Employment Law Boot Camp (Part 1): When The EEOC Comes Knocking

Defending Against Charges of Discrimination and Considerations for the Public Employer To Avoid A Cause Determination.

By Lawrence Lee and Daniel C. Perkins, Fisher & Phillips, LLP, Denver, Colorado



The City of Wonderland, USA is a beautiful city with nice homes, well-kept streets and parks, and a local government that prides itself on keeping its citizens happy. Catrina is the first female Captain of the City's Police Department. She is 45 years old, is a recovering alcoholic, was born in South America and is a U.S. Citizen. Catrina has been employed with the Department for 21 years. Her personnel file is filled with consistently high marks for performance, and her internal personnel record is clean.

Catrina reports to the City's Human Resources Director that a respected City Councilman has been calling her during work hours over the past two months and has made lewd sexual remarks to her in an effort to go out on a date. A subsequent workplace investigation finds that Catrina's report could not be substantiated. Two weeks later, Catrina appears at the office intoxicated, and then shouts "F_ _ k the City! The Mayor and all city leaders must be shot and die!"

Catrina is placed on administrative leave and subsequently provided the opportunity to resign in lieu of termination. As the City Attorney of Wonderland, you convince Catrina and her union attorney to sign a valid Waiver and Release on all claims in exchange for one year of separation pay.

Six weeks later, the male Police Chief walks in your office and provides you with a copy of a Notice of Charge of Discrimination with Catrina named as the Charging Party.

How Can Catrina File A Charge After Settlement with the City?

The EEOC or Commission has taken the position that an employee can file a Charge of Discrimination even if the employee signed a general release of rights. As long as the employee carries a belief that she or he was discriminated against during employment or was wrongfully terminated, then, according to the Commission, no agreement between the City of Wonderland and Catrina can limit her right to testify, assist, or participate in an investigation, hearing, or proceeding conducted by the EEOC under the ADEA, Title VII, the ADA, or the EPA. The EEOC opines that any provision in a waiver attempting to waive the employee's rights is invalid and unenforceable. The Commission further contends that Catrina will not have to return the monetary consideration that was provided to her by the City in exchange for her execution of the waiver and release.

Initial Considerations

As the City of Wonderland's City Attorney defending or overseeing Catrina's Charge of Discrimination, what should be done? First, Counsel for the employer must commit to memory basic terminology before proceeding forward. The Charging Party is the present or former employee that believes a federal civil right or employment law has been violated. The Responding Party is the employer. Once in a while, the EEOC will send an employer a Notice of Discrimination without attaching the formal Charge of Discrimination merely to inform the employer ahead of time that the charging party has provided a letter, or "unperfected charge." Unperfected means that the Charging Party has not yet submitted an EEOC questionnaire at the "intake" stage and signed the Charge of Discrimination form containing the claims and allegations. An employer does not have an obligation to respond to the EEOC until it receives a "perfected" Notice and Charge of Discrimination.

Except for a discrimination claim brought under the Equal Pay Act or under Section 1981 or 1983, federal employment laws require the employee to file a Charge with the EEOC prior

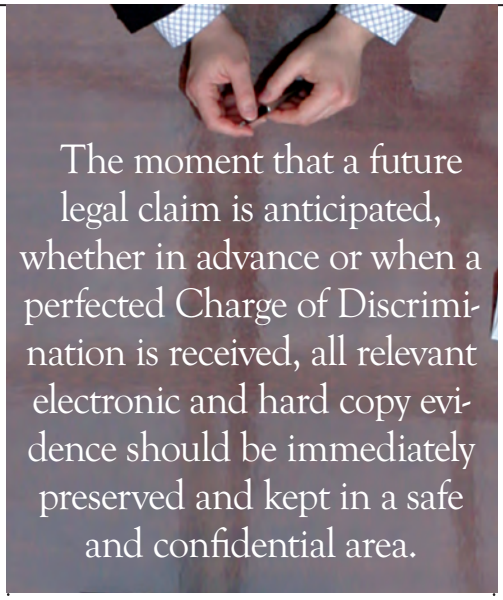
to filing a lawsuit in court. The Charge must be filed with the EEOC within 180 days from the date of the alleged discriminatory violation. The 180 day deadline is extended to 300 days if the charge is covered by a state or local anti-discrimination law. For Charges under the ADEA, only state laws are allowed to extend the filing limit to 300 days.

