

Responding to the EEOC and Other State Agencies

Bianca V. Black

Littler Mendelson, P.C. – Indianapolis, Indiana

Presented By



Bianca V. Black

Associate

Littler Mendelson P.C.

Indianapolis, Indiana

Agenda

- Evaluating A Charge of Discrimination
- Charge Investigation Best Practices
- Document and Computer Evidence Retention
- Position Statements
- The EEOC Today

The EEOC Basics

- An administrative agency enforcing federal laws prohibiting employment discrimination on the basis of **race, color, religion, sex** (including pregnancy, gender identity, and sexual orientation), **national origin, age** (40 or older), **disability, or genetic information**.
- Receives charges, investigates, and makes a decision regarding matters filed against private sector employers, employment agencies, labor unions, and state and local governments.

State Agencies

- "Fair Employment Practices Agencies" (FEPA) are State and local administrative agencies with their own laws prohibiting discrimination and authority to enforce those laws.
- The laws enforced by these agencies are similar to those enforced by the EEOC.
 - In some cases, these agencies enforce laws that offer greater protection to workers, such as protection from discrimination because of your marital status, you have children or because of your sexual orientation.

Evaluating the Claim

The Statute of Limitations

- To exhaust administrative remedies, the employee must:
 - (1) timely file a Charge of Discrimination with an administrative agency
 - (2) receive notice of the right to sue.
- Federal law requires an employee to file a charge within 180 days from the day the alleged “discriminatory act” took place.
 - This deadline is extended to 300 days if a state or local agency enforces a similar law which prohibits discrimination.
- The time begins to run when the employee knew or should have known about the “discriminatory act.”
 - Generally speaking, each discrete discriminatory act starts a new clock for filing charges alleging that act
- The ***continuing violations doctrine*** permits employees to recover for discriminatory acts, such as harassment or promotion denials, that fall outside the limitations period, as long as part of a “continuing violation” is within the period.
 - See *Castelino v. Rose-Hulman Inst. of Tech*, 999 F.3d 1031 (7th Cir. 2021); see also *Delaware State College v. Ricks*, 449 U.S. 250 (1980).

Identifying the Claim

Making A *Prima Facie* Case

- Title VII (race, color, religion, sex and national origin)
 - The employee is in a protected class.
 - The employee was meeting the employer's legitimate expectations.
 - The employee was subjected to an adverse action.
 - An employee outside of the protected class received better treatment or replaced the employee.
- ADA (accommodation)
 - The employee has a disability as defined by the ADA.
 - The employee informed the employer of his or her condition and requested an accommodation.
 - There was an accommodation available that would have been effective and would not have posed an undue hardship to the employer.
 - The employer failed to provide an accommodation.
- EPA
 - An employee must show the employer paid employees of opposite sexes different wages for substantially equal work in jobs that require substantially equal skill, effort, and responsibility and that are performed under similar working conditions.
 - If an employee provides evidence of such, the burden shifts to the employer to prove the pay disparity is justified under one of four affirmative defenses:
 - (1) a seniority system;
 - (2) a merit system;
 - (3) a pay system based on quantity or quality of output; or
 - (4) any factor other than sex.

Defending the Claim

Defeating The Elements of a *Prima Facie* Case

Title VII Discrimination

- Protected class – African American.
 - “the decision-makers involved in the termination were unaware of the employee’s racial demographic.”
- Meeting the employer’s legitimate expectations – received excellent performance reviews 3 consistent years.
 - “the employee received three write-ups for violating company safety policies within that three year period and as a result was not meeting the employer’s legitimate expectations.”
- Subjected to an adverse action – written disciplinary action.
 - “one written disciplinary action does not rise to the level of “adverse action” as described in Rodgers v. Gary Comm. Sch. Corp., 167 F. Supp. 3d 940, 954 (N.D. Ind. Mar. 1, 2016).
- An employee outside of the protected class received better treatment or replaced the employee.
 - Present data showing non-African American employees received discipline for attendance violations in accordance with Company policy.

Defending the Claim Retaliation

- The EEOC is becoming increasingly aggressive on its pursuit of retaliation claims.
- Pertinent Elements:
 - Engaged in a protective protected activity;
 - suffered an adverse action
 - causal connection b/w activity and adverse action “but for”

Charge Investigation Best Practices

Document and Computer Retention

- Why is document and Computer Retention Important ?
 - Spoliation of evidence is the intentional, reckless, or negligent withholding, hiding, altering, fabricating, or destroying of evidence relevant to a legal proceeding.
- Issue a litigation hold
- Consider general data retention

Interacting with the EEOC

- Fostering a Good relationship with EEOC
 - Civility and respect
 - Communicate politely
 - Respectful treatment
 - Respect for legal judgments
 - Employer credibility and reputation
 - Honest dealings
- Avoid “legalese” in communications – limit citations
- Review the Strategic Enforcement Plan (2017-2021)
 - 2022 focus on retaliation claims and artificial intelligence.



Investigating the Charge

- Helpful to speak with the investigator handling the charge
- Get information from intake questionnaire, other documents or from investigator's interview with charging party.
- Try to find out if charging party has identified comparators, who they are, how charging party alleges that they were more favorably treated
- Try to determine the charging party's objective in filing the charge. Consider early mediation or settlement.



Mediation

- Avoids lengthy and unnecessary litigation
- Halts the investigation
- Allows for consideration of the strength and weaknesses of the claim prior to formal litigation.
- Cost effective.

Settlement Agreements

- Settlement typically reached during the mediation process
- Settlement can occur at any point during the investigation process.
- Settlement agreements are enforceable and do not constitute an admission of liability.
- Standard settlement agreement v. separate settlement agreements
- Courts are split on whether the EEOC may continue its investigation post settlement.

The General Investigation Process

- Assignments to investigators
- SOPs and RFIs
- On-site investigations
- Fact-finding conferences
- Consider EEOC initiated investigations



Timing of Investigative Process

- Be aware of EEOC and State agency rules. Deadlines vary by agency.
 - i.e. the EEOC is obligated to provide Notice of a Charge of Discrimination to the employer within 10 days of filing.
- The timing of the investigation process will largely depend upon
 - the type of claim being brought;
 - the appointed investigator's normal practice; and
 - the administrative agency's claim load at the time of filing
- Begin the investigation as soon as Notice has been received.

Scope of Investigation

- The term “relevant” is construed broadly and the EEOC is afforded access to any information that might cast light on allegations.
- The “relevant” investigation is not limited to incidents set out in the Charge.
- The investigation is limited to matters that can reasonably be expected to grow out of the charge. This may include discrimination after the date of the Charge.
- Remember the importance of lit holds, particularly, in the event of class Charge.

Scope of Investigation – What Will Be Investigated

- Issues in charge and like/related issues
- Additional issues
- Comparative evidence
- Statistical evidence
- Employer's justification
- Selection procedures



Conciliation – Duty and Process

- EEOC is statutorily required to attempt to resolve findings of discrimination through "informal methods of conference, conciliation, and persuasion" prior to suing the employer in Federal or State Court. 42 U.S.C. 2000e-5(b).
 - EEOC issues a letter to both parties to partake in the conciliation process
- EEOC's failure to conciliate does not bar a private individual's Title VII, ADA, GINA or ADEA lawsuit as Charging party is under no duty to conciliate before suing
- Process
 - Most field offices send a proposed conciliation agreement to respondent when or soon after they invite conciliation
 - "Substantial relief"
 - EEOC take it or leave it position
 - Confidentiality



Requests for Information

- Common requests
 - Policies
 - Employee statements
 - Personnel files
 - Video evidence
 - Lists regarding comparators
- EEOC RFIs often appear out of proportion to charge:
 - Provide simple explanations first
 - Identify irrelevant and burdensome requests
- Balancing act – Work to reasonably limit scope
 - Consider Confidentiality/privacy concerns

EEOC Subpoenas

- EEOC ordinarily will issue only after preliminary investigative methods are unsuccessful.
 - Courts have read standard of relevance to underlying charge broadly and deferentially.
- Differences in Statutory Authority
 - Title VII, ADA and GINA (relevant evidence)
 - EPA
- Strict 5 business days - time limit on petition to modify or revoke subpoena to District Director (or GC for Commissioner Charges). See 29 C.F.R. § 1601.16.
- Responding to an EEOC subpoena
 - Negotiate limitations – most fruitful
 - Confidentiality considerations – possible agreement

On-Site Investigations

- Relatively rare
- Often used to verify or clarify information received in response to RFI or to resolve inconsistencies in evidence from parties
- Elements
 - Respondent/witness interviews
 - Tour
 - Request for documents



Disposition of Charges



- Charge Withdrawals
- Dismissals
- Mediated Settlements
- Negotiated Settlement Agreement
- Cause Findings
- Conciliation
- Notice of Right to Sue

Position Statements as Potential Evidence in Litigation

Respondent's Position Statement

- When position statement may be delayed or limited
 - Mediation
 - Issue already being litigated or investigated
 - Charging party intent to immediately litigate
 - Valid threshold or jurisdictional defense
- Who should prepare



Respondent's Position Statement

- Answer request for position statement and RFI separately
- Reason to submit
 - Correct factual misstatements
 - Supply additional factual information
 - Focus the investigation
 - Refute unfounded allegations
 - Build trust
 - Avoid other investigator techniques and subpoenas
 - Persuade investigator
 - Discourage competent plaintiff's counsel



Respondent's Position Statement

- Better with “story” format rather than answers to charge paragraphs
- Content
 - Authoritative
 - Comprehensive
 - Reader-friendly (not a legal brief)
 - Consistent
 - Focused
- Tone – professional, courteous, not legalistic



Respondent's Position Statement

- Component Parts
 - Introductory Paragraphs
 - Summary of why no merit
 - Request desired outcome
- Facts
 - Compelling, not conclusory
 - Evidence to support facts
- Application of Fact to Law
- Closing

Effective Position Statements

- Tell a story
- Consider your audience –
 - Fairness
- Write persuasively and succinctly
 - Friendly not attacking
- Organized and easy to read
 - Summary of allegations and denial of alleged wrongdoing
 - Recitation of facts related to the charge
 - Describe charging party's employment history and job duties
 - Nature of employer's business
 - Proactive steps taken to avoid discrimination/harassment



The EEOC Today

- October 28, 2021, the U.S. Equal Employment Opportunity Commission announced the launch of an initiative aimed at ensuring that the use of artificial intelligence (AI) and other technology-driven tools utilized in hiring and other employment decisions complies with anti-discrimination laws.
- December 2021, the EEOC announced that it updated its COVID-19 Technical Assistance Questions and Answers adding a new section -- N. COVID-10 and the Definition of “Disability” Under the ADA/Rehabilitation Act. The EEOC intended to clarify under what circumstances COVID-19 may be considered a disability under the ADA and the Rehabilitation Act.

Questions?

Thank You!

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