



# Someone's Knocking At The Door, Somebody's Ringing The Bell

How to Respond to An  
Employee's Filing of a Charge  
With the EEOC

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# EEOC Overview

- 5-member bipartisan committee
- 3 Commissioners, Chair and Vice Chair
- Presidential Appointees
- President also appoints General Counsel
  - Oversees and directs litigation program
- 53 Field Offices
- Washington, D.C. HQ

# EEOC Overview

- Statutes enforced by EEOC:
  - Title VII of Civil Rights Act of 1964
  - ADEA
  - Equal Pay Act
  - ADA & Rehabilitation Act of 1973
  - GINA
  - Pregnancy Discrimination Act

# EEOC Overview

- Enforcement Procedure
  - Charge may be filed at EEOC office or with representative
  - Charge Intake
  - Priority Charge Handling Procedures: A, B, C charges
  - “Charge” interpreted liberally: letter or correspondence may be sufficient

# EEOC Overview

- Deferral/State FEP agency
- Title VII or ADA charge must be filed first with state agency
- Worksharing agreements
- 180/300 days

# EEOC Overview

- Investigations
  - Position statement
  - Request for information/documents
  - Site visit
  - Interview witnesses
  - Factfinding conference
  - Scope

# EEOC Overview

- Determination: Probable cause or dismissal
- Negotiated Settlement, pre-determination
  - Mediation prior to charge-investigation
  - Ongoing opportunities?
  - EEOC as party
  - System discrimination charges rarely settled until late in process

# EEOC Overview

- Determinations
  - Letter of determination
  - Letter of violation
  - “No probable cause” = “without particularized findings”
  - Notice of right to sue

# EEOC Overview

- Conciliation
- Required of EEOC after finding of probable cause
- Proposed conciliation agreement; follow-up
- Often limited negotiation
- If successful, end of process
- If unsuccessful, notice of RTS or EEOC litigation

# EEOC Overview

- Notices of Right To Sue
- If charge-handling complete and EEOC not pursuing litigation
- May also be obtained by charging party upon request
- Civil action must be filed within 90 days of receipt of notice of right to sue

# EEOC Overview

- Systemic Investigations
  - Commissioner charge
    - Must be in writing, under oath, and state the facts constituting alleged discrimination
  - Without a charge, under ADEA or EPA
  - Generally result from commissioner's inquiry or based upon leads and tips gained in field unit investigations

# EEOC Overview

- Subpoenas: EEOC has broad investigative & subpoena authority
- Courts deferential to EEOC in enforcing its subpoenas
  - Assertions that subpoenas too indefinite or issued in bad faith generally fail
- Generally, if relevant & material, Courts say OK

# How To Respond to EEOC Charge

- Don't ignore
- Check to see if charge timely filed (180/300 days).
- Plan internal investigation
- Prevent retaliation
- Assess propriety mediation
- Prepare & file position statement

# Internal Investigation

- Critical to effective defense of charge
- Time of essence
- Start with HR or mgmt personnel with knowledge of facts
- But investigate from external/detached perspective

# Internal Investigation

- Review documents
  - Personnel files; discipline and performance history; attendance records
    - For charging party, decisionmakers, and comparables
  - Policies and procedures
  - Complaints by charging party or others about allegedly discriminatory decision-makers

# Internal Investigation

- Interviews:
  - All decisionmakers (including HR and management)
    - Including those who contributed information contributing to adverse action decisions
  - Witnesses who observed relevant incidents
  - Authors of documents
  - Conduct in person whenever possible

# Internal Investigation

- Interview preparation
  - Be familiar with allegations and topics to be discussed with witness
  - Employer's explanations, treatment of similarly situated employees should be discussed
  - Explain context to those being interviewed & assure will not be retaliated against

# Internal Investigation

- Identification of relevant documents and witnesses: to be comprehensive, should inquire of those interviewed whether missing anything/anyone.
- Demonstrative exhibits? Charts/graphs
- Skepticism: look for contradictions in employer explanation and between witnesses; search for reasonable explanation

# Internal Investigation

- Skepticism: Every issue you sort out ahead of time is one that will not slow down the investigation or undermine your credibility.
- If you cannot find reasonable explanations, consider whether contradictions reveal weakness in your position that could contribute to exposure later; take action now.

# So What About Mediation?

- Usually opportunity is offered before investigation begins
- Should you consider it?
  - Can be cost-effective
  - Confidential with no admission of wrongdoing
  - Opportunity to learn about charge/charging party
  - Opportunity to engage charging party

# So What About Mediation?

- Case-specific factors
  - EEOC “hot topics”
  - Timing considerations vis-à-vis allegations
  - Difficulty of defense considerations
  - Opportunity to minimize back-pay exposure (another timing consideration)?

# Drafting The Position Statement

- Opportunity to tell your side of story
  - Don't limit to responding to charge or requests
- Deny liability and summarize position
- Explain your business, and the charging party's job
  - Foundation for explanations of business necessity

# Drafting The Position Statement

- Explain EEO Policies & Complaint Procedures
  - Charging Party failure to report/complain and/or exhaust internal procedures often important defense to charge.
  - If complaints were made, explain what you did and what you found.

# Drafting The Position Statement

- Explain Charging Party's Employment History
  - Chronologically if at all possible
  - Job and pay history; job descriptions; disciplinary and performance record.
  - Same Actor Inference?
  - Foundation for distinguishing those alleged to be similarly situated and identifying those who are.

# Drafting The Position Statement

- Detailed explanation of facts and circumstances surrounding challenged/ adverse actions.
- Address those alleged to be similarly situated but better treated.
- Identify others who are similarly situated and who were similarly treated.

# Drafting The Position Statement

- Other defenses to liability
  - Timeliness
    - Especially vis-à-vis charges of retaliation
  - Constructive Discharge issues: how bad was it, really?
  - Reinstatement offers
  - After-acquired evidence (*if* employer not aware prior to challenged adverse action).

# Drafting The Position Statement

- Include documents
  - Consider what EEOC needs (all of it), rather than simply what it asks for
- Fact-check
- Avoid jargon unless explained and defined
- Mind your manners to be the good guy

# Drafting The Position Statement

- Highlight “good facts”
- But *do not* ignore inconvenient or negative ones
  - Acknowledge and explain why irrelevant or immaterial
  - Avoid “discovery” by EEOC with preemptive disclosure
- Remember position statement is discoverable
  - Charging Party access
  - Subsequent litigation

**Questions?**

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