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EMPLOYER NEWSLETTER

RESPONDING TO AN EEOC CHARGE OF DISCRIMINATION: What you should do when an employee alleges harassment or discrimination

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Coming under enemy fire for the first time, young Winston Churchill wrote, “There is nothing in life so exhilarating as to be shot at without result.” In today’s litigious environment, chances are increasingly great that a disgruntled employee may take a pot shot at your company.

However, before an employee can sue for discrimination or sexual harassment under federal or state anti-discrimination laws, he or she must first file a “Charge of Discrimination” with the Equal Employment Opportunity Commission (or, in Arizona, the Civil Rights Division of the Attorney General’s Office). Between 2009 and 2013, the EEOC has received an average of just over 97,000 *new* charges of discrimination each year.¹ Many of these cases are subsequently filed in state or federal court. Whether the employer is sued depends in large part on what happens during the EEOC’s investigation. If the EEOC finds in the employee’s favor, count on getting sued. If the EEOC finds that it has no cause to believe that discrimination occurred, the chances of getting sued are greatly diminished. Thus, it is critical that employers understand how the EEOC investigates discrimination or harassment charges and what you should do if a charge is filed against your company.

A. How the EEOC Gets Involved

The process usually begins by the employee phoning the EEOC or the AG’s Civil Rights Division. After being interviewed by an investigator, the employee is usually permitted to file a charge of discrimination.

After the charge is filed, the EEOC mails to the employer a “Notice of Charge Filed,” a copy of the employee’s charge, and a request that the employer submit a “position statement” outlining the employer’s side of the issue. In many cases, the EEOC also requests copies of the employer’s personnel manuals, personnel files, and lists of similarly stated employees and employees who have been fired in the last year or two. Employers must take the charge very seriously as the EEOC has broad power to subpoena documents and interview employees.

EEOC’s Jurisdiction

The employer’s first inquiry should be to determine if the EEOC has jurisdiction over the charge. Lack of jurisdiction can occur if:

¹ Source: Equal Employment Opportunity Commission statistics.

- The employee fails to file the complaint within 300 days after the discriminatory event. In such cases, he or she irretrievably forfeits the right to an administrative claim for relief through the EEOC. (For complaints filed with the AG's Civil Rights Division, the filing time is 180 days.)
- The employer doesn't have enough employees to be subject to the law under which the complaint was filed. The ADA and Title VII of the 1964 Civil Rights Act applies only to employers with 15 or more part-and full time employees, excluding temporary employees. The Age Discrimination Act, which prohibits discrimination against workers age 40 or older, applies to employers with more than 20 employees.

B. How You Should Respond

If the EEOC has jurisdiction, the employer must turn its attention to its response. The response consists of (1) conducting an investigation, (2) drafting a position statement, and (3) reviewing requested documents.

1. *Investigation.* The employer should promptly investigate the charge. The EEOC is often as interested in learning whether an employer has a system for investigating employee charges as it is with determining whether the charge is accurate. If the employer is large enough, its human resources department usually conducts this investigation working closely with legal counsel. Employers that don't have qualified HR professionals should hire a qualified employment law attorney to interview the persons involved and respond to the EEOC.
2. *Position Statement.* The next step is to draft the employer's position statement. The statement should explain how the investigation was conducted and give a detailed account of the employer's version of events. The EEOC investigator reviewing the position statement is not a staff attorney; consequently, a legal treatise on employment discrimination impresses no one at this stage. However, the employer should take great care in drafting the position statement and be scrupulously accurate with the facts. If the employee pursues discrimination or wrongful termination litigation, an employer's position statement could be admissible if inconsistent positions are taken at trial.
3. *Document Review.* Finally, the employer should carefully review the documents that the EEOC requests. Since employment discrimination law is highly nuanced and even counterintuitive, these documents should be reviewed by an employment law attorney before being submitted to the EEOC.

C. Waiting Game

After the charge is filed, the EEOC investigates the charge, evaluates the parties' respective statements, may ask witnesses questions, or may review additional records. The EEOC is inundated with work, and the investigation can last years.

If the EEOC finds that discrimination has occurred, it tries to help the parties reach an acceptable settlement. If conciliation efforts fail the employee can, of course, file a lawsuit. In

particularly egregious cases (usually involving a whole class of employees) the EEOC may decide to sue the employer on the federal government's nickel.

Conversely, if the EEOC issues a "no discrimination" finding, it usually closes the case. The employee can then drop the matter or, within 90 days of the EEOC's finding, file suit in federal court alleging discrimination. However, the no-discrimination finding frequently has the effect of dampening the employee's desire to pursue litigation.

Conclusion

Unless federal and state employment discrimination laws change, more employers can expect to deal with an aggrieved employee's EEOC discrimination charge. To keep the EEOC at bay and to prevent subsequent litigation, employers should thoroughly investigate the EEOC charge, submit a well-drafted position statement, and carefully review requested employee records.

If we can be of assistance or answer your questions, please contact Ezra T. Clark, III at (480) 844-0039 or etc@clarkfirm.com.

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