

**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**

by

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This presentation contains general guidelines to assist employers in investigating, evaluating, and responding to charges of discrimination from either the EEOC or a state fair employment practices (“FEP”) agency. While the procedures may vary slightly depending on whether you are before the federal agency — the EEOC — or one of the state or local FEP agencies such as the Ohio Civil Rights Commission (OCRC), the investigation process recommended to enable you to respond to a charge, including the process of evaluating the merits of the charge and its potential for mediation or settlement, will be the same no matter what agency you are before. In addition, the principles of preparing an effective position statement will be the same no matter what administrative agency is responsible for investigating and processing the charge.

I. OVERVIEW OF THE EEOC’S STRUCTURE, AUTHORITY, AND INTERNAL PROCEDURES

A. Commission Structure

- (1) The Equal Employment Opportunity Commission (“EEOC”) is a bipartisan committee composed of five members including three Commissioners, the Chair and Vice Chair who are presidential appointees.
- (2) The Chair is responsible for the administration and implementation of policy for and the financial management and organizational development of the Commission.

- (3) The Vice Chair and the three Commissioners participate equally in the development and approval of Commission policies, issue charges of discrimination where appropriate, and authorize the filing of suits.
- (4) The President also appoints a General Counsel whose job is to provide direction, coordination and support to the EEOC's litigation program.
- (5) There are 53 field offices throughout the U.S. although the EEOC is headquartered in Washington, D.C.

B. Statutes Enforced by the EEOC

- (1) Title VII of the Civil Rights Act of 1964 ("Title VII")
- (2) Age Discrimination in Employment Act ("ADEA")
- (3) Equal Pay Act of 1964 ("EPA")
- (4) Americans with Disabilities Act ("ADA") and the Rehabilitation Act of 1973
- (5) GINA (Genetic Information Non-Discrimination Act of 2008)
- (6) Pregnancy Discrimination Act

C. EEOC Enforcement Procedure

- (1) A discrimination charge may be filed at any EEOC office or with any EEOC representative. 29 C.F.R. §§ 1601.8, 1625.5. If the respondent (generally the employer) does not have a facility in the

district where the charge is filed, the charge is forwarded to the district including the location where the charging party worked or where the facility involved with the claimed discrimination is located.

(2) Charge Intake and Investigation

- a. The agency's intake process is intended to screen out invalid discrimination charges early if possible and to obtain the facts which the charging party believes support his or her discrimination claim. The intake facts generally are reflected on a multi-page intake questionnaire form, completed by the charging party.
- b. In 1995, the EEOC adopted Priority Charge Handling Procedures under which field offices use three categories to classify new charges into one of three categories, based on the likely merit of a charge:
 - (i) The first category, so-called "A" charges, includes charges falling within the national or local enforcement plan, those in which it appears discrimination more likely than not occurred, and those where the risk of irreparable harm necessitates expedited processing.
 - (ii) The second category, "B" charges, includes those that initially appear to have some merit, but that will require

- (iii) The third category, “C” charges, includes those charges where there is enough information to conclude it is not likely that further information will result in a cause finding.
- (3) In February 1996, the EEOC adopted its National Enforcement Plan, identifying three major categories of priorities: 1) cases that by their nature could have a potential significant impact broader than the parties to the dispute; 2) cases with potential to promote development of law supporting the purposes of the statutes enforced by the EEOC; and 3) cases involving the integrity or effectiveness of the EEOC’s enforcement process.
- (4) To constitute a charge, correspondence or a letter may be sufficient, even if not on an EEOC charge form, so long as it is written and contains the needed information, such as the name of the respondent, the relevant facts and the signature of the charging party.
 - a. EEOC regulations provide that amendments to perfect or add to a charge relate back to the date the charge was first received. 29 C.F.R. § 1601.12(b).
 - b. The Supreme Court in *Edelman v. Lynchburg College*, 535 U.S. 106 (2002), upheld EEOC’s interpretation that 29 C.F.R.

§ 1601.12(b) permits a charge to be verified after expiration of the applicable limitations period.

D. Deferral

- (1) Where there is a state or local fair employment practices agency, Section 706 of Title VII (incorporated by reference into the ADA) requires that a charge of discrimination be filed first with the state or local agency. 42 U.S.C. § 2000e-5.
- (2) Sections 7(d) and 14(b) of the ADEA require that a charge of age discrimination be filed with the state agency as a pre-condition to suit, but not as a prerequisite to filing with the EEOC. 29 U.S.C. §§ 626(d), 633(b); see *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 753 (1979) (Section 14(b) of ADEA requires complainant to file with available state agency before commencing ADEA action in federal court).
- (3) State and local agencies with the requisite jurisdiction and authority are designated by EEOC regulations as “FEP agencies” or “deferral agencies.” 29 C.F.R. §§ 1601.70 & 1601.71 (Title VII and ADA); *id.* § 1626.9 & .10 (ADEA). The EEOC defers Title VII and ADA charges it initially receives to such agencies for an initial 60-day period, unless the agency earlier terminates its proceedings, or waives its right to process a charge on an exclusive basis during the 60-day period. 29 C.F.R. § 1601.13(a)(3). Such waivers are contained in “worksharing agreements” between the deferral agencies and EEOC, as authorized under the statutes enforced by EEOC.

