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Best Practices for Religious Employers

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Overview



Ministerial Exception Applicable Statutory Provisions Considering the Law

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The Ministerial Exception

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Religion Clauses of the First Amendment

- **Establishment Clause**
 - “Congress shall make no law respecting an establishment of religion . . .”
- **Free Exercise Clause**
 - “. . . or prohibiting the free exercise thereof . . .”

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Religion Clauses of the First Amendment

- The ministerial exception is an application of the First Amendment and shields religious organizations from judicial review of internal employment disputes regarding selection, control and removal of employees designated as ministers.
- The Supreme Court has recognized that the ministerial exception creates a constitutionally protected interest in a religious organization's ministers under the **Establishment** and **Free Exercise** clauses.

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Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC (2012)

- Cheryl Perich taught kindergarten and fourth grade at Hosanna-Tabor Evangelical Lutheran Church and School in Redford, Michigan.
- She was initially hired as a lay teacher, but later became a "called teacher." She received a "diploma of vocation" designating her as a commissioned minister.
- In addition to math, language arts, social studies, science, gym, art, and music, Perich also taught a religion class four days a week, led the students in prayer and devotional exercises each day, attended a weekly school-wide chapel service, and led the chapel service herself twice a year.

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Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC (2012)

- Perich developed narcolepsy in 2004, five years after she was hired by Hosanna-Tabor.
- Following months of disability leave, Perich informed the school she was ready to return to teaching. The school informed her they had already hired a new lay teacher and they did not believe she was ready to return to the classroom.
- At a congregation meeting, the congregation voted to offer Perich a “peaceful release” from her call and pay a portion of her health insurance premiums in exchange for her resignation as a called teacher.
- Perich refused to resign and Hosanna-Tabor terminated her employment.

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Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC (2012)

- Perich filed a complaint with the EEOC alleging she was terminated in violation of the Americans with Disabilities Act.
- The EEOC filed suit against Hosanna-Tabor, claiming that Perich was terminated for threatening to file a lawsuit pursuant to the ADA.
- Hosanna-Tabor filed a motion for summary judgment, claiming the suit was barred by the ministerial exception. The district court agreed and granted the summary judgment motion.
- The Sixth Circuit reversed, claiming that the ministerial exception did not apply because Perich was not a minister.
- The Supreme Court granted certiorari.

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Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC (2012)

- “Since the passage of Title VII of the Civil Rights Act of 1964 . . . the Courts of Appeals have uniformly recognized the existence of a **ministerial exception** . . . that precludes application of such legislation to claims concerning the employment relationship between a religious institution and its ministers. **We agree that there is such a ministerial exception.** The members of a religious group put their faith in the hands of their ministers. Requiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision. . . . By imposing an unwanted minister, the state infringes the **Free Exercise Clause**, which protects a religious group’s right to shape its own faith and mission through its appointments. According the state the power to determine which individuals will minister to the faithful also violates the **Establishment Clause**, which prohibits government involvement in such ecclesiastical decisions.”

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Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC (2012)

- “[T]he ministerial exception is not limited to the head of a religious congregation. . . . We are reluctant, however, to adopt a rigid formula for deciding when an employee qualifies as a minister. It is enough for us to conclude, in this our first case involving the ministerial exception, that the exception covers Perich, given all the circumstances of her employment.”

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Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC (2012)

- The key circumstances of Perich’s employment that the Court considered:
 - Held out as minister
 - Religious training
 - Formal process of commissioning
 - Job duties reflected role in carrying out church’s mission

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Our Lady of Guadalupe School v. Morrissey-Berru (2020)

- Agnes Morrissey-Berru worked at Our Lady of Guadalupe School, a Catholic primary school, teaching fifth and sixth grade.
- Although she was a lay teacher, she taught all subjects, including religion.
- She attended religious education courses at the request of the school.
- She attended, but did not lead, faculty prayer services.
- The faculty agreement stated that the school’s mission was “to develop and promote a Catholic School Faith Community” and teachers were required to lead prayer and take students to Mass, communion, and confession.

