



Episode 38: “All Your New York State Division of Human Rights Questions Answered, Part 2,” With Debbie Kent

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[Ari Kwiatowski]: Hi, everyone, this is a Barclay Damon live broadcast where we discuss all things L&E, labor and employment. I’m Ari. Let’s dig in.

[Ari]: Hey, guys, welcome to “All Your New York State Division of Human Rights Questions Answered,” a one-on-one conversation with the regional director. We are back this week with Debbie Kent, who is the New York State Division of Human Rights regional director for the Buffalo office. Debbie, welcome back.

[Debbie]: Hi. It’s good to be back.

[Ari]: Absolutely. Again, thanks so much for joining us. So, Debbie, last week we talked about, you know, the complaint, how the division is structured. You know, its screening process and how the charge or excuse me, how the complaint process kind of plays out pre-investigation. So I thought this week we would dive and dig right back in to the investigation process. Just for our listeners, the complaint is filed; the division begins to investigate the allegations in the complaint. So, Debbie, my first question is, who actually completes the investigation, or does the investigation from the division side?

[Debbie]: We have that’s the investigators or for their official title is human rights specialists have human rights 1s, where our main investigators we have human right specialists 2s, who are supervise the investigators, but they also do investigations. And sometimes I do investigations as well. So all investigative team.

[Ari]: Yes. And you’re wearing many hats it sounds like. So that is helpful to know, Debbie. And can you tell our listeners just generally what does the investigation entail? What does the investigation look like?

[Debbie]: So the first thing we do, I think I mentioned last time, we serve the complaint to the respondent, and they have an opportunity to respond in writing to the allegations. Once we get that, we send that out to the complainant and they get an opportunity to respond to that, which we call a rebuttal. So once those are in the file, that’s kind of the basic positions of the parties on the issues. So then the case is assigned to an investigator, the investigators going to review that information and determine the course of their investigation. And the investigation can take many different avenues and different tools depending on the issues and how the investigator believes they can best obtain information to get a clear picture of what’s happened, or to verify information that the parties have talked about in their statements.

[Ari]: So no...necessarily “one size fits all” rubric for every investigation, it sounds like.

[Debbie]: Now we have wide latitude under the law to conduct our investigations. And so we do have multiple different methods. Two-party conferences is one of those methods. And that's where we would have the parties come together, bring their witnesses, bring documents, and we would go over that, the allegations and their positions at that time and go through the evidence at that time with both parties present. That is a...that's like a real-time kind of situation where it's not hearings, but both parties are there. There's no cross-examination. The questions are only coming from the investigator that is conducting the conference. And the complainant, though, can respond right then their rebuttal, right then to anything they hear, whereas if we do maybe a one-party conference or a separate witness interviews or interrogatories, those types of things, or those reports are going to be sent to the complainant and they're going to be given that time to respond. So it's all the same information. It's just different ways of getting the information back and forth between the parties.

[Ari]: Absolutely. And I think we'll definitely, if you'll permit me, get into a little more detail on a couple of the things you just mentioned in a few minutes. One of the questions that we get a lot from employers is, whether in the course of the investigation, the division investigator can contact current and former employees to ask about the allegations in the complaint? So wondering if you can shed a little bit of light on that question because it does come up quite a bit for us.

[Debbie]: The division can interview anybody we want to interview, so whether that is, you know, if they have relevant information in the case, right. We can interview former employees. We would try to get their contact information. Sometimes the complainants have it, sometimes we need to get their last known contact information from the respondent, and sometimes we just have to do our own research to get that information. If it's a current employee, we would probably reach out to the respondents to make them available. But sometimes the complainant also has their contact information and depending on the level of where the employee is, we may just contact them directly so that...we're going to be looking at, you know, who is this person and what is their relationship to the company. And that's going to determine whether or not the company can be involved in the interviews or their attorney.

[Ari]: Right?

[Debbie]: Yeah.

[Ari]: No, sorry, Debbie. I mean to talk over you. You just anticipated my next question, which was, if an employer wants to be involved in that interview of a current employee, may the employer be involved? Or how does that work?

[Debbie]: Right. If an employee is of a high enough level of management where they are legally indistinguishable from the company, then the respondent or their representative would have a right to participate in that interview process. And if not, then, you know, we may elect to interview them separately. Also, there may be situations where the attorney is representing both the company and the individuals, obviously, if they are represented, then the representative could be in there. So we would have to just see, you know, who they are or what type of job they're doing and whether or not is appropriate for someone to be in there.