- (4) EEOC regulations provide that if a charge arises in a jurisdiction with a deferral agency, but in a substantive law area over which the agency has waived its processing rights, the charge is considered filed upon initial receipt by the EEOC and is timely so long as received within 300 days. 29 C.F.R. § 1601.13(a)(4)(ii)(A).
- (5) Where the deferral agency has not waived its rights to exclusive processing of a Title VII or an ADA charge, the EEOC will send the charge to the agency by registered mail, unless the two agencies have agreed to another method in the worksharing agreement. See 29 C.F.R. § 1601.13(a)(4)(i)(B). Proceedings before the deferral agency begin on the date the charge is mailed or hand-delivered by the EEOC. *Id.* § 1601.13(a)(4)(ii)(B). The charging party then is advised of the deferral, and the Title VII or ADA charge is deemed automatically “filed” with the EEOC upon expiration of 60 days. *Id.* § 1601.13(a)(4)(ii)(B).

E. Investigations

- (1) Charges are assigned to an investigator in a field office when the respondent is served with notice of the charge. The respondent generally is asked to submit a position statement with supporting documentation within a specific time frame. The EEOC sometimes sends a written request for information with the charge.
- (2) The EEOC sometimes, but infrequently, uses a fact finding conference as an investigative tool. A fact finding conference is a fact-to-face

meeting, intended to define issues, determine what is disputed and undisputed, determine what other evidence may be necessary and sometimes help achieve a settlement.

- (3) The purpose of the investigation of a charge is to give the EEOC the basis to determine whether there is reasonable cause to believe the charge is true. The EEOC is not strictly limited to the scope of the charge in conducting its investigation. It may choose not to investigate certain allegations in a charge or it may expand the investigation to include similar or related issues.
- (4) When enough evidence has been obtained to make a determination, the EEOC investigator will sometimes meet with the party to whom the determination is adverse – if it is a for cause or “probable cause” determination, with the respondent; if the determination is to dismiss the charge, with the charging party. In “probable cause” cases this occurs after the file is reviewed by the district office director and legal unit. Typically, the investigator summarizes the evidence and invites submission of additional evidence that could change the result.

F. Negotiated Settlement before Determination

(1) Mediation

- a. The EEOC offers mediation shortly after charge-filing to charging parties whose cases have potential merit based on initial information but are not priority cases. If it is a priority use, or if

multiple charges have been filed in a particular facility, mediation will not be offered.

- b. If the employee accepts, the EEOC seeks agreement from the employer so that mediation may occur with a neutral mediator.
- c. Statements made in the mediation are confidential and cannot be used in any EEOC investigation or litigation if mediation fails.
- d. If mediation fails, normal charge processing resumes.

(2) The opportunity to settle a charge of discrimination exists, at least theoretically, throughout the investigative process.

(3) The EEOC will be a party to a settlement agreement unless it includes an unlawful provision, purports to validate practices the EEOC has not investigated including a waiver of the charging party's prospective rights.

(4) Settlements of the Commission's systemic charges typically are not until near the end of the investigation, at which time the EEOC generally seeks specific and substantial forms of relief.

G. EEOC Determinations

(1) The authority to issue a "letter of determination" is delegated to the EEOC's field directors, except in cases designated for priority review. 29 C.F.R. §§ 1601.19(a) & 1601.21(d) (Title VII and ADA). Under the ADEA and EPA, directors are authorized to issue "a letter of violation." *Id.* §§ 1626.15(b)(e) (ADEA) & 1620.30(a), (b)

(EPA). In actual practice, age and equal pay cases are resolved in “determinations.” 1 EEOC Compl. Man. (BNA) § 4.5(a) at 4:0005.

a. What once were called “no probable cause” determinations now are dismissals “without particularized findings.” 1 EEOC Compl. Man. (BNA) § 22.15 at 22:0012; *id.* § 27 at 27:0001-02.

b. In such a case, the dismissal typically is issued by the district director upon recommendation by the enforcement unit. The determination is the charging party's notice of right to sue under Title VII and the ADA, and is accompanied by an information sheet on filing in federal court.

H. Conciliation

(1) The EEOC may seek conciliation at any time during the administrative process. The agency has an obligation to conciliate after a finding of probable cause, which obligates it to respond in good faith to an employer's settlement efforts. See 42 U.S.C. § 2000e-5(f)(1). See, e.g., *EEOC v. Asplundh Tree Expert Co.* (11th Cir. 2003), 340 F.3d 1256; *EEOC v. Agro Distribution LLC* (5th Cir. 2009), 555 F.3d 462; but see *EEOC v. Supervalu Inc.* (N. D. Illinois, Dec. 15, 2009), 674 F. Supp.2d 1007.