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Our Lady of Guadalupe School v. Morrissey-Berru (2020)

- Morrissey-Berru was moved from a full-time to a part-time position in 2012 and the school failed to renew her contract in 2013.
- She filed an age discrimination claim under the Age Discrimination in Employment Act, claiming she was being terminated so the school could replace her with a younger teacher.
- The school's motion for summary judgment – based on the ministerial exception – was granted, but the Ninth Circuit reversed.
- The Ninth Circuit reasoned that “an employee’s duties alone are not dispositive under Hosanna-Tabor’s framework.” Unlike Perich, Morrissey-Berru did not have the formal title of “minister;” had limited formal religious training, and “did not hold herself out to the public as a religious leader or minister.”

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Our Lady of Guadalupe School v. Morrissey-Berru (2020)

- In a 7-2 decision (Sotomayor & Ginsburg dissenting), the Supreme Court expanded the application of the ministerial exception beyond ministers of the faith who occupy a leadership role in the religious organization, holding that it also applied to lay teachers who were entrusted to educate students in their faith.
- The Court held that the ministerial exception applied to Morrissey-Berru because she “played a vital role in carrying out the mission of the church.”

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Our Lady of Guadalupe School v. Morrissey-Berru (2020)

- The Court held that an analysis about the application of the ministerial exception is not limited to the four factors identified by the *Hosanna-Tabor* Court.
- The Court noted that clerical titles and religious training are not dispositive: “[w]hat matters, at bottom, is what an employee does.”
- Whether an employee is a practicing member of the faith is also not dispositive (Morrissey-Berru offered testimony that she was not a practicing Catholic).
- The Court declined to adopt a “rigid formula” and instead consider the case before it, as it expects lower courts to do.

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Demkovitch v. St. Andrew the Apostle Parish (2021)

- Sandor Demkovitch was hired in 2012 as the music director, choir director, and organist at St. Andrew the Apostle Parish in Illinois.
- Terminated in 2014 by his supervisor, Reverend Jacek Dada.
- Demkovitch filed suit against St. Andrew the Apostle Parish and the Archdiocese of Chicago alleging that his superior subjected him to a hostile work environment based on his sex, sexual orientation and marital status under Title VII and based on his disabilities under the American with Disabilities Act.

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Demkovitch v. St. Andrew the Apostle Parish (2021)

- Demkovitch is a gay man and claims he was subjected to derogatory comments and demeaning epithets concerning his sexual orientation. These comments increased prior to Demkovitch's marriage.
 - Following his marriage, Reverend Dada told Demkovitch his marriage was against the teachings of the Catholic Church, asked for his resignation, and ultimately terminated his employment.
- Demkovitch also suffered from diabetes, metabolic syndrome, and weight issues. He claims he was subjected to belittling and humiliating comments based on these conditions that had nothing to do with the terms of his employment.

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Demkovitch v. St. Andrew the Apostle Parish (2021)

- Demkovitch sued the church and the Archdiocese, alleging the church violated Title VII of the 1964 Civil Rights Act, the Americans with Disability Act, and analogous state laws.
 - The district court granted the church's motion to dismiss the claims based on the ministerial exception.
- Demkovitch filed an amended complaint repackaging his allegations as hostile work environment claims.
 - The district court granted the church's motion to dismiss the hostile work environment claims based on sex, sexual orientation, and marital status, but allowed the disability-based claims to proceed.

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Demkovitch v. St. Andrew the Apostle Parish (2021)

- A split panel of the Seventh Circuit ruled against the church, allowing all hostile work environmental claims to proceed.
 - The majority opinion stated that harassment is not part of the process of selecting and controlling employees, including ministers of the faith. Instead, such conduct is in the nature of a tort and not constitutionally protected.
- The church asked the full court to reconsider the panel's decision.

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Demkovitch v. St. Andrew the Apostle Parish (2021)

- The Seventh Circuit, sitting *en banc*, ruled that the ministerial exception precludes any inquiry into the reasons behind a religious organization's ministerial employment decision, regardless of the type of claims at issue.
- The court reasoned that disputes among ministers are constitutionally protected and claims related to the ministerial employment relationship are a religious matter, stating: "if the relationship between a church and its minister is its lifeblood, then the relationship between its ministers is its backbone."
- The court opined that any state regulation of the work environment impermissibly intrudes on the internal affairs of the religious organization and dismissed all employment claims, **including claims of hostile work environment based on disability** where the church provided no "religious justification" to defend the alleged conduct underlying that claim.