[Ari]: Makes sense.

[Debbie]: We usually do let them know that if they feel they're being retaliated against for participating in the process and they certainly have the right to file their own retaliation complaint.

[Ari]: Right. Understood. So kind of the flip side, Debbie, can an employer ask the division to interview individuals at the company or in the employer's, you know, under the employer's control that the employer believes may have relevant information to the allegations in the complaint?

[Debbie]: Sure, either parties can let us know about witnesses that they feel are relevant. And but the ultimate decision interviewing is going to be made by the investigator. So they may ask some information as to what information or what information or evidence or what did this person witness that they're going to be a relevant person to interview as part of this process? If they are relevant, then absolutely we would move forward with an interview. There are instances when someone wants to have a witness who stopped working there for years ago, didn't see anything that happened during the course of that period of time that we're looking at. But they just want to say, you know, this person is a great, great person or they were great when I worked with them...

[Ari]: Right.

[Debbie]: So it's not relevant really to the matter that we're looking at. So we're not going to spend time and resources, you know, interviewing people who are not really relevant. But sometimes respondents will send us statements, written statements from individuals who witness something. So that's why we can put those in in the case and then, you know, give it the appropriate weight. Sometimes we have to reach out to those individuals to try to verify that they made the statement or we may... there may be additional questions beyond what was in the writing.

[Ari]: Yes, great. Thanks for clearing that up, Debbie. So I know that you mentioned the tools that an investigator has. And a little bit about the two-party conference. Can you just explain a little bit for our listeners the differences between the two-party conference, the fact-finding conference, and just an interview maybe with an investigator? Because I think maybe it's just the lingo, but just the fact that there are different tools available. I think it can be a little confusing.

[Debbie]: I think the two-party conference and fact-finding conference are all...often used interchangeably, but I think any kind of meeting or interview could be fact finding. So it's you know, but I think that that is a term that people use to mean a two-party conference for a period of time. So I don't know if there's any difference between the two. So an individual interview or one-party conference, it's basically it's just the difference of who's there, who is at these conferences at the time, if it's a two-party conference, the complainants still going to get that information, it's just going to be immediate while they're there. If it's one-party conference, they're going to get that information in a report.

[Ari]: And the two-party conference, Debbie, would happen after the submission of the response or position statement on behalf of the respondent. Is that typically the case...

[Debbie]: Generally the case is not going to be assigned to a specific investigator until we receive a response and rebuttal. Is it really just makes sense to guide our investigation once we have a clear idea about the positions of the parties and if they're claiming certain information or a certain position, that's going to guide us as to, okay, so how can we verify this position and, you know, who might have information on that we might need to interview? What documents do we request. If they're mentioning surveillance video, is that something we can see? So it really helps to guide us in our investigation once we have that information. If you tried to do it beforehand, you know, we're not going to necessarily know everything to ask for and it's going to just duplicate things.

[Ari]: Right. So yeah. So that makes total sense. So I know we've discussed, Debbie, the what we call the position statement or the respondent's response to the allegations in the complaint. One thing I wanted to ask you about was a request for information, because we see a lot of these. So I was just wondering if you could tell our listeners what that is and really what its purpose is.

[Debbie]: The request for information purpose is...sometimes we don't need to interview people. So we just might need to documents and other evidence to verify the positions, as I said. So that is just a document that we're going to put all the information and evidence that we want to see. Sometimes we might have questions in there or provide comparative information and things like that. So we're going to list all those things in that request for information and send it out. Now we send request for information not just to respondents, sometimes we are sending that to the complainants as well because they may have information in evidence that we would like to see as well.

[Ari]: Understood. So, Debbie, the information that is provided by respondents or complainants, but actually let me back up. I'll just say respondents, is that information shared with the complaining party?

[Debbie]: Yes. Every... according to our process, everything that comes into the file is available for both parties to see actually. But the response and any additional information we do share with the complainant. And then we give them the time to review that. And provide any feedback on that all we need. Sometimes we need to follow up depending on what the information is and sometimes they don't give us any additional information. So there are different scenarios...