When a past or present employee files a Charge of Discrimination, it is usually not a surprise. The moment that a future legal claim is anticipated, whether in advance or when a perfected Charge of Discrimination is received, all relevant electronic and hard copy evidence should be immediately preserved and kept in a safe and confidential area. This includes all emails, performance documents, voice mails, personnel files, calendar appointments, and any other records that may conceivably be relevant. Best practices also dictate that initial witness interviews should immediately be conducted by employment counsel to later assess the strengths and weaknesses of the prospective testimonial evidence. During this Q and A of relevant individuals, witnesses should be made to feel free that they can answer all questions candidly without feeling that divulging the truth will result in retaliation or adverse consequences. Finally, the City's risk manager or employment carrier should be notified sooner rather than later so that there is no issue of untimely notice.

Significant consideration should be given to the fact that the EEOC has its own set of in-house litigation counsel in every state and in its Washington D.C. headquarters. This means that the EEOC from the intake stage to the final part of the process is considering whether to issue a reasonable cause determination for future conciliation or to file a future lawsuit on behalf of or in conjunction with future plaintiffs. A determination of reasonable cause is the Commission's belief that discrimination has occurred based on evidence obtained in investigation.

Reviewing Catrina's Notice and Perfected Charge

Catrina's Notice of Charge of Discrimination has the following claims: Title VII (based on sex/gender and national origin), the ADA and the ADEA. Boxes 3 and 4 of the Notice are checked off, demonstrating when the employer's position statement and the responses to the Request for Information or RFI are due. Box 5, invitation for participation in the EEOC's no-cost early mediation program, for purposes of these facts, is not checked off. This means that either Catrina is upset enough not to participate in a free mediation with an EEOC mediator, or the Commission may believe that Catrina's rights were violated and has encouraged her not to settle early.



If the deadlines to file a position statement and respond to the RFI are imminent, then the City Attorney should immediately contact the intake supervisor listed in the Notice, make an appearance on behalf of the Responding Party and request an extension of time to respond at a future date.

Position Statement

The City Attorney will want to prepare a well-drafted position statement with evidence, documentation and witness statements that will help accelerate the investigation and could limit requests for additional information or witness interviews conducted by the EEOC investigator. Clear, concise and complete statements and responses should be provided to the EEOC, while bearing in mind that the employer's response will likely be shared with others, including the Charging Party and other employees in the Commission. If the EEOC's investigation leads to litigation, the Responding Party's position statement could be used as evidence.

Counsel should start strong with an introductory paragraph that provides a brief summary of the City's position. For example, here is suggested language: "This letter responds to the charge of discrimination filed on March 23, 2015 by Catrina, in which the charging party alleges she was discharged because of sex, national origin, age, and disability. The City of Wonderland strongly denies the charge and maintains that there is no evidence to support Catrina's allegations. As explained with the facts and evidence below, the charging party was terminated based solely on her inappropriate and threatening behavior while at work and in violation of the City's Employee Handbook."

The next section should introduce background to set the stage for the specific reasons for the employment action that was taken. It is a given to spell out statements of the City's EEO policies and procedures at this juncture. This demonstrates the City's commitment to a workplace free of discrimination, retaliation and harassment. Further statements about how the City stresses the importance of following the law and policies and how the information is distributed to employees are just as important. The first reference to an exhibit should include the relevant

Continued on page 10





Larry Lee is a partner in Fisher & Phillips' Denver office, focusing on employment litigation, counseling, and defending employers against claims of discrimination, retaliation, wrongful termination and breach of contract. Before entering private practice he was a senior employment attorney the Colorado Attorney General's Office. He is a graduate of the University of Denver Law School.

Dan Perkins litigates a wide range of employment law issues for Fisher & Phillips' Denver office. He has tried to verdict more than 25 jury trials in a wide array of state and federal venues, including the Fifth Circuit. He was previously a senior attorney in the Texas Attorney General's Office, specializing in employment litigation matters at the trial and appellate level.

employment policy as well as a copy of the acknowledgment form signed by Catrina, assuming a copy exists. Describing the sections of the relevant employment policies clearly and concisely is an important precept so that the EEOC investigator does not have to spend time poring over the multiple exhibits that will be provided.