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Faith Bible Chapel International v. Tucker (2023)

- The Supreme Court will consider the case of Gregory Tucker this term.
- The Court is being asked to consider:
 - Whether the ministerial exception provides an “immunity from judicial interference” (such as merits discovery and trial) or is merely a defense against liability.
 - Whether application of the ministerial exception is a legal or factual question.
 - Whether denial of a motion to invoke the defense is appealable.
- Goes to a common issue: even if what you are doing is legal, it doesn’t mean you won’t get sued.

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Does the Ministerial Exception Apply?

- First, are you a religious organization?
 - Can include schools, hospitals, and retirement homes if its “mission is marked by clear or obvious religious characteristics.”
 - The exception did not apply to a hospital that removed from its certificate of incorporation provisions relating to its relationship with the United Methodist Church.

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Does the Ministerial Exception Apply?

- Second, is the employee at issue a minister?
 - *Hosanna-Tabor* factors: title, training, commissioning, job duties reflect role in carrying out church's mission.
 - What does the employee do?
 - Case law has covered music ministers, teachers, librarians (*Stabler v. Congregation Emanu-El*), and school principals (*Zaleuke v. Archdiocese of St. Louis*).

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Gordon College v. DeWeese-Boyd (2022)

- The Supreme Judicial Court of Massachusetts held that the ministerial exception did not apply to professor at a religious college that did not teach religion or religious texts, but who was still expected to “integrate her Christian faith into her teaching and scholarship.”
 - Professor of social work required to sign a “Christian Statement of Faith” and the faculty handbook included several references to religious issues.
 - Professor DeWeese-Boyd was denied a promotion to full professor. She claimed it was due to her opposition to the school's views regarding LGBTQ+ students.
 - Cross motions for summary judgment. Trial court ruled for DeWeese-Boyd. Massachusetts Supreme Judicial Court upheld, concluding she was not a minister.
- Supreme Court denied cert, meaning they would not hear the case, but four justices (Alito, Thomas, Kavanaugh, Barrett) penned a six-page statement suggesting that the Court “may be required to resolve this important question of religious liberty” in an appropriate future case.
 - Opined the state court reflected a “troubling and narrow view of religious education.”

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Does the Ministerial Exception Apply?

- Third, is the activity itself protected?
 - Includes hostile work environment claims and even sexual harassment (*Montgomery v. St. John's United Church of Christ [Ohio]*).

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What Impact Should the Ministerial Exception Have on Religious Employers?

- Much will depend on the ruling in the *Tucker* case currently before the Supreme Court.
- Consider pushback about the exception restricting civil rights of church employees.
- Even if the Supreme Court restricts litigation in ministerial exception cases, being on the receiving end of a lawsuit is still an expensive, time-consuming, and emotional process.
- A victory in court may not mean a victory in the eyes of the public (or your congregation).
- Just because something is legal does not mean that it is right.

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Applicable Statutory Provisions

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Statutory Considerations

<p>TITLE VII</p> <hr/> <p>Prohibits Gender, Race, National Origin, and Religious Discrimination, Harassment, Retaliation</p> <hr/> <p>+15 or More Employees</p>	<p>ADEA</p> <hr/> <p>Prohibits Age Discrimination, Harassment, Retaliation</p> <hr/> <p>+20 or More Employees</p>	<p>ADA</p> <hr/> <p>Prohibits Disability Discrimination, Harassment, Retaliation</p> <hr/> <p>+15 or More Employees</p>	<p>STATE LAWS</p> <hr/> <p>Varies by State</p> <hr/>
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Other Laws: Pregnancy Discrimination Act; Equal Pay Act; GINA; USERRA

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Title VII

- Makes it unlawful for an employer to “fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his [and her] compensation, terms, conditions, or privileges or employment” on the basis of gender, race, national origin, and religion.

EXCEPTION	“Religious Organization” “Religious Educational Institutions”
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Title VII

Religious Organizations:

Institutions whose “purpose and character are primarily religious.”

Day-to-day operations

Services the entity performs

Articles of incorporation

Affiliated with religion

Educational curriculum

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Religious organizations can prefer to employ individuals who share their same religion, including the employer's religious observances, practices, and beliefs.