[Ari]: Understood. Definitely want to get into the information-sharing component you just mentioned, Debbie, before I do, I wanted to ask you, do you have any tips for respondents responding to requests for information?

[Debbie]: Well, first of all, I would just say make sure that you're responding in a narrative form to each allegation and the complaint. Sometimes we get back responses and they may not answer a particular allegation. And I think even if they feel there's nothing there, that that needs to be mentioned as well. It's just so we don't think, okay, well, why are they avoiding responding to this particular allegation? But it also we have to follow up. So that's important. And to respond to requests in a timely manner, that's important as well.

[Ari]: So Debbie, sounds to me like—and I don't want to put words in your mouth—but what you're saying is provide a meaningful and complete response to the allegations in the complaint, meaning if there is some fact out there, no matter how crazy the employer or respondent thinks that the allegation may be, address it and don't just leave it hanging out there.

[Debbie]: Yeah, absolutely.

[Ari]: Okay. Oh, go ahead. Sorry.

[Debbie]: Okay. I was going to say...what we have initially is the complaint, that's what the complainant is saying. The response, is the respondent's opportunity to get their position out there, to say what happened? And if they don't, then all we have is what the complainant saying. And I don't think that the respondents want that, and I just want to add if the respondents can provide documentation or any evidence to support the positions that they're making in their response. That's really helpful as well. I mean, we can always request it later, but it can be really helpful to have it up front. And there are times with some law firms or attorneys will send that information. And sometimes there's not anything to ask for, or very little to ask for because we've done most of what we would ask for.

[Ari]: Makes sense. So basically provide the complete response and don't be afraid to submit documents to the division that would support the arguments or the information contained in the response, because it might even obviate the need for a request for information which saves both the division and the employer some time. I guess.

[Debbie]: Exactly, exactly.

[Ari]: Great. So you mentioned a few minutes ago the rebuttal, so I kind of wanted to spend some time talking about this. So for our listeners, we know that, Debbie, the complaint is submitted. The respondent submits its response or position statement to the complaint and there is opportunity for what we call in the business as rebuttal. Can you just explain, Debbie, for our listeners what that means and whether the employer then has the ability to respond to the rebuttal.

[Debbie]: Well the rebuttal is hopefully designed so that the complainant could read the information, and if they disagree with something or they have some type of information or evidence to show that the information is not correct or something of that nature, then this is their opportunity to put that in writing to us. So they may direct us to other types of evidence, witnesses or other information that could support that, their position on that as well.

[Ari]: That's great information, Debbie. And with respect to the rebuttal, which is really the complaining party's ability to respond to what the respondent has said in its position statement, does the employer or respondent then get a copy or can the respondent request a copy of that rebuttal? How does that work?

[Debbie]: Yeah, the respondent can certainly request a copy of the rebuttal or any other information in the file, and we would be happy to provide that. And if they want to provide a response to the rebuttal, they can. We don't require that. But certainly if one case is still open, that will go into the file and be considered. Obviously, we can't go back and forth forever because if we get another response from them about the rebuttal, we have to send that to the complainant so you can see where this could go on and on and on. But certainly any submissions by either party that come in, even if not requested, will go into the file and be considered during that...our final determination process.

[Ari]: Got it. And you kind of anticipated, I think, my next question, Debbie, which is, you know, we've talked about this investigatory process in kind of what that entails in terms of the complaint and responding and interviews, how long typically, emphasis on typically, does an investigation take that?

[Debbie]: So I think there's a goal of 180 days, but, you know, that is not always realistic and it doesn't always happen. But we certainly try to...that is the goal that we're trying to achieve. And, you know, just like any other business, we have been impacted by the pandemic as well. And, you know, staffing and hiring freezes and various things. So we are working diligently to get back to, you know, getting where we're meeting that that goal.

[Ari]: I think we all are. So, Debbie, this has been a great conversation about the investigation piece of it. Before I kind of turn to what the possible outcomes are, I just wanted to get your thoughts on, you know, the best piece of advice that you have for respondents going through this investigation process. What do you think is the most important thing for them to know or keep in mind as we're cooperating with the division to investigate the allegations?

[Debbie]: Well, I think the most important thing to know is that we are neutral. So we're not representing the complainants. And really, we want to enforce New York state human rights law. But we don't want to enforce it inappropriately. So we are just trying to get the best information that we can, a clear picture of what happened so that we can make the best decision going forward on that.