(2) Where the EEOC finds reasonable cause to believe that unlawful discrimination occurred, it must try to remedy and eliminate the

unlawful practice through conciliation. See 42 U.S.C. § 2000e-5(b) and 29 C.F.R. § 1601.254 (Title VII and ADA); 29 U.S.C. § 626(b), (d) and 29 C.F.R. § 1626.15(b), (c) (ADEA). Under the EPA, the EEOC has the option of attempting settlement after a letter of violation and before EEOC suit. See EEOC Compl. Man. (BNA) § 15.3(c) at 15:0001; § 60.3(c) at 60:0001-2.

- (3) After investigation, the EEOC investigator often will send a proposed conciliation agreement to the respondent and then follow up to see if a settlement can be reached.
- (4) If a conciliation agreement is reached, the EEOC ceases administrative processing except for necessary follow up on the conciliation agreement. In Title VII and ADA cases, if conciliation fails, EEOC regulations require the agency to send notice of that failure to the respondent. 29 C.F.R. § 1601.25. In ADEA cases, EEOC must provide a copy of notice of conciliation failure to respondent's attorney. EEOC Comp. Man. (BNA) § 66.2(b) at 66:0001. The file is then forwarded to the regional attorney for a recommendation to headquarters either for or against EEOC litigation. If the EEOC does not decide to litigate, the parties are sent a notice and the charging party is issued a right-to-sue letter for any Title VII or ADA claims.

I. Notices of Right to Sue

- (1) When the EEOC concludes its administrative charge-handling process with respect to a charge on which it will not bring suit, the charging party is issued a notice of the right to bring a civil action.
- (2) The Charging Party may also obtain a right-to-sue letter upon request.
- (3) A civil action must be filed within 90 days of receive of the statutory notice of right to sue. 29 U.S.C. § 626(e) (ADEA); 42 U.S.C. § 2000e-5(f)(1). (Title VII)

J. Systemic Investigations

- (1) The EEOC's systemic program primarily handles development and resolution of commissioner charges under Title VII. See 42 U.S.C. § 2000e-5(b). Under the ADEA and the EPA, the EEOC may conduct a “directed investigation” of a particular respondent even without a charge from the public or itself. 29 C.F.R. §§ 1620.30 & 1626.15.
- (2) A commissioner charge must be in writing and under oath and state the facts constituting the alleged discrimination. 42 U.S.C. § 2000e-5(b); 29 C.F.R. § 1601.12(a)(3).
- (3) Systemic charges typically are generated either by a commissioner's inquiry or by the EEOC's field units from leads or facts obtained in the course of investigating individual charges.
- (4) Most systemic investigations occur through district offices, which are responsible for selecting and recommending for investigation a

manageable number of systemic targets. 1 EEOC Compl. Man. (BNA) §§ 8.2 & 8.3 at 8:0001-05.

K. EEOC Investigation and Subpoena Authority

- (1) The EEOC has broad investigative and subpoena power authority in its investigative role.

See Title VII and the ADA, Sections 709(a) and 710 of Title VII set forth that authority. 42 U.S.C. §§ 2000e-8(a), 9 (Title VII, ADA).

- (2) A prerequisite to enforcement of a subpoena issued by the EEOC in a Title VII case is existence of a charge meeting the requirements of Section 706(b) of Title VII. *EEOC v. Shell Oil Co.*, 466 U.S. 54, 65 & n. 15 (1984). But as a practical matter, courts enforce most EEOC subpoenas even if they do not satisfy all of the factors in *Shell Oil*. There is no comparable “valid charge” requirement in ADEA subpoena-enforcement actions.

- a. Courts generally have enforced subpoenas over claims that they are too indefinite to provide the basis for investigation or that the EEOC has acted in bad faith. Nor must a district court find that the charge is verifiable or factually or legally well-founded.

- b. Also, where a charge at least facially appears timely, courts will enforce the subpoena and leave the timeliness issue for later disposition.

- (3) If an EEOC subpoena is properly issued in a Title VII case, a court will normally enforce it as long as the requested information is relevant and material. In an ADEA or EPA investigation, the subpoena normally will be enforced if the information sought is within the scope of the statute and is being sought for legitimate purpose (arguably, a slightly narrower test).

II. WHAT TO DO WHEN SERVED WITH A CHARGE

A. Preliminary Response

The following are the steps that should be taken immediately upon receipt of a charge of discrimination from an FEP agency:

- (1) *Do not ignore the charge.* Notify the affected managers immediately upon receipt of the discrimination charge and ask them to assemble and preserve all documents relating to the Charging Party, including e-mails and other electronic forms of documentation.
- (2) *Prepare a notice of appearance and request an extension on the position statement, if necessary.* If the charge requests that a position statement be prepared and/or a Notice of Appearance, prepare them immediately and file them with the appropriate person. In addition, if you believe you will need more time to file a position statement in cases in which one is requested, promptly request an extension—do not wait until the day before the position statement is due to request more time. While different FEP agencies have different procedures for requesting an extension, in general, it is preferable to speak to the person who has transmitted the

charge or who has been identified as the investigator rather than to make a written request. Then you should confirm the agreement regarding the extension in writing. Remember, when communicating with the agency investigator, that he or she is *not* the person who is charging the Employer/Respondent with discrimination—he or she is just doing their job in investigating charges made by someone else. Accordingly, communicating courteously with the investigator and appearing cooperative in providing responsive materials can only help the Employer/Respondent. For one thing, it will make it easier to obtain procedural favors such as extensions of time. And, for another, a positive initial experience with you as an Employer representative will translate into a more open-minded investigation and willingness to fairly view the Employer's evidence in most cases.

