

## Closing Argument > column



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### Creating a winning recipe

I am a huge fan of “Cupcake Wars,” which airs Thursday nights on the Food Network. During each episode, four bakers battle in three elimination rounds for \$10,000 and the chance to showcase their cupcakes at a major event. How does this show offer best practices to attorneys counseling employers facing discrimination charges through the fact-finding conference at the Illinois Department of Human Rights? Attorneys may not face the same time pressures and our work product may not be as sweet, but there are some similarities.

#### Round One: Taste Challenge

In Round One, the bakers try to create a great-tasting cupcake in 45 minutes using two or three oddball ingredients, such as turkey, oysters or mutton. In our Round One, we face an employment discrimination charge filed by a disgruntled employee. We shift through unusual facts to uncover the legitimate business reason for our client’s employment decision. Complainants contend the adverse actions were based on their membership in a protected class — race, age, gender identity, etc. Clients assure us their decisions were based on performance or business necessities — anything but the employees’ status. We compile the facts — witness statements, disciplinary reports — in support of the legitimate business reasons — to make that cupcake.

#### Round Two: Taste and Presentation

In Round Two, the remaining bakers face off to create three cupcakes in just 75 minutes. Our Round Two challenge is to prepare and submit a sound, verified response to the charge, a persuasive position paper and complete answers to the questionnaire.

Like the bakers, we have time constraints; we must complete and “plate” our documents within 60 days, although there can be some flexibility for the position paper and the an-

swers. One important procedural step: Send the verified response to the claimant — but not the position paper or the answers — and use a notice of filing and a certificate of service. You should reserve argument for the position paper, but add some flavor to the affirmative defenses — mention the legitimate business reason for the action taken.

Some attorneys blend the questionnaire answers into the position paper. That can be a good idea, giving the investigator a start toward a favorable investigative report. The questionnaire is a “bear of a document” designed by the department to elicit facts and comparables. It is customized to the charge — race, age, disability — and seeks evidence from the year before the adverse action involving the claimant. Deeply involve your client in answering the questionnaire since it educates them on comparables — other employees in similar positions in similar circumstances — and helps them to uncover consistency hiccups. Were all employees in the same position treated the same? Did the disciplining supervisor act similarly for all employees? Investing your client in the process both saves them money and educates them.

If you are working under a tight time constraint — your client sat on the charge and the verified response is due tomorrow — you might wait to submit the position paper and the answers. Once assigned to a charge, the investigator will contact you to schedule the fact-finding conference and then will ask you for the missing documents. It is better practice, however, to prepare them together — the issues are fresher and you’ll have more facts to prepare a stronger verified response.

#### Round Three: 1,000 Cupcake Display

Round Three pits the two remaining competitors in the challenge of baking 1,000 cup-

cakes and creating a display in just two hours. They get a team of baking assistants and a master carpenter. From hastily drawn stick figures, the carpentry wizards create amazing displays. Winning bakers never forget the branding. The judges must know that this display is for this contest and could not be found at any other event.

Our Round Three challenge is the fact-finding conference run exclusively by the investigator at the department. We’d all like a team of assistants, but often it is just you and the client working to deliver the best presentation possible. Never forget that each presentation is unique. Never use a canned position paper or presentation; you must impress the investigator — the judge — with the specific and unique facts in this situation. Make sure your witnesses are well-versed in the verified response, the documents supporting their decision and the comparable employees. On a limited basis, you can chime in at the conference to “focus” the answers but, in my experience, your input is not appreciated by the investigator. Your work must be done in advance of the conference, making sure your witnesses are at ease with the facts and comfortable with the setting. They must sit quietly through the claimant’s presentation and not respond with sighs, groans or exclamations. As in “Cupcake Wars,” presentation is critical. Finally, your clients must be prepared for the possibility of a settlement discussion. If it goes well, you may settle or limit the requests for further information from the investigator.

Defending your client well through the fact-finding conference is sweet. “Winning” with a “no substantial evidence” finding comes only after significant preparation and, of course, good facts-ingredients. ■

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