

*Responding to Human Rights Bureau Charges: Insights from Captain Hindsight*

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### Hindsight or Learning Opportunity?

- The problem with Captain Hindsight is that he fails to accomplish anything with the problem at hand.




- In our version, hindsight provides helpful insights.

### Hindsight Is 20/20: A Top Five List


- While you may not always be able to prevent a bad situation or a charge being filed, there are almost always opportunities to either help or hurt yourself through your response.
- We see cases in which a probable cause finding might have been avoidable, but for an unfortunate action taken or argument made in the response to the charge.
- In hindsight, the employer could have avoided a probable cause determination or adverse Commission finding, if only:

### #5: If only... they had considered mediation

- Bureau considers every case an ADR opportunity
- May not always be offered, but always available
- Sometimes CP doesn't want much to settle
- Sometimes what CP wants is better than defending the claim, especially if you think it might get a PC



### #4: If only... they had (or had fully) responded to the investigation



- Initially, upon repeated attempts, following extensions, or following requests for additional information
- Provide the information requested
- Clarify with investigator as needed
- Follow up with promised exhibits

### #4: If only... they had (or had fully) responded to the investigation

- Provide information to support the response, even if not specifically requested
- If your position statement rests on claims of comparable treatment, performance issues, etc., provide evidence of it even if not asked for
- Investigator may not always know what to ask for in anticipation of your defense – be proactive
- Address all the issues presented in the charge, not just the one you think applies

### #3: If only... they had been more informed

- ... about the laws under which the charge was filed
- Spousal affiliation is not a protected status under the HRA?
- Charge was filed untimely because filed more than 180 days after the last date of harm?
- FPWA ≠ EPA : no 4<sup>th</sup> exception; 2 years to file; damages go back 6 years



### #3: If only... they had been more informed

- ... about the laws under which the charge was filed
- ADA arguments in an ADAAA world – “significantly/completely restricted,” “not a disability,” etc.
- Title VII arguments in an HRB world – sexual orientation not specifically covered, arguing a Title VII-esque argument concerning the applicability of gender stereotyping theory



### #2: If only ... they had not defended their action with a different unlawful/questionable action

- “We fired them based on our policy that complaining/stating intent to complain is insubordination”
- “We know they weren’t disabled because they said so when we asked on the job app”
- “We didn’t hire her because she was pregnant when she applied”



### #2: If only ... they had not defended their action with a different unlawful/questionable action

- “We solved the problem of her complaint by firing everyone involved: the alleged harasser, the person who complained about him, and the coworkers who witnessed it”
- “We didn’t give him an accommodation for his medical condition/religious practice because nobody gets any special treatment/everyone has to do that task”



### #1: If only... they had not retaliated against CP after charge filed

- Is it pretext? ...
- “We needed to do a reduction in force... of one position”
- “We suddenly decided to begin enforcing this rule and terminated CP for violating it”



### #1: If only... they had not retaliated against CP after charge filed

- Or is it not knowing what retaliation is?
- “We’re not taking action on the hostile work environment because of the pending external complaint”
- “We didn’t hire her for the new position she applied for because she has this ongoing complaint”
- “We let her husband go because of her complaint”



### In Summary...

Turning hindsight into insights lets you go from this:



To this!



### Contacting the Human Rights Bureau

**We can be contacted at:**

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