This exception is not absolute. Religious organizations cannot discriminate against an employee on the basis of any other protected class.

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Example

Female employee taught at a small Catholic college, which requires all employees to agree to adhere to Catholic doctrine. Female employee signed a pro-choice advertisement in the local newspaper. The college terminated her employment because of her public support of a position in violation of the Church doctrine. Female employee sued the college for sex discrimination, alleging male professors were treated less harshly for *other* conduct that violated Church doctrine.

Curay-Cramer v. Ursulina Acad. Of Wilmington, Del., Inc.,
450 F.3d 130 (3d Cir. 2006)

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State Laws



UNITED STATES OF AMERICA

STATE SPECIFIC
SEEK ADVICE FROM AN ATTORNEY

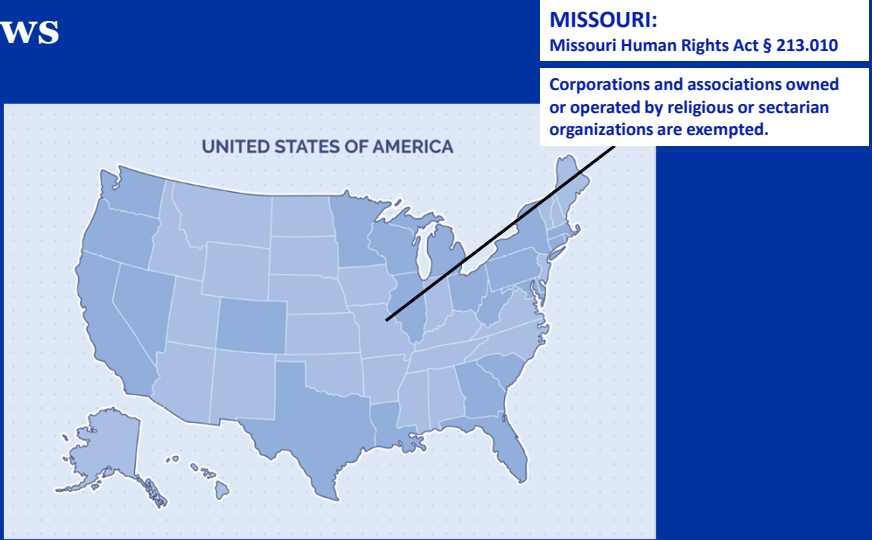
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State Laws



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MISSOURI:
Missouri Human Rights Act § 213.010
Corporations and associations owned or operated by religious or sectarian organizations are exempted.

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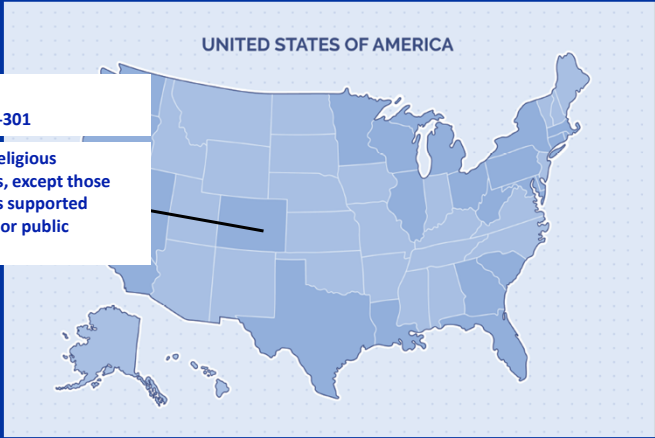
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State Laws

COLORADO:
 Colo. Rev. Stat. Ann. § 24-34-301

Employer does not include religious organizations or associations, except those organizations or associations supported entirely or partially by taxes or public burrowing.