- (3) *Check to see whether the charge was timely filed.* If the charge is untimely, you may be able to obtain its dismissal on those grounds alone. For most state FEP agencies, the limitations period for filing a charge of discrimination is 180 days. The EEOC, likewise, has a limitations period of 180 days from the date of the discriminatory act, *but* additional time will be given to the Charging Party to file a charge with EEOC if the state has an FEP “deferral” agency. In general, this means that the Charging Party will have 300 days to file a charge after he or she has notice of the alleged discrimination. As a practical matter, if the charge has been filed close to 180 days after the alleged discriminatory act, you should check with legal

counsel to determine what the limitations period is for this agency/this action/this state. In this respect it is important to verify dates given by Charging Parties. They are frequently wrong. And the Employer can frequently prove this with written documents or e-mails that show when the Charging Party had notice of the allegedly unlawful act.¹

- (4) *Plan your internal investigation.* Schedule times to meet with the persons having knowledge of the allegedly unlawful actions to obtain the real facts as quickly as possible. Begin the procedure for assembling relevant documents and e-mails immediately.
- (5) *If the Charging Party is still employed by the Employer, take steps to insure no potentially retaliatory action is taken.* Notify the managers who have responsibility for the Charging Party that no adverse employment action should be taken against the Charging Party without it being first cleared with you. If the Charging Party has engaged in misconduct that would require that he or she immediately be removed from the work area, advise the managers to suspend the person pending investigation rather than discharging him or her.
- (6) *If you are given the option of mediating the charge, assess whether it is in the Employer's interest to pursue settlement or mediation.* The factors to

¹ The time for filing the charge runs from the time that the Charging Party had knowledge of the alleged discrimination. Sometimes, the Charging Party will attempt to avoid imposition of time limits that would result in the dismissal of his or her charge by claiming that he or she had no knowledge of the discriminatory action until a later date. In cases involving alleged discriminatory promotions, for example, the Charging Party may claim that he or she was unaware that a person outside the protected group had received the promotion until a much later date than the actual date of promotion. Accordingly, obtaining documents showing that notice was given, for example, a

consider in determining whether to agree to mediation will be set forth in a separate section.

- (7) *If you have chosen not to mediate, or if mediation is unsuccessful, prepare and file a position statement by the due date.*² If you need more time, make your request as early as possible. More detailed suggestions on how to prepare an effective position statement are contained in a later section of these guidelines.

B. Conducting an Internal Investigation

A prompt and thorough investigation is essential to an effective defense of an EEOC charge. Except in cases where you know immediately that you will settle or are likely to settle, you should begin your investigation immediately. Line up witnesses while their memories are fresh, review documents before they can be destroyed pursuant to any Employer (or individual's) retention policy, and begin the process of gathering the information you will need. A prompt and thorough investigation will enable you to:

- (a) evaluate the case and determine its amenability to mediation;
 - (b) determine whether there is any liability on the Employer's part which might suggest the advisability of making an unconditional offer of reinstatement;
- and

general e-mail to all employees congratulating the person who was promoted will result in a quickly-dismissed charge.

² Generally, if the parties agree to mediate, the processing of the charge will be placed on hold so that no Position statement will be due unless or until mediation proves to be unsuccessful.

- (c) insure that you are armed with the tools needed to prepare a comprehensive and persuasive position statement.

In beginning your internal investigation, the obvious place to start is by obtaining information from any Human Resources personnel who have previously dealt with the Charging Party or who advised management concerning the adverse action(s) of which the Charging Party complains. But it is important that you do not stop there. Instead, you should conduct your own *independent* investigation; in fact, you may wish to review the file prior to talking to the person who investigated initially. You should attempt to view this case as much as possible as if you were an outsider. This is the best way to insure that you will be able to objectively evaluate the case in terms of potential liability and it will enable you to prepare a position statement that is persuasive to an outside third party.

The following are suggested guidelines in conducting the internal investigation.

- (1) *Review documents.* Obtain and review all relevant documents as part of your investigation. In general, records you may wish to review include:
 - (a) the personnel file for the Charging Party, including any unofficial files kept by a manager or supervisor;
 - (b) personnel files of supervisors, decision-makers, and similarly-situated employees;
 - (c) relevant personnel policies and procedures, including signed acknowledgements and receipts of the Charging Party;

- (d) written discipline relating to the Charging Party;
- (e) any complaints made by the Charging Party or other complaints naming the same decision makers as discriminators in prior claims;
- (f) any complaints or records relating to the Charging Party or to others with a significant role in the allegations, such as an alleged harasser;
- (g) medical files, if applicable;
- (h) any statistical analyses that might be relevant;
- (i) if relevant, sales or performance records of the Charging Party;
- (j) if relevant, schedules, attendance, leave-related documents; and
- (k) payroll/compensation documents.

