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What We Should Know When Facing A Charge of the Commission Brigade

Presented by:

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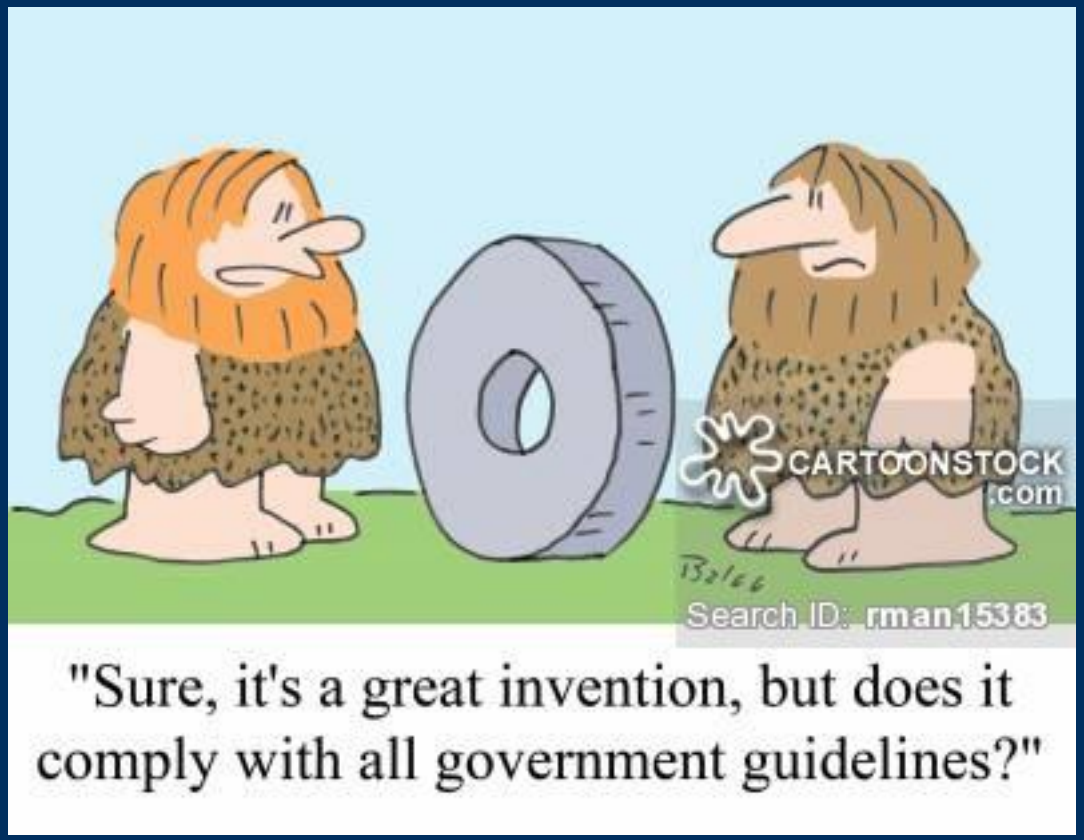
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"Sure, it's a great invention, but does it comply with all government guidelines?"

Part I: Refresher

EEOC Charges

- Total Number of Private Entity Charge of Discriminations Filed with the EEOC in 2014: 88,878

- $296 million collected by the EEOC pre-lawsuit; and another $22.5 million collected when the EEOC was Plaintiff in a lawsuit. What does that tell us?



What Do You Do When the Charge Arrives?

- Panic??
- Tell your Boss??
- Call a Lawyer??



CHARGE OF DISCRIMINATION

This form is affected by the Privacy Act of 1974; see Privacy Act Statement on reverse before completing this form.

AGENCY
☒ FEPA
☒ EEOC

and EEO

(State or Local Agency, if Any)

NAME (Indicate Mr., Ms., or Mrs.)

HOME TELEPHONE NUMBER (Include Area Code)

STREET ADDRESS

CITY, STATE AND ZIP CODE

DATE

NAMED IS THE EMPLOYER, LABOR ORGANIZATION, EMPLOYMENT AGENCY, APPRENTICESHIP COMMITTEE, STATE OR LOCAL GOVERNMENT AGENCY WHO DISCRIMINATED AGAINST ME (If more than one list below).