The City Attorney should be confident to address any "bad facts" with the best explanation that can be given without exaggerating or stretching the truth. Under these facts, Counsel must show credibility by acknowledging the truth about Catrina's somewhat clean performance in the past while highlighting her violation of employment policy. It is also wise to include all facts that are relevant to the City's defense of the Charge. This could include other performance issues that were never documented and the potential evidence that may show other City leaders' or employees' concern for safety based on Catrina's threatening statement. Further investigation should be conducted to rule in or out other examples of bad behavior by Catrina.

Similar to a trial attorney providing a story of the facts in an Opening Statement, presenting the written facts chronologically is the best approach in a position statement. Inclusion of Catrina's job description and responsibilities, and translation of the importance of Catrina's duty to the public, may be included in the position statement so that the EEOC investigator understands why Catrina was asked to resign in lieu of termination. Counsel for any employer that is preparing a position statement should address each and every allegation while leaving no unanswered questions. Inclusion of Catrina's spotty attendance records and inappropriate or unprofessional e-mails, if any, may operate as part of the City's factual defenses.

The responsible City Attorney should provide evidence of similar decisions made in the past by the decision-maker to demonstrate that Catrina was treated in a fair and consistent manner. One way to disprove a charge of discrimination, assuming such facts exist, is to explain why similarly situated employees in the past were or were not treated the same way as the Charging Party. If another female officer, like Catrina, that was higher in the chain of command was disciplined similarly for similar conduct, such a reference should be included in the position statement.

[T]he City Attorney should bear in mind that EEOC investigators are not attorneys. While most of them will pay some attention to legal citations that are included in the position statement, it is likely that an EEOC investigator will be more receptive to references to the EEOC *Compliance Manual* as additional guidance.

On the one hand, the City Attorney should bear in mind that EEOC investigators are not attorneys. While most of them will pay some attention to legal citations that are included in the position statement, it is likely that an EEOC investigator will be more receptive to references to the *EEOC Compliance Manual* as additional guidance. On the other hand, a concise and well-thought out legal analysis, if not overdone, is a good practice, especially if the position statement is likely to be provided to the EEOC's in-house or litigation attorneys.

Finally, the City Attorney should end his or her position statement with a firmly stated conclusion that the Charging Party's (Catrina's) claim is not valid and that the City acted fairly, consistently with its policy and practice, and in a nondiscriminatory manner, assuming that all of this can be demonstrated. If the City Attorney does not believe that the law was violated, then he or she should request that the charge be dismissed in plain and respectful language. The written position statement should then be reviewed and cleared for approval with the appropriate client representative. This person may be higher-ranking official, like a City Manager or the Director of Human Resources, or a colleague in the City Attorney's office.

Responding to the RFI

The City Attorney would be wise to tackle the requests for information early with the help of human resources and/or the decision-maker. In its RFI the EEOC usually seeks copies of personnel policies, personnel files, similarly-situated employees, and contact information of every city employee or official that may be involved. If the RFI is too broad, the handling City Attorney should pick up the phone and talk to the EEOC intake person or investigator about narrowing the scope of the request. This conversation should always be cordial, with counsel, with remaining firm on important points. Amicable and respectful relationships with EEOC investigators and agency personnel are just as important as the work product that is provided to the Commission and both can be critical to the final determination or outcome.

If the City Attorney fails to provide information that has been requested by the EEOC, however, then the Commission will likely subpoena the data. City Attorney can challenge the scope of a subpoena, but the EEOC will likely prevail if the information that it seeks is relevant to the investigation. Again, a reasonable investigator will usually be willing to narrow the scope of an information request if contacted in a cordial and timely manner by counsel with a reasonable explanation of the City's position. The best practice is simply to include the requested information in the position statement, if it exists.