UNITED STATES OF AMERICA

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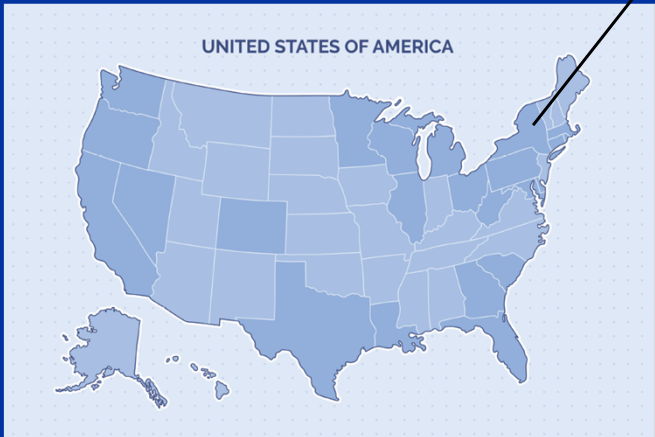
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State Laws

NEW YORK:
 New York State Human Rights Law § 290

Does not exempt religious organizations.



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State Laws

UNITED STATES OF AMERICA

CALIFORNIA:
Cal. Gov't Code § 12926

Does not exempt religious organizations.

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State Laws

UNITED STATES OF AMERICA

Wisconsin:
Wis. Stat. § 111.321

Does not exempt religious organizations.

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Best Practices Throughout the Lifecycle of an Employee

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Hiring Process

- Update Job Description
 - Hiring should be based upon objective, measurable, job-related criteria
 - Written job descriptions are encouraged
 - Consider:
 - Necessary Skills
 - Education
 - Experience
 - Certifications
 - Core functions of the Job

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Hiring Process

- Application Process
 - Have applicants complete an application, not just submit resume.
 - Include at-will language for at-will employees.
 - Provide an acknowledgement that information on application and resume is truthful.
 - Get a reference release.
 - Do not request medical information.
 - Be aware of ban-the-box requirements where applicable.

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Hiring Process

- Interviewing and Assessing Applicants
 - Assess applicants with objective measures: experience, training, education
 - Document the interview
 - Avoid questions based on age, sex, race, disability, marital status, or other protected characteristics, including inquires about applicant's family/relatives
 - Remember: Religious organizations can prefer candidates with the same religious views







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Hiring Process: Interview Questions

	Don't ask disability-related questions until after conditional job offer.		May ask about a job applicant's ability to perform specific job functions.
	Don't ask the applicant to state their age or date of birth.		May ask if the applicant is generally older than 18 years.
	Don't ask applicants if they have children or plan to have children.		May ask if applicant has any commitments or responsibilities that prevent him/her from regular and timely attendance.







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Hiring Process: Interview Questions

	Don't ask questions about whether the applicant is a citizen.		May ask applicant if he/she can submit proof of citizenship after hiring.
	Don't ask applicant for his/her military service records.		May ask if the applicant has served in the armed forces.
	Non-religious organization should not ask questions about religion.		But religious employers can ask questions about the applicant's religious beliefs.

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Hiring Process

- Notify candidates of decision
- Execute an offer letter
 - State parameters of employment relationship:
 - Position
 - Term
 - Compensation
 - Expectations
 - Duties
- Onboarding
 - Consider probationary period
 - Complete new hire paperwork
 - Provide handbooks/policies
 - Conduct training and orientation

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H-B — Complaints

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graph LR; A["Internal Complaint  
Demand Letter  
Administrative Charge  
Lawsuit / Demand for Arbitration"] --> B["DUTY TO INVESTIGATE"]
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Complaints

- Complaints do not need to be in writing.
 - “The employer is obligated to investigate the allegations regardless of whether it conforms to a particular format or is made in writing.” *EEOC Enforcement Guidance.*
- There are no magic words that a complainant has to use.

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Investigations into Complaints

- Initial response
- Refer complaint to proper internal party
 - i.e. Human Resource Manager
 - i.e. Manager
 - i.e. Executive Pastor
- Interviewing Complainant
 - Assure non-retaliation
 - Never promise confidentiality
- Gather relevant documentation and identify witnesses
- Interview fact witnesses

RECOMMENDATION:
The employee handbook should contain a duty-to-cooperate provision.

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Concluding the Investigation



Based on investigation, make a determination and close the loop.



If applicable, identify the rules that were broken and state the remedial measures to be taken.



Document, document, document.

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Termination Process

- Decision maker
- Getting property back
 - Keys, credit cards, tools, computers
 - Passwords for accounts
- Communicating termination
 - Have a witness
 - Reason for termination tied to company policy
- Document, document, document

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