NAME

NO. OF EMPLOYEES/MEMBERS

TELEPHONE NUMBER (Include Area Code)

STREET ADDRESS

CITY, STATE AND ZIP CODE

NAME

NO. OF EMPLOYEES/MEMBERS

TELEPHONE NUMBER (Include Area Code)

STREET ADDRESS

CITY, STATE AND ZIP CODE

CAUSE OF DISCRIMINATION BASED ON (Check appropriate box(es))

☐ RACE ☐ COLOR ☐ SEX ☐ RELIGION ☐ NATIONAL ORIGIN
☐ RETALIATION ☐ AGE ☐ DISABILITY ☐ OTHER (Specify)

DATE DISCRIMINATION TOOK PLACE
EARLIEST

☐ CONTINUING ACTION

I want this charge filed with the EEOC and the State FEPA. I will advise the agencies if I change my address or telephone number and I will cooperate fully with them in the processing of my charge in accordance with their procedures.

NOTARY – (When necessary to meet State and Local Requirements)

I declare under penalty of perjury that the foregoing is true and correct.

I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.

SIGNATURE OF COMPLAINANT

SUBSCRIBED AND SWORN TO BEFORE ME THIS DATE:
(Month, day and year)

Date

Charging Party (Signature)

EEOC and Deferral States

- The Equal Employment Opportunity Commission (EEOC) is charged with enforcing federal anti-discrimination laws. The EEOC has authority to investigate, settle, or try claims of illegal discrimination.

- Many states have their own anti-discrimination agencies
  - *E.g.* Colorado Civil Rights Division, Florida Commission on Human Relations, Illinois Department of Human Rights, Oregon Bureau of Labor & Industries

Laws Enforced by the EEOC

- Title VII of the Civil Rights Act
- Equal Pay Act of 1963
- Age Discrimination in Employment Act of 1967
- Rehabilitation Act of 1990
- Civil Rights Act of 1991



Deadlines

- The employee's deadline for filing a Charge with the EEOC is **180 days** from the discriminatory act.
- The employee has **90 days** to file a lawsuit after receiving a Notice-of-Right-to-Sue.



Investigation Phase – General Rules

- Stone-walling is not an effective tactic because it ticks off the investigator, the litigators and the Director.
- File an assertive written response if early and free mediation is not an option.



Objectives

The Municipal Employer will want:



- To Obtain a “No Cause” determination and a standard “Right to Sue letter”
- To Dissuade the employee from filing suit
  - When told that they don’t have a case by an independent third party *or* if he/she has found a job, many employees will drop the matter
- To Have the Authority to Defend. In other words, if a lawsuit is filed, you (still) have the internal authority to defend.

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Part II: What to Consider

How Much Information Should You Provide?

- Two General Styles:
  - What I do

    vs.

  - What those *not so smart* do…



What to Include in the Position Statement and Responses to RFI, Part One

- Information about you as the Employer
- Employee's date of hire
- Probationary v. regular employee
- Employee's position
- At-will employment status
- Signed receipt for handbook
- Information regarding posting of company policies/rules violated
- Documentation regarding negative counseling or disciplinary action during course of employment
- Copies of policies/rules violated related to charge
- Receipt indicating knowledge of policies/rules violated

What to Include in the Position Statement and Responses to RFI, Part Two

- Background information leading to the action taken by the Employer
- Admissions by employee about the misconduct
- Employees who have been disciplined for engaging in similar actions outside of the protected class
- Summary and analysis of relevant law
- Evidence that complainant was hired, disciplined, or terminated by someone within his or her protected class
- Other facts suggesting no discrimination

Why Include So Many Documents?

- The point is to avoid an on-site investigation whenever possible
- If a thorough investigation has already been conducted, then an on-site might not be necessary.



How Detailed Do I Get?

- DETAILED IF IT HELPS THE MUNICIPALITY
- WHY?
  - It is important for the investigator to understand that he or she has all of the relevant information.