(2) *Interview the following witnesses:*

- (a) all decision-makers, including management and HR personnel;
- (b) managerial and supervisory employees who provided information that led to the adverse action;
- (c) anyone who directly observed a relevant incident; and
- (d) the authors of any relevant documents that are not self-explanatory or self-authenticating.

(3) *Conduct witness interviews in person whenever possible.* It is sometimes difficult to conduct in-person interviews of all persons with relevant information. Nevertheless, it is also true that you learn more in face-to-

face interviews than you do over the telephone or by e-mail. Accordingly, to the extent it is possible to conduct in-person interviews, particularly of the key decision makers, we strongly recommend that you do so.

- (4) *Prepare for the interviews ahead of time.* To the extent you already are aware of relevant documents that you would want to discuss with the interviewee, have the documents with you. Know what the Charging Party's allegations are. Prepare a list of topics you wish to explore with each witness in advance so that you do not miss something. These may relate to the Charging Party's allegations, the Employer's explanations for challenged actions, how others similarly situated were treated, etc. Have an opening statement prepared, particularly for non-managerial witnesses, which explains what's going on. Many of the employees whom you interview in an investigation will be nervous and apprehensive about how their answers or participation in the process might affect them. We therefore recommend that you provide a brief explanation at the start of the interview regarding what is going on and what is expected of the person interviewed. While the explanation obviously will vary depending on the nature of the charge and the reason you are interviewing a particular person, in general, the opening remarks should touch upon the following:

- (a) a brief explanation of the nature of the matter you are investigating;

- (b) why the witness has been included in the investigation (e.g., that they have been identified as someone who might have knowledge relevant to the Charging Party's claims);
 - (c) assuring that the information provided by the interviewee will be kept as confidential as possible, but will be utilized as necessary to respond to the charge; and
 - (d) assuring that the Employer will not permit retaliation against any participant in the investigation as a result of their honest and good faith cooperation in the investigation.
- (5) *Identify other relevant documents and witnesses.* Be sure to ask each person whom you interview whether they are aware of any documents that support the Employer's position or if there are other witnesses who can provide relevant information. Find corroborating evidence to support Employer witnesses' statements as much as possible.
- (6) *Consider the possibility of creating demonstrative exhibits.* If you can create charts or graphs or other exhibits that help explain the case or which refute specific claims made by the Charging Party, you should do so. If, for example, the Charging Party was discharged for low production and claims to have had production figures comparable to other employees, in addition to providing the underlying records, you could prepare a graph that directly compares the Charging Party's and other employees' productivity on a monthly basis over a six month or a year

period of time. Likewise, pictures or videotapes of an employee's work area may be relevant to a disability discrimination claim.

- (7) *Look for discrepancies and ask for explanations.* Review all information given to you by witnesses or contained in documents with a skeptical eye. Is there anything that is in a document that appears to contradict the Employer's story? Does one witness to an event contradict another witness even if it's not on what appears to be an important point? Frequently, you will find that if you check discrepancies you will obtain a reasonable explanation that resolves the discrepancy. It is better to provide that explanation to the FEP investigator in your initial position statement rather than having him or her decide a discrepancy exists. The investigator might not bother to ask you later for an explanation (or remember to follow up), but could instead decide that he or she does not believe the Employer's position due to the discrepancy. On other occasions, you may find that your witness really does not have a good explanation and is not credible. It is better to know that now so you can take appropriate corrective action, including settling the charge quickly rather than seeing a potential increase in the Employer's exposure.

C. Factors to Consider in Deciding Whether to Participate in Mediation

The EEOC offers the possibility of mediation as a matter of course at the time it notifies the employer that a charge of discrimination has been filed in all but a handful of

cases.³ If both parties agree to mediation, then the EEOC will schedule a mediation before either a mediator employed by the EEOC or with a private attorney who has volunteered to serve as a mediator. In either event, however, the person who would serve as a mediator is not the same person who will investigate the case.

MEDIATION: GENERAL CONSIDERATIONS

The following are some general factors that mitigate in favor of mediating in virtually any case. The next section sets forth more case-specific factors to weigh in determining whether to mediate a particular charge.

Factors favoring mediation, in general:

- (1) *This could be the most cost-effective way to resolve a claim.* Once the parties have agreed to mediate, the Employer is not required to respond to the EEOC's request for documents or provide a position statement. Accordingly, the time and expense associated with drafting a position statement may not need to be expended. This could be a significant savings of managerial time and expense, as the EEOC and a number of FEP agencies generally request the opportunity to perform an on-site investigation to review documents and to interview potential witnesses. This can be very disruptive to the operation and can take time away from the employee's real job of running the business.
- (2) *A mediation is confidential.* Everything that is said during the mediation is considered to be confidential, as is any settlement that ensues.

³ The EEOC does not offer mediation in cases where it thinks discrimination is likely to have occurred. Further, it may not offer mediation when multiple employees in a single employment location have filed charges, or if believes that there is potentially a class of employees that have been discriminated against.

