

What to Expect When You're Expecting...a Deposition

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What is a deposition?

- Sworn testimony of a witness taken before trial, out of court, without a judge present; carries same weight as if given at trial
- Can be used to try to get summary judgment and can be used to impeach you during trial
- Opportunity for the other side to assess your credibility and effectiveness as a witness



What rules apply?

- Federal or state rules of civil procedure
- Allows for almost unlimited questioning – does not have to be relevant
- Objections are limited. Can object to form but still have to answer. Don't have to answer questions that would reveal a privilege.
- Your ability to stop the depo to ask for help in answering a question is limited

Before your deposition:

- Devote sufficient time to prepare
- Look for documents responsive to discovery requests (including “unofficial” personnel files)
- Educate your attorney on your Company, your business, and the plaintiff
- Share your concerns with your attorney (e.g., examples of inconsistent treatment, things you may have screwed up, etc.)
- Don't try to prepare on your own (no privilege)



What to expect:

- Casual setting (conference room, etc.) at one of the attorneys' offices
- Court reporter will be making a transcript (sometimes video)
- Opposing counsel will be asking you questions
- Plaintiff will be there
- Your attorney will be there



What to expect: (continued)

- Be prepared for a long ride; get a good night's sleep and eat a good breakfast (think SAT's)
- Don't bring anything your attorney hasn't instructed you to bring
- You are in the driver's seat – ask for breaks when you need them, bring cigs and a snack



General Rules

- Tell the truth
 - Avoid getting in trouble for perjury
 - If you're being asked, the opposing counsel may already know the answer to the question
 - Makes it harder for the other employer witnesses if one witness lies



General Rules (continued)

- A depo is not a conversation and should not feel comfortable
- During a break do not remain in the room alone with plaintiff or his/her counsel; remain outside until your attorney returns
- Initial questions are usually innocuous (your educational background, work history, etc.). Do not get complacent.
- Opposing counsel, no matter how nice, is not your friend.



How to answer questions

- Listen carefully to **entire** question, pause, then respond
- Answer fully, but do not volunteer additional information that is not directly responsive
- Don't "talk through" an answer with opposing counsel
- Good answers: "Yes," "No," "I don't know," "I don't recall," and "I don't understand the question"



How to answer questions (continued)

- If asked to estimate, make clear that's what you are doing
- Keep your answers short
- Never volunteer the existence of a document
- Never speculate regarding the existence of a document (“I’m sure we must have written that down somewhere”)
- Get comfortable with silence



How to answer questions (continued)

- Don't argue with opposing counsel
- Don't try to show how smart you are
- Don't try to be funny – levity and sarcasm doesn't show up on a transcript
- Answer based on your **own** knowledge; don't speculate as to what others know
- Read any documents presented to you; ask for documents if you need to refer to them



Introductory Questions

- Your Social Security number
- Your criminal arrest record (if you aren't sure, ask your attorney)
- What drugs have you taken in the last 24 hours?
- What have you had to drink in the last 24 hours?



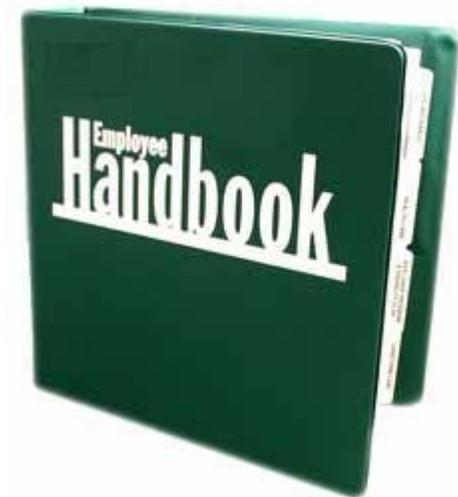
How did you prepare for your deposition?

- Fine for you to have met with an attorney
- Will be asked what documents you reviewed
- Will not be asked what you discussed with attorney
- Will be asked if you discussed with anyone else – remember, conversations with people other than your attorney are not privileged, so do not have them unless you want to discuss them



Things you must review:

- Employee handbook/policies
- EEOC/THRC charge and company's response
- Complaint and Answer
- Discovery responses (including all documents produced)
- Plaintiff's deposition transcript (look for things you disagree with) – even if you were there
- Personnel file of plaintiff – look at everything
- Company's other litigation/charges
- Training records
- Unemployment hearing transcript



Policies to review:

- EO policies
- Complaint-resolution policies and procedures
- Policies/written procedures re investigations
- Disciplinary policies
- Policies regarding promotion (if applicable)
- Termination policies



Training...what have you done?