[Ari]: Yeah, I think that's such good advice, Debbie, because, you know, I think the reality is if you've been named in a complaint as a business or an employer, you know, there's...it's definitely an element of shock, I think, and it's definitely a source of anxiety. But I think it's so important you pointed that out, because the division really exists just simply to investigate what the allegations are. And I think the best thing that employers and we can do is just help facilitate that investigation in the most cooperative way possible to make it efficient for everyone. Right. That's the goal, at least.

[Debbie]: Nobody likes getting the complaints, you know. So I just tell people, I know you're not happy about it. But we have to go through the process. So if you're providing information, we'll get through this process. And there has been no discrimination. And that's what the findings will show. Right?

[Ari]: Right. Okay, Debbie, so I think let's leave the investigation behind. I did just want to talk briefly about the possible outcomes of the investigation. So as you know, Debbie, for our next segment, a Division of Human Rights attorney, Catherine Ostrowski Martin will be joining us and she'll kind of take us through the next phase of what happens with the complaint before the division. But if you could kind of brief that for us and just tell us, generally, what are the possible outcomes once an investigation is complete?

[Debbie]: Right. So once the investigation is complete? I ultimately have to make a determination as to whether or not there's enough evidence to go forward to a public hearing. So there's either going to be a "no probable cause" finding or "probable cause" finding. If there is not enough evidence to support the violation of human rights law, then it's going to receive a no probable cause finding. And then we're going to close the case at this point. Although the complainant does file their appeal in State Supreme Court, they can also request to reopen it the division as well. So they have 60 days to file their appeals in State Supreme Court, and if the court finds that there was something that was missed or something more that should be looked into, then the case may be reopened and then we would complete that component. If there is enough evidence to go forward, the case will receive the probable cause finding and that it will be scheduled for a public hearing at that point. And the respondent does have rights to request a reopening as well. At that point...think it's section 465.20B, in general we call it the 20B reopening, but part of the law gives them the right to request a review of that determination of probable cause. And if you know, but that's us reviewing it and then if we determine that there is something, again, that needs to be looked at and that wasn't considered or whatever situation that happened, you know, those could be reopened as well. If not, if it's not reopened, then the case goes forward to a public hearing or it's heard in front of the administrative law judge, we have our own process here, which is different from the EOC, where their cases could end up in federal court.

[Ari]: Right. And can you—just because our listeners, Debbie, if they're kind of following our...along our segment related to discrimination in the workplace—can you just elaborate just a little bit on the difference? Because as you mentioned, you know, with the EEOC, the EEOC has the ability to kind of sue a risk to a respondent directly in federal court if conciliation fails. Is there any kind of counterpart to that under the New York state human rights law or the private litigants or the complaining parties' ability to pursue further legal action once you have closed your investigation?

[Debbie]: The complainants can take their case into state court. So once they've exhausted their administrative remedy, so to speak, they can decide not to go through the hearing process and they can take the case into state court. And/or federal court if that applies as well. So they would need to request that. And then we could annul the case and give it an annulment and allow them to take it into court.

[Ari]: So that's great information, Debbie, and thank you so much. You've really taken our listeners through the complaint process, the investigation process, and then the possible determinations. And before I let you go, sadly for the segment, I wanted to ask you one final question, which is: what do you think an employer can or should do to make an investigation go smoothly or just to make it easier for the division?

[Debbie]: Yeah, I think we've already mentioned pretty much the things that they can do with this patient. You know, send in the responses and try to answer things fully, cooperate with your investigator and that will help resolve the...we get smoothly through the process.

[Ari]: Yes. Wise words, Debbie, although we thank you so much again for joining us. I know this has been so informative. It's been helped informative for me. I know our listeners so appreciate the information. I know how busy you are. So thank you again so much for joining.

[Debbie]: Thank you.

[Ari]: To our listeners next week, as I mentioned, we will have New York State Division of Human Rights attorney Catherine Ostrowski Martin on and she will pick up where we left off and talk about the possible determination and really what happens next. So you definitely don't want to miss it. Tune in. Thanks again, Debbie. I appreciate it.

[Ari]: The Labor & Employment Podcast is available on barclaydamon.com, YouTube, LinkedIn, Apple Podcasts, Spotify, and Google Podcasts. Like, follow, share, and continue to listen. Thanks.

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