- (3) *A mediation is not an admission of wrong-doing.* All EEOC settlement agreements contain non-admissions clauses. In addition, the EEOC generally allows the employer to require a supplemental general release as a condition of settlement. Accordingly, a settlement of the EEOC charge could also be used to insure that the Charging Party does not bring other types of claims that are not mentioned in the EEOC charge or which do not fall within the jurisdiction of the EEOC. In this respect it is important to note that the EEOC's settlement agreement will refer only to the charge that the EEOC is investigating. Therefore, if you are going to settle, it is important to have a lawyer prepare a general release to accompany the EEOC settlement.
- (4) *You learn things in mediation that you might not otherwise learn.* While statements made and positions taken during mediation are confidential to the extent that you cannot quote what a Charging Party says in mediation at a later point, you frequently come into possession of information concerning the Charging Party's position that you might otherwise not learn. For example, you may learn that all the Charging Party is looking for is an apology. Or he or she may not understand what happened and why. For example, if the Charging Party was passed over for a promotion, he might not understand what experience the "winner" had that he doesn't and what makes the other person more qualified. Thus, mediation gives you an opportunity to apologize or explain. You may settle the charge for a nominal sum or sometimes for nothing more than a written apology. In

addition, you will frequently learn “facts” that the Charging Party believes supports his or her position that you can anticipate in your position statement should mediation prove unsuccessful.

MEDIATION: CASE-SPECIFIC CONSIDERATIONS

The following is a list of case-specific factors that you should evaluate in determining whether a particular case is a good candidate for mediation:

- (1) *Does the case involve “hot topics” for the EEOC?* There are certain types of cases that the EEOC considers to be top priorities, either because they have received numerous charges concerning this type of alleged discriminatory activity or because the EEOC has recently issued guidelines concerning the alleged discriminatory actions. For example, the EEOC recently issued revised guidelines on “caregiver” responsibilities and discrimination. The EEOC is looking for cases to apply these new guidelines and to determine whether caregiver discrimination has occurred.

- (2) *Are there vulnerabilities in the Employer’s defense to the charge?* In your preliminary investigation of the charge, have you learned facts that suggest that the Employer’s defense may be difficult to prove, either because it involves a he said/she said situation or because important Employer witnesses are no longer with the Employer or because important Employer witnesses have been found themselves to have engaged in this conduct or to have engaged in discrimination towards other employees?

- (3) *Are there problems with the timing of the adverse action alleged to be discriminatory?* Did the Employer, for example, fire the Charging Party immediately after the Charging Party had filed a previous charge of discrimination? Even if you can explain this, it will always raise red flags for an investigator unless there is particularly egregious misconduct on the Charging Party's part.
- (4) *How much of the Employer's defense is documented through contemporaneous memoranda or corporate records that are kept in the ordinary course of business?* Does the Employer have documents that help prove its side of the story or will it be required to rely on the testimony of witnesses? If the latter, mediation may be the best option as it is difficult to obtain a favorable credibility resolution at this level, especially if both sides of the story are plausible.
- (5) *Is this particular Charging Party likely to accept a cost-effective settlement?* Review Employer payroll records to determine whether the Charging Party has suffered economic losses because of the alleged discriminatory actions and quantify the extent of the economic loss. In general, the less economic harm that the Charging Party has suffered at the time of mediation, the more likely it is that a cost-effective settlement can be reached.

D. Drafting an Effective Position Statement

The position statement gives you the chance to tell the Employer's side of the story in response to the EEOC charge. It should not simply constitute a response to the

charges made by the Charging Party. Instead it should tell a complete story explaining exactly why the Employer did what it did. Like any good story, the Employer's position statement should be clear, concise, and complete. It should have a beginning, middle, and end. It should be written so that someone who does not know your business and who does not know the players will understand exactly what happened and why it happened.

THE CONSTRUCTION OF THE POSITION STATEMENT

In general, the following elements should be contained in your position statement, and in generally the following order, so as to tell your story in the most persuasive manner possible:

- (1) *Start your position statement with an explicit denial of the Charging Party's claim and a brief summary of the Employer's position.* Example: "This position statement responds to the charge of discrimination filed by H. Houdini against the Employer in which Mr. Houdini alleges he was discharged because of his race (black). Respondent denies the charge—it has not discriminated against Mr. Houdini because of his race or because of any other protected status. Rather, as is more fully described later in this position statement, Mr. Houdini was discharged on June 19, 2008 because he violated the Employer's written no show/no report policy. Specifically, Mr. Houdini left work early on June 15 after an argument with his supervisor over a change in assignment, then failed to either report to work or call off for the next three days."

