



Advice for DIYers: EEOC Charges and Internal Investigations



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October 29, 2024

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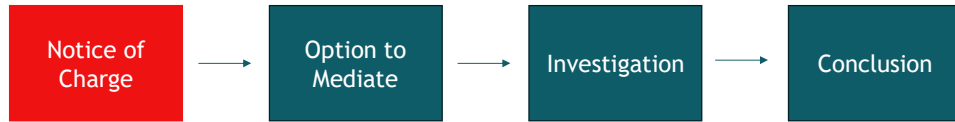
Effectively Interacting with EEOC Investigators and Responding to Charges of Discrimination

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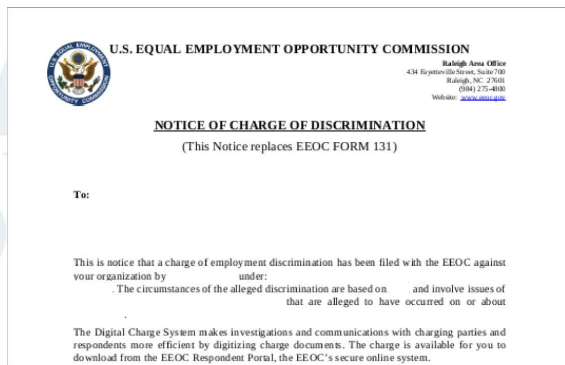
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EEOC Process - What to Expect



Notice of Charge of Discrimination

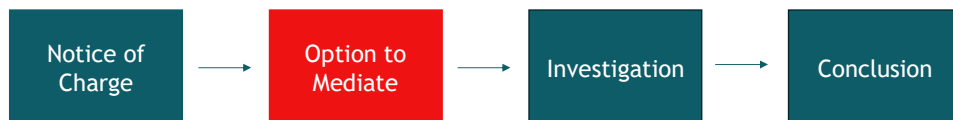




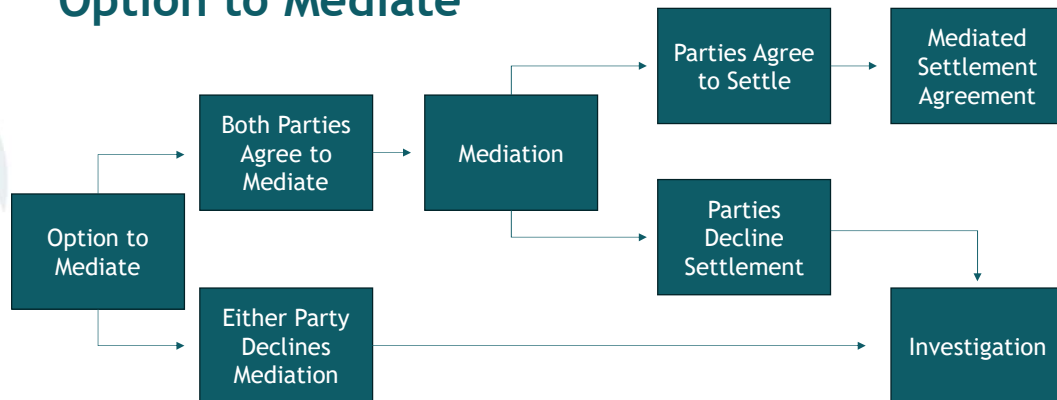
Review the Charge Carefully

- In North Carolina, in most situations, the Charge must be filed within 180 days of the alleged discriminatory act (in some states it's 300 days)
- If Charge is not timely, raise that issue with the EEOC in a letter
- Take steps to preserve the relevant information
- Collect the documents you need
- Make a list of the people you will need to talk with

