and the amount of additional time requested. Extension of time request for extension of time must be filed with the charging party, which the EEOC will consider in its determination. Extension of time request must be filed with the charging party, which the EEOC will consider in its determination. Extension of time request must be filed with the charging party, which the EEOC will consider in its determination.

Upload the Position Statement and Attachments into the Respondent Portal

You can submit your position statement and attachments into the Respondent Portal using the "Upload Documents" button. Select the "Position Statement" document type and click the "New Upload" button to upload the Position Statement and attachments. EEOC will send the Position Statement to both parties, you will not be able to retract it at the Portal.

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Notice to Respondents

For requests for Position Statements as of 1/1/16, request advises Respondent:

- To prepare a fact-based statement
- Signed by an authorized representative
- To segregate confidential info into separately labeled attachments (e.g., "Confidential Financial Info")

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Notice to Respondents of Charging Party's Review of and Response to Position Statement

Request informs Respondent of EEOC's procedures:

- That Charging Party may review and respond
- That Charging Party's response will not be provided to Respondent
 - EEOC has determined that a review of the charge, Respondent's position statement, and Charging Party's rebuttal provides sufficient information to assess the credibility of the parties and their respective positions.

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Title VII Confidentiality and § 83 Do Not Apply to Release of Info to Charging Party During the Investigation

- Charging Party is not a member of the public per *EEOC v. Associated Dry Goods*, 449 U.S. 590 (1981) ("disclosure to the parties can speed the Commission's required investigation")
- § 83 applies when the investigation is closed – not during the investigation

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Confidential Information – What Respondent Should Segregate

- Sensitive medical information (except for the Charging Party's info)
- Social Security Numbers
- Confidential commercial or financial information
- Trade secrets information
- Non-relevant PII of witnesses, third parties, comparators, etc., (DOB in non-age cases, addresses, phone numbers, email addresses, etc.)
- References to other charges filed against the Respondent

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Contact Information & Resources

U.S. Equal Employment Opportunity Commission



Toll-free: 1-800-669-4000
TTY: 1-800-669-6820

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