(2) *Explain the nature of the Employer's business and the Charging Party's job.* The FEP investigator usually knows very little or nothing about the nature of your business. While the name of an Employer's company may suggest what the Employer does, the day-to-day operations of the business and how it is run will not be something that the FEP investigator knows. In addition, the FEP investigator will not know what the Charging Party's day-to-day duties consist of and how they relate to the Employer's overall operations. Before receiving your position statement, the FEP investigator will only "know" what the Charging Party has told her. And frequently, the Charging Party does not understand the nature of the Employer's business or how his or her duties should be performed (which is why he or she may no longer have a job). Accordingly, the position statement is your opportunity to explain *what* Respondent's business is and *how* it does what it does. This will help provide the necessary background for your later explanation of why the employment decision made regarding the Charging Party was for a legitimate business reason. In the case of Harry Houdini, for example, if there are only one or two other employees scheduled to work at the same time as Mr. Houdini, his failure to show up to work is going to have an immediate and severe impact. Similarly, if an employee will have access to valuable merchandise on a daily basis, and you recently learn that she lied on the job application about a criminal history for theft, the EEOC will be able to understand why you fired that person for lying on her application.

- (3) *Explain the Employer's EEO policies and complaint procedures.* It is important for the FEP agency to understand that the Employer takes equal employment opportunity seriously and has policies in place prohibiting discrimination and harassment. It is also important to explain to the agency that the Employer has policies in place that provide a complaint procedure so that employees have a mechanism in place for reporting any discrimination and harassment and allowing the Employer the opportunity to take appropriate corrective action. Explain to the FEP agency what the Employer does to make employees aware of its EEO policies and internal grievance or dispute resolution procedures. If the Charging Party failed to utilize the Employer's grievance procedures, it is important to point out that this did not happen, along with all the available reporting mechanisms that were not taken advantage of by the Charging Party. This information is very important, particularly for Charging Parties who claim that they were subject to harassment or discrimination prior to discharge, because a Charging Party's failure to complain and to exhaust internal Employer procedures for reporting and investigating claims of discrimination and harassment is often a key factor in avoid liability for the Employer. If the Charging Party *did* register a complaint of discrimination or harassment, you should indicate that this occurred and what the Employer's investigation disclosed, along with what corrective action, if any, the Employer took. If the Employer took corrective action (or determined that no corrective action was necessary) you should explain why.

- (4) *Explain the Charging Party's employment history with the Employer.* In general, it is best to explain this background in chronological order so it is easier for the FEP investigator to follow: Explain when and for what position the Charging Party was hired. Include an explanation of the responsibilities of each position held. Attach copies of job descriptions, if relevant. If, for example, the Charging Party was disciplined for failing to perform a specific assignment, it is frequently helpful to point out that the assignment at issue is part of the job description and something expected of all employees in the same position. Include facts relating to the Charging Party's hiring or a prior promotion which are relevant to the defense. For example, there is a defense known as the "same actor inference" which essentially provides that if the same person hired and fired the Charging Party within a relatively short period of time,⁴ and the Charging Party fell within the protected group on both occasions, then there is an inference that no discrimination occurred. Therefore, when describing the Charging Party's hiring, if the same person who hired him is the one who fired him later, it would be important to make this point early in this section; i.e., "Joe Smith was the person who hired Harry Houdini and fired him only three months later. Since Mr. Smith was aware that Mr. Houdini was black at the time he interviewed and hired him, clearly it was Mr. Houdini's violation of the Employer's no show/no report policy, rather

⁴ This inference has been applied in cases where there has been up to three years between the hiring (or promotion) and the allegedly unlawful discharge.

than Mr. Houdini's race, that motivated Mr. Smith's decision to fire Mr. Houdini only three months after hiring him."

- (5) *Explain in detail the facts and circumstances which gave rise to the non-discriminatory employment decision.* What led the Employer to take the adverse action? Who made the decision? Why? What was this person's relationship to the Charging Party before?
- (6) *Include a section that affirmatively shows non-discrimination.* Provide the FEP agency with any affirmative evidence you might have to show a non-discriminatory motive. For example, are there other employees outside the protected group who have been discharged for similar misconduct? Name those people and provide documentation of their non-protected status and their discharge. Similarly, in a pregnancy discrimination case, have there been female employees who worked for the same supervisor or manager who have gone on maternity leave, delivered their babies, and successfully returned to work? Name them and provide supporting documents. In an age case, what are the demographics of the Employer's work force? Even if the Charging Party is within the protected group, are there other employees of the same age or older working for the same manager in a same job classification without difficulty?
- (7) *Explain why any comparable employees identified by the Charging Party are not similarly situated to the Charging Party.* Frequently, the Charging Party will include allegations in the charge suggesting that persons outside the protected group engaged in the same misconduct and were treated

more favorably. If the Charging Party has identified persons outside the protected group who have allegedly been treated better, be sure to include a section that explains why these people are *not* similarly situated if that is the case. For example, if the Charging Party violated a rule three times, but an alleged comparable only violated the rule once and never engaged in the misconduct again, point this out. If another comparable employee worked for the Employer for 25 years and had a stellar record before beginning to miss a lot of work, whereas the Charging Party worked for only six months and had excessive absenteeism, point this out. If the Charging Party worked on a job where safety was jeopardized as a result of his misconduct, while the consequences resulting from an alleged comparable's engagement in similar misconduct were minor, point this out.