- College courses
- SHRM training/certification training
- Reviewing articles and HR Magazine
- Attending seminars
- Attending BDBCB Breakfast Briefings



Training for your managers

- Send them to BDBCB breakfast briefings
- Provide training in employment law
- Keep track of training
- Informal training at Company management meetings



Progressive Discipline Policies

- Ask the attorney to define “progressive discipline policy”
- Know whether you have one
- If you don’t, be able to explain what your policy requires
- Listen for mentions of “progressive discipline” in your deposition – don’t agree that you have one unless you do



Know all applicable policies

- Policy that was violated
- Discipline policy
- Is there a policy that governs whether the employee is classified as eligible for rehire? Did you follow it?
- Did you follow these policies in other instances? If not, why not?



Identify the Decision Makers

- Make sure everyone on the team agrees
- Understand each person's role
- If you were there, were you really a decision maker? Or did you just offer advice? Or did you find out about it the next morning?
- If you weren't part of the process, why not? Is your lack of participation unusual?



Consistency of treatment

- Have you treated similarly-situated employees the same?
- Who is similarly-situated?
- If answer to first question is no, why not? What factors distinguish the situations?



Investigative process

- What is your policy regarding investigations?
- What is your usual practice?
- What was your practice in this case? Did it differ at all from what you usually do? If so, why?
- Be prepared to address investigative avenues you didn't follow up on; don't admit that your investigation was flawed/incomplete



How do you define harassment?

- Ask to see the policy – you don't need to have it memorized.
- If they ask for your best recollection as to what the policy says, remember that harassment is based on a protected status
- Most policies define harassment more broadly than just violating the law



Trick question: Do you follow the EEOC guidelines regarding X?

- Don't say yes unless you know what the guidelines are
- Ask which guidelines the attorney is referring to (there are many)
- Don't worry if you disagree with the EEOC guidelines in certain respects



Trick question: Is the plaintiff lying?

- Heck yes, the plaintiff is lying!
- Don't hesitate!



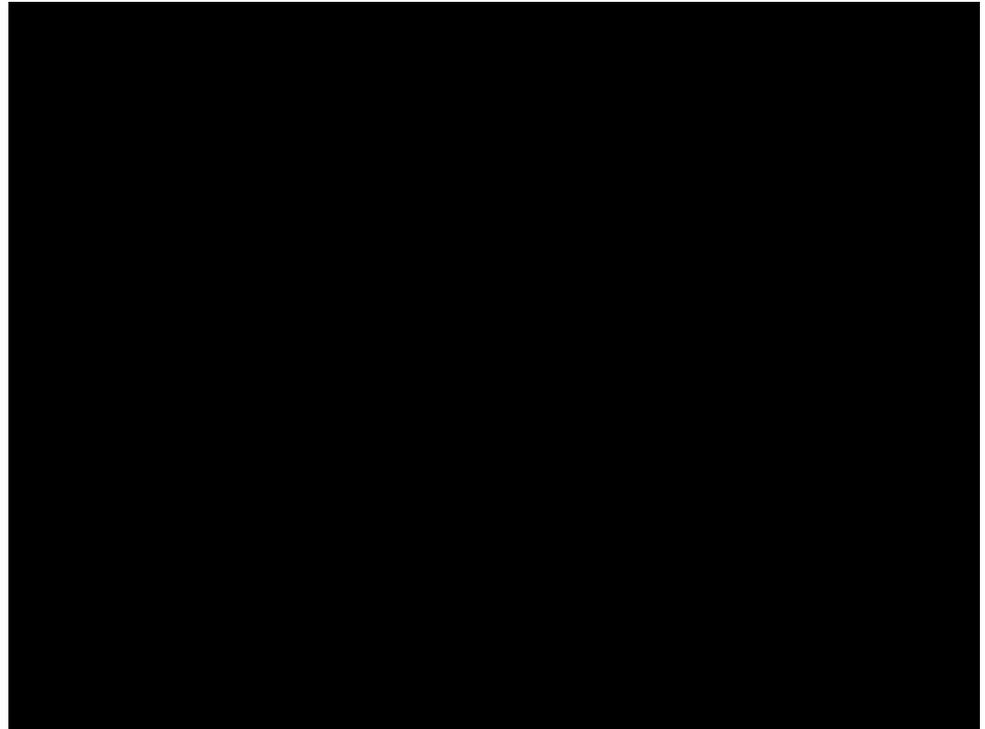
What if you forget to get info in?

- Don't worry – worry will cause you to lose focus
- Can get it in later with an affidavit
- Affidavit can't contradict prior testimony, though, so if you make a mistake, tell your attorney so you can correct your mistake



Special rules for video depositions

- Dress the part
- Pauses do matter here
- Mannerisms will be noticed
- Don't get angry



Questions, Comments, Discussion...