EEOC Process - What to Expect



Option to Mediate



Key Terms in a Mediated Settlement Agreement

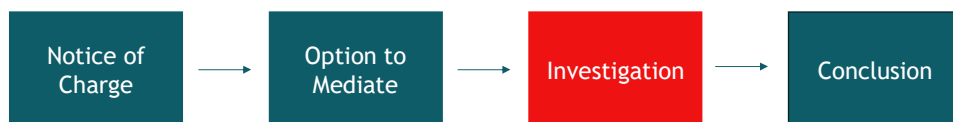
- EEOC's agreement will only cover what's in the charge
- Standard terms include:
 - Charging Party agrees not to institute a lawsuit under the statutes underlying the Charge allegations
 - Payment to Charging Party
 - EEOC agrees to terminate investigation of Charge

Additional Terms to Consider

- May want to have a side settlement agreement to include:
 - full general release of all claims
 - no rehire
 - confidentiality
- EEOC will not be a party but will allow



EEOC Process - What to Expect





Investigation

- Position Statement
- Request for Information (RFI)
- On-site Visit or Interviews
- Negotiated Settlement Agreement (NSA)



The Position Statement

- What is it? Your chance to respond to the Charge allegations
- Take it very seriously, always
- Ask for more time if you need it
- Opportunity to “nip the Charge in the bud”
 - Write simply - tell the story
 - Provide background on your business/industry
 - Do not “trash” the Charging Party -
 - “they were the worst employee ever”
 - “they were toxic”
 - “they lied about everything including the hours they worked”



The Position Statement

- Provide the facts and documents that support those facts
 - “The performance issues were well-documented and the subject of several discussions with Charging Party.” (See copies of Performance Reviews and Performance Improvement Plan)
 - “The time-keeping policy was shared with Charging Party, and they had been counseled about the importance of compliance on several occasions before the termination.” (See copies of the Timekeeping Policy and Supervisor’s Notes from Discussions with Charging Party)



The Position Statement

- It is the story you will live with AND key “evidence” in the investigation and in any litigation
 - Tell the truth - shifting stories are fatal
 - Example: don’t say it was a “reduction in force” if it was not
 - Have the key people review it and ensure it is 100% true
 - Don’t inadvertently admit a violation of another law
 - Example: “We didn’t fire because of gender, but because their STD expired and they couldn’t come back to work yet.”



The Position Statement

- Don't "information dump" - be precise
 - Example: Health information -
 - be careful how you provide and describe
 - cannot be kept in the "personnel file" - must be segregated
 - Example: Info on other employees -
 - Submit confidentially
 - Could expand the scope of investigation inadvertently
- Don't share what your lawyers told you - don't waive attorney client privilege



The Request for Information (RFI)

- Sometimes issued with the Notice of Charge, sometimes after, and sometimes after position statement turned in
- Might just be box checking so respond timely
- If too broad/unreasonable it's okay to push back/negotiate



“On Sites”

- Typically virtual
- Prepare the people EEOC asks to speak with
- Be present if they are managers/supervisors



Negotiated Settlement Agreement (NSA)

- Sometimes offered by the investigator before he/she concludes his/her investigation
- Can indicate the investigator is going to find cause - but not always
- Will usually require some amount of training by the Respondent
- Attempt to negotiate important terms
 - Limit group that has to be trained as much as possible
 - Limit number of years training has to be reported to EEOC

EEOC Process - What to Expect



Conclusion

- Dismissal and Notice of Right to Sue; or
- Letter of Determination - “Cause Finding”
 - Conciliation
 - EEOC Files Lawsuit
 - Notice of Right to Sue



Conclusion

- Conciliation -voluntary and confidential
 - Only when EEOC finds “cause”
 - No opportunity to reargue your position
 - EEOC provides a “demand” - has to provide basis for findings and for damages requested
 - Training (can negotiate scope of group to be trained)
 - Policy revisions
 - Post a notice of the agreement
 - Report on compliance (can be for years - negotiable)
 - Failure to comply is an additional violation of the law

Conducting Thorough and Effective Internal Investigations into Workplace Issues

Spooky Stories from Case Law:

Mohamed v. Society for Human Resource Management (D. Colo. Oct. 8, 2024)

- Plaintiff complained that her manager treated White employees differently from non-White employees
- An HR employee was assigned to investigate the complaint *and* ghostwrote emails to Plaintiff for her manager about deadlines
- Plaintiff complained of retaliation but there was no evidence indicating that complaint was investigated



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Mohamed v. Society for Human Resource Management (D. Colo. Oct. 8, 2024)

- “[J]ury could reasonably conclude that the investigation was a sham in view of, for example, [the HR employee’s] failure to discuss [Plaintiff’s] retaliation complaint with her and his involvement in drafting the email setting deadlines that led to both the retaliation complaint and termination.”



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Spooky Stories from Case Law: Your Investigator Matters

- In *Jameson v. Pacific Gas & Electric Co.*, the employer hired an experienced lawyer to investigate a complaint regarding retaliation by the Plaintiff against an employee who reported safety violations
- The lawyer's report led to termination of Plaintiff's employment, and the Plaintiff argued that the lawyer was biased and did not conduct a thorough investigation. The Court disagreed, noting the investigator's experience.

16 Cal. App. 5th 901, 225 Cal. Rptr. 3d 171 (2017)



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Spooky Stories from Case Law: Your Investigator Matters

- In *Kramer v. Wasatch County Sheriff's Office*, the plaintiff, a bailiff in a county jail, was sexually assaulted multiple times by her direct supervisor
- The Sheriff asked a detective to investigate potential sexual misconduct between plaintiff and the supervisor
- The detective was not:
 - an HR specialist
 - trained in conducting sexual harassment investigations
 - given any policies or procedures on how to conduct the investigation
- The detective was friends with the accused and considered him a mentor

743 F.3d 726, 730 (10th Cir. 2014)



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Trick-or-Treat

Traps to avoid and practical tips

Traps to Avoid and Practical Tips

- Choose the right investigator
 - unbiased, experienced
 - HR person involved in employee discipline should not investigate complaints by employee
- Define the scope of the investigation
- Preserve relevant information
- Identify potential witnesses
- Prepare for investigation
 - Review policies at issue
 - Review documents before interview
 - Prepare an outline for each witness interview

Traps to Avoid and Practical Tips

- Confidentiality
 - NLRB - instruction not to discuss ongoing investigation may violate rights to engage in protected concerted activity under NLRA
 - If instruction is limited to duration of a workplace investigation, it is presumptively lawful
 - If instruction is not limited to the duration of the investigation, case-by-case business justification required
 - Witness needs protection (from violence or manipulation)
 - Evidence may be destroyed
 - Testimony may be fabricated
 - Need to prevent a cover-up
 - Don't guarantee confidentiality to anyone

Traps to Avoid and Practical Tips

- Do not prejudge - keep an open mind
- Do not share your interpretation, assumptions, or subjective comments with witnesses
 - Ask questions, record answers

Traps to Avoid and Practical Tips

- Do not fail to ask witnesses difficult questions
 - Save hostile or embarrassing questions for the end - but be sure to ask them
 - Ask about past practices/similarly situated employees
- Be thorough
 - Resist pressure to “wrap it up”
 - Follow up on info learned
 - Reinterview if necessary to resolve conflicting info

Traps to Avoid and Practical Tips

- Assess witness credibility
 - Pay attention to inconsistencies, evasiveness, and non-verbal cues
- Do not waive attorney-client privilege inadvertently
 - Do not disclose discussions with counsel (internal or external) - to witnesses or in the report

Traps to Avoid and Practical Tips

- Produce an airtight report -
 - Objective, thorough, well-written (no typos/poor grammar)
 - Do not draw legal conclusions
 - Don't say: "Employee X was sexually harassed by Employee Y."
 - Do say: "Employee X stated that Employee Y made sexual gestures to her. Specifically, she reported that Employee Y rubbed up against her from behind and brushed his hand across her buttocks."
- Communicate the results of the investigation
 - Memo to complaining party advising of result, action, and request that he/she report any reoccurrence or retaliation
 - Close Out Memo to accused employee



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