- (8) *Consider other possible defenses to liability.* While the position statement should be able to factually explain why a charge is without merit, the position statement should also include an analysis of any legal defenses to liability. While it is not always necessary to cite cases in this section, it is frequently helpful to cite to the EEOC guidelines. Consultation with a lawyer may also be necessary in cases where you believe that you may have legal defenses that are not necessarily routine or common and therefore more instruction is necessary for the FEP agency. Matters to consider include:

- (a) *Timeliness.* Sometimes the charge shows its lack of timeliness on its face. On other occasions, the employee may be attempting to claim that he or she did not discover the adverse action earlier in order to avoid dismissal on a timeliness basis. Consultation with a lawyer to help prove knowledge and to cite relevant cases may be important in this history.
- (b) *Constructive Discharge.* Is the Charging Party claiming that he or she was made so miserable that he or she had no choice but to quit? If so, the position statement must explain why the Charging Party's employment circumstances were not so bad that a reasonable person would have felt compelled to quit under the same circumstances.
- (c) *Offers of Reinstatement.* If the Charging Party was provided with an unconditional offer of reinstatement, or the Employer has evidence that the Charging Party received another job offer, then back pay exposure (if any) will likely be terminated. In addition, of course, if the Charging Party was unconditionally offered reinstatement and rejected it, then the FEP agency will not pursue reinstatement as a remedy.
- (d) *After-acquired evidence.* If, after the Charging Party was discharged, you learn of additional misconduct or rule violations committed by the Charging Party while employed,

but of which you were not previously aware, then this evidence should also be included in the position statement. If you can show that had you known of the Charging Party's additional misconduct prior to firing him or her you would have discharged the Charging Party for those reasons alone, then, once again, the Charging Party's back pay, if any, would be terminated. For example, if, after you discharge the Charging Party, you learn that he or she had previously lied on a job application and you have a consistent policy of discharging for falsification of the application, then this evidence should be brought to the attention of the FEP agency. Likewise, if after you discharge the Charging Party you learn that he has been stealing from the Employer, this evidence should be brought to the attention of the FEP agency. It is important, however, that the Employer not have been previously aware of this misconduct. If a manager knew about the misconduct, but failed to take action on it, it cannot be proffered later as "after-acquired evidence."

- (9) *Include a "conclusion" section.* Include a final section to your position statement which briefly summarizes the Employer's position and requests that the charge be dismissed.

ADDITIONAL SUGGESTIONS TO SUPPORT THE EMPLOYER'S POSITION STATEMENT

Other general considerations to help draft an effective position statement:

- (1) *Include Documents.* Voluntarily provide copies of documents that support your position with your position statement. Frequently, the FEP charge will include a request for information that asks for specific documents. Usually, the documents requested by the FEP agency will include those that appear to be relevant to the charge as formulated by the Charging Party. You do not necessarily have to provide the FEP agency with all the documents that *it* requests in its initial request for information if you give the FEP agency the documents it *really needs* to understand what really happened. While sometimes the FEP agency will follow-up its initial request for documents with a subsequent request asking for the same documents again, many times the FEP agency will drop its requests or eliminate many of them once it understands what really happened.
- (2) *Check your facts.* Make sure your facts are accurate. Consider having key managerial witnesses review your position statement before you provide it to the EEOC so they can catch any errors that might have occurred in the translation. While it is always possible to correct misstatements later, if necessary, the less you have to do this, the better. If the facts that you provide to the FEP agency are accurate and can be backed up by witness testimony or documents, you will have greater credibility with the investigator.
- (3) *Don't use jargon or technical terms without explaining them.* As previously pointed out, the FEP agency knows nothing about your business. Make sure you draft your position statement so that it is clear to an outsider and

- (4) *Refer as respectfully as possible to the Charging Party.* While this may be difficult on occasion, as there is sometimes animosity once a person has been discharged, if you refer to the Charging Party respectfully while still detailing his misconduct, this is far more effective than referring to the Charging Party in pejorative terms. Do not, for example, refer to the Charging Party as an idiot or a moron or a jerk (even if he is). But instead, make your point about the Charging Party respectfully, i.e., “Mr. Houdini was either unable or unwilling to follow the rules despite the Employer’s efforts to educate him regarding those rules.”
- (5) *Highlight the good facts — but don’t ignore the bad facts.* Make your points as clearly and persuasively as possible. Highlight the facts that support your position, but don’t ignore the inconvenient negative facts. Instead, acknowledge the negative facts, but explain why they don’t matter. For example, if the Charging Party had excellent job performance for five years (a point he will certainly make) you should acknowledge that the Charging Party indeed had good performance evaluations (although perhaps not as glowing as the Charging Party had painted them) but the good evaluations are irrelevant since the misconduct in which the

Charging Party engaged—stealing from the Employer, for example—was so egregious that his prior glowing record is irrelevant.

- (6) *Remember that your position statement is discoverable and can be used in subsequent litigation.* The FEP investigation will disclose the information contained in your position statement to the Charging Party to obtain the Charging Party's response; so be aware that you may find yourself having to explain to the agency various claims and assertions that you make in the position statement. In addition, all information in the FEP agency's file, including your position statement, will be discoverable should litigation ensue. Don't say anything in your position statement that you would not want to have quoted at a trial.