Relevant Statistical Trends of the EEOC

Earlier this year, the EEOC released its enforcement statistics for year 2014. The number of Claimants that filed charges all over the U.S. – both in the private and public sectors – totaled 88,778, which was down from 93,727

individuals filing claims with the Commission the year before, a decrease of five percent. In fact, since 2011, when a record 99,947 charges were filed with the EEOC, the number of filings has steadily decreased over the last three years. The decline of filings with the EEOC could be attributed to more settlements taking place prior to charges being filed. The other reason may be due to an increase of charges being filed at the local level, as state anti-discrimination statutes appear to be moving towards stretching out remedies more favorably for employees.

Also noteworthy from the EEOC's statistics is the fact that race remains at 35% of those charges filed, age is at 32% and sex or gender hovers at 29%. Disability claims continue to rise as a percentage since 2008 and last year made up 29% of claims filed with the EEOC. Retaliation is a claim that may be asserted along with a discrimination claim based on one of the above protected classes. Since 2006, Retaliation has steadily increased and was at 43% in 2014, which means charging parties file retaliation claims with the EEOC a little over 4 out of 10 times. Presume that these statistics, at a plus or minus of eight percent, reflect a specific state's demographics for filing. Finally, it is important to note the EEOC, as a named Plaintiff, filed 167 separate civil federal civil rights lawsuits against employers in 2014, which was an increase from 148 in 2013.

Mediation

As noted above, Catrina's Notice did not show that the EEOC's early mediation program was an option because Box No. 5 was left blank. That should not dissuade the City Attorney from calling up the EEOC intake person or investigator and inquiring whether the blank "check" from box no. 5 was inadvertent. This phone call should be made well before the deadline of the position statement and response to the RFI so as to provide the City Attorney plenty of time to prepare for next steps.

Assuming that Catrina is interested in early mediation, then the City Attorney should immediately advise the municipal client decision-maker at the highest level about this option. The early mediation program through the EEOC usually carries no mediation fee, is entirely voluntary, and both the Charging Party and Responding Party must agree to participate in it. Early mediation often provides a faster and cheaper resolution by avoiding a lengthy investigation and possible costly litigation.

The EEOC Mediators usually do not possess law degrees; however, they are neutral third parties and are bound by confidentiality rules. They are not allowed to provide information about mediation discussions to the investigators or the Commission's in-house lawyers. Mediation is an informal resolution process to get the Charge resolved but is not a fact-finding mission. The goal is settlement within a less-than-full day time frame. An advantage of the EEOC's early mediation program is that the City Attorney can retain some control over the outcome, including obtaining a global release of all potential claims against the City. If mediation leads to an agreement, the EEOC will then close the file after monetary consideration is provided to the Charging Party. If the mediation does not lead to an agreement, Catrina's Charge of Discrimination and the file will be sent to the investigator for investigation of the Charge. The City Attorney will not be required to provide a position statement until the mediation process is over.

Of course, a settlement can occur at any time during the investigation. If the parties, and the EEOC, reach a voluntary agreement, the Charge will be dismissed. In general, all employers will want to consider attempting an early settlement if a Charge of Discrimination falls under any of the EEOC's hot-button topics. In 2014, these topics included employment screening based on arrest or conviction records, credit history, or unemployment status, due to the potential disparate impact that these types of screening could have on minority groups. Other enforcement priorities are equal pay; harassment claims; caregiver and pregnancy discrimination; and "systemic bias" cases in which the alleged discrimination has a broad impact on an industry, profession, company or geographic area.

Hurry up and Wait for that Right to Sue Letter

Assuming a Charge has not settled, the investigation may take months if not years before the EEOC makes a determination on the merits of the Charge. If it is determined that the claims and allegations are unfounded, then a Dismissal and Notice of Right to Sue letter is issued to the Charging Party with a copy sent to the Employer. Based on the date of receipt, the Charging Party is entitled to file a lawsuit in federal court within 90 days of receiving the letter. Under the facts in our case, a standard Right to Sue Letter may not be a bad thing from the City of Wonderland's position, especially because it demonstrates the avoidance of a cause determination, which starts the conciliation process and potential litigation.

This prospective part of the EEOC process and other legal issues will be covered in our next article, to be published in the May-June issue of *Municipal Lawyer*, titled: *Employment Law Bootcamp (Part II)*: Handling EEOC Conciliations and Future Litigation, and Considerations Based on Recent Decisions by the Courts. ML