Miscellaneous Considerations

- Don’t ignore the “smoking gun” provided by employee and address it directly
- Explain why actions taken were different for different employees
- Don’t ignore an issue – respond.



What You Should Not Do With Position Statements

- *DO NOT HAVE THE WRONG PERSON DRAFT YOUR POSITION STATEMENT!*
  - Ensure the author is knowledgeable of the facts and the law

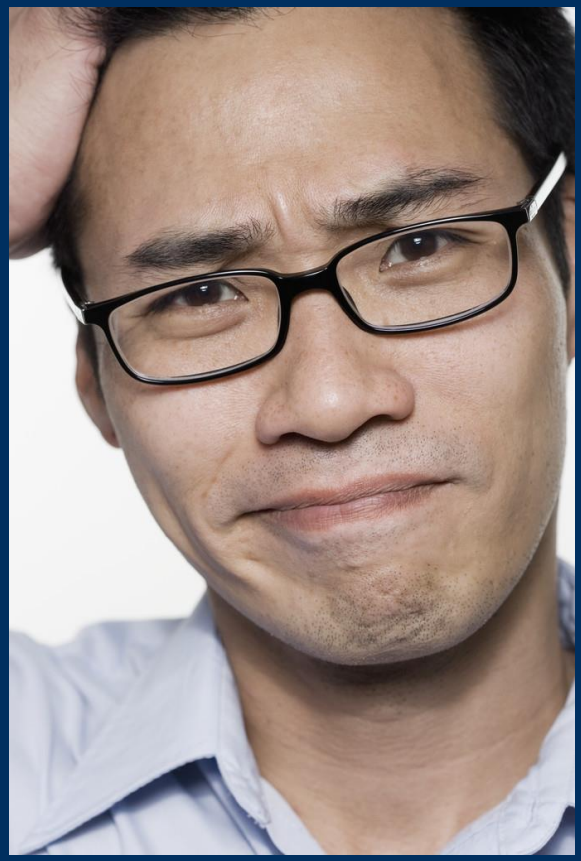


- Do not take a position that could later be inconsistent with your position in litigation

Impact Of Inconsistent Positions

- Evidence of pretext could unfold

- Also, keep in mind unemployment hearing transcripts, correspondence to the Department of Labor, and statements made to other supervisors/employees. Don't send someone who doesn't know what he/she is doing and bind the Employer.



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Part III: Legal and Practical Considerations

EEOC Determination

- Administrative Closure
- No Cause
- No Conciliation
- Right To Sue Notice

Legal Matters

- **Document Preservation:** Upon notice of any threatened litigation, including a Charge, you should immediately take steps to preserve all hard copy and electronic documents that may relate to the case

- **Insurance:** Also, immediately put your risk manager or EPLI carrier on notice of the Charge

EEOC – Early Mediation (Part 1)

EEOC's TEN REASONS TO MEDIATE

1. **Mediation is free.**
2. **Mediation is fair and neutral.**
3. **Mediation saves time and money.**
4. **Mediation is confidential.**
5. **Mediation avoids litigation.**

EEOC – Mediation (Part II)

EEOC's TEN REASONS TO MEDIATE

6. **Mediation fosters cooperation**
7. **Mediation improves communication**
8. **Mediation helps to discover the real issues in your workplace.**
9. **Mediation allows you to design your own solution**
10. **With mediation, everyone wins.**

Should you *only* mediate cases you expect to lose?

- **No**
- Early settlement is NOT an admission of wrongdoing
- Early settlement is NOT losing
- Early settlement does result in a significant savings of time, energy and money.



Settlement Factors

- Probabilities of a Favorable Litigation Outcome
- Costs of Litigation
  - Legal Fees
  - “Me Too” Employees
- Length of time to Reach Final Decision in Litigation
- Interest in Expeditious Resolution
- What is a Reasonable Monetary Range of Value?
- Recent Jury Verdicts in Cases (that started as an EEOC Charge)

2015 Court Decisions Involving the EEOC as Plaintiff

See My Handout

Take Aways

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Thank You

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