RESPONDING TO EEOC COMPLAINTS

Texas City Attorney's Association
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I. Introduction

In the course of advising your clients, it is very likely that there will be times that personnel issues arise. Employees will need to be hired, disciplined, and terminated. Many of those actions, of course, are negative for the employee.

In my experience, such employees usually do not agree with the negative determination. The motivation for the adverse employment action, in the mind of the employee, is rarely traced to the employee's actions. Quite often, the employee suspects, or has concluded, that the motivations are nefarious—that the supervisor, department head, or CEO is motivated by the employee's race, gender, age, religion, or disability. So an EEOC complaint is filed.[1]

The purpose of this paper is to serve as a useful guide for the city attorney when responding to EEOC complaints. The primary focus will be on neither the legalities of discrimination complaints, nor the strategies for handling litigation. Before litigation may proceed, there is a process at the EEOC,[2] and in responding to that process the city attorney can improve the chances of resolving the matter satisfactorily, and avoiding litigation altogether.

II. Step one – Notice of Charge

In general, you will initially become aware of the employee's action when you receive a "Notice of Charge" from the EEOC. The notice of charge may be nothing more than a form that states who filed the charge, when the charge was filed, the statute that is the basis of the charge, and the status that is alleged to be the basis of discrimination. Ultimately, you will be provided with a copy of the charge, but it is my experience that often such charges are submitted to the EEOC with some technical defect or without the necessary detail to conclude that a violation is alleged. It seems that there is some effort

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[1] I will, in this paper, speak solely to complaints with the Equal Employment Opportunity Commission. An aggrieved employee also has the right to file the complaint with the Texas Workforce Commission. The TWC operates under an agreement with the EEOC that finds the TWC process to be in compliance with the requirements of the laws enforced by the EEOC. There is not, therefore, a great deal of difference in the ways of responding to the charges, whether the complaint is filed with the federal or state agency.

[2] *Love v. Pullman Co.*, 404 U.S. 522, 523, 92 S.Ct. 616, 617, 30 L.Ed.2d 679 (1972); the same exhaustion rule applies to suits after filing with the state. *Schroeder v. Texas Iron Works, Inc.*, 813 S.W.2d 483, 488 (Tex. 1991), *overruled on other grounds*, *In re United States Automobile Association*, 307 S.W.3d 299, 305 (Tex. 2010).

at the EEOC to work with complaining parties to determine whether the complaint alleges one of the statutory violations enforced by the agency, or to correct the technical deficiency. During this time, therefore, the agency will direct the employer that no action is necessary in response to the charge.

It may be that the charge will be dismissed without requiring a response from the employer. Typically, this is because:

- the facts alleged do not state a violation of any EEOC statute;
- in an ADA claim, the allegations do not involve a "disability" as defined by that Act;
- the employer is not covered by the statutes; or
- the charge was not timely filed (within 300 days of the alleged act of discrimination, in Texas).

The burden at this stage is small. If the employee alleges that an action was taken that is adverse to the employee, and alleges that the action was motivated by some illegitimate status of the employee, the charge will typically go forward.

Even if the EEOC states that "no action is necessary" in response to the initial notice, the best practice is to take at least some action. First, it would be advisable to issue a "litigation hold" memo to the city. Documentation relating to the employee needs to be preserved whether it is supportive of the city's position or not. Second, at least some fact-finding is appropriate. At this stage, it is useful to know if this is a serious charge that is likely to go forward or a frivolous charge that is likely to go away. Finally, it is a good idea to notify any insurer that you have. Getting TMLIRP on board with the handling of the claim helps avoid potential coverage issues as the matter proceeds.

III. The Position Statement

If the charge is sufficient to state a claim, and was timely filed, the EEOC will request a position statement from the city. This is your first opportunity to respond substantively to the allegations. This is an opportunity that should not be missed.

A. Strategies

In my experience, there are three primary strategies that are employed in a position statement, and your statement is likely to use one or more of the strategies:

1. Dispute the facts

The first strategy is the most basic, but is not likely to be the most successful. The complaint will most likely allege facts that state a *prima facie* case of discrimination. However, if the facts are not well-founded, it is necessary to point out the inaccuracies. If the charge states that the complainant was the only employee disciplined with regard to an incident, and in fact other employees received the same discipline, that should be pointed out. The dispute may be as basic as a statement that the employee was discharged, when in fact the employee resigned. It is appropriate, however, to point out disputes even if there is no documentation or proof.

It is unlikely that merely disputing facts will resolve the complaint unless the city's factual assertion can be documented. If the city can produce documentation of the same discipline for the other employees, this may be successful. But if the employee has alleged that a supervisor has made disparaging comments based on race, religion, or gender, and the supervisor denies that the comments were made, the factual dispute will not be resolved early in the process. It is certainly important to point out the factual allegations that are disputed, so that the EEOC is aware that there is a point of contention. However, the other two strategies hold more promise for swift resolution.

2. Point out the legal inadequacy of the charge.

Often, an aggrieved employee will allege that they were disciplined or terminated based on some misconduct or policy violation, and will allege that the actual motivation for the punishment was the race or some other protected status of the employee. What the complaint may fail to do, however, is to formally point out that other similarly situated employees that are not in the protected class have been treated differently. The allegation may only be "I was late for work 5 times in a month, and was discharged for this reason. This punishment was unfairly harsh, and was motivated by my supervisor's animus towards my race." However, if the employee cannot allege that other employees had a similar attendance history but were treated less harshly, there will be a strong ground for dismissing the complaint.

3. Establish a defense

It is very common that the complaint of unfair termination or discipline will be filed when the motivation for the adverse employment action was valid and non-discriminatory. The employee terminated for poor performance, or dishonesty, or for failure to follow policy, will complain that the termination is actually the result of a discriminatory motive. This is where the usefulness of documenting an employment action is most evident.

Of course, it is common knowledge that Texas is an "at will" state. Most employee handbooks will include language confirming that city employment is at will and that employees may be terminated for any legal reason or no reason at all. So a termination, in order to be legal, does not have to be documented. However, as all employees are part of some protected class (though I used to joke that as a white, male, heterosexual, non-disabled, native-born Texan raised as a Methodist, I was never entitled to statutory protection, in fact would not have been legal to take an adverse employment action because of my race, color, sex, or religion; now, of course, I have left the age of 45 far behind me, so I am clearly entitled at least to protection against age discrimination), it is simply a good standard practice to document any adverse employment action. If there is good documentation of the misconduct by the employee, the use of progressive discipline, and the failure of the employee to improve the area of concern, it will be very difficult for the employee to establish a discriminatory motive.

B. Format

The position statement will generally be simply a narrative of the city's position and the reason the EEOC should not go forward with the matter. The EEOC urges that the statement be "clear, concise, complete, and responsive." (This sounds like good advice for anything an attorney writes.)

Be sure to address all of the charges. Do not assume that the area of disagreement with the employee will be the only basis for the complaint to the EEOC. What may look like a throwaway add-on complaint to you, who has been dealing with the difficult employee for 2 years, will be indistinguishable from the primary complaint to an EEOC staffer seeing the issue for the first time.

The EEOC and practice guides emphasize the usefulness of providing copies of policies regarding discrimination and compliance with applicable laws. To me, while this might be important if dealing with an employer that may be unsophisticated and unaware of the legal requirements (e.g., a wrecker company who just added a few more employees and is now subject to the non-discrimination laws), it seems to be a given that a city would have a policy forbidding racial discrimination. The key issue is whether that policy was followed. Nevertheless, it is probably wise to include such policies if for no other reason than to avoid the suspicion that might follow if the opposite were true ("They don't even have a non-discrimination policy?!?")

I find that it is most effective to respond in dispassionate, even, tones. Harsh rhetoric could be mistaken for hostility – either to the charging party, the EEOC, or even the statutes that are being enforced. Simply point out the legitimate basis for the negative action against the employee, the flaws in the employee's argument, and the allegations that are disputed.

It may be useful to include documentary support for the response. Besides the city's policy of non-discrimination, include documentation of any policy that was violated (which formed the basis of the adverse employment action), any email or other documentation that might contradict the factual assertions of the complainant, the attendance records that demonstrate the absences that actually motivated the termination, and the employee evaluations and written reprimands that demonstrate the ways the complainant is not meeting performance standards. It is conceivable that you will need to submit confidential information in support of your claim, such as pay records or even medical information of other employees (to rebut claims of inconsistent treatment). In this instance, the EEOC does permit the responding party to submit the information separately and confidentially. (However, medical information about the complaining party is not considered confidential.)

IV. Mediation

If the complaint is not summarily disposed of based on missed deadlines or failure to state a claim, the EEOC will usually ask the parties if they are agreeable to mediation.

Most attorneys, especially litigators, will be experienced in mediation. Mediation is an effective tool to reach a settlement when a settlement is possible. Often, in litigation,

I find that early mediation is ineffective because the disputed facts have not been fully investigated. In an EEOC matter, however, the complaint is usually related to a fairly discrete set of facts, and a dispute that can be narrowed significantly. In this instance, an early resolution can reduce expense. Further, if the complaining party remains employed, the early resolution may be useful to reduce tension and increased animosity that may come from further litigation.

The mediation process at the EEOC is, in my experience, somewhat less formal than a typical mediation of a lawsuit. The mediator may well not be an attorney, but the mediator will likely have substantial experience in EEOC cases. They will be familiar with the elements of the claim that the charging party must show, and will be willing to discuss those elements (and the lack of proof for those elements) with the charging party.

In my experience, the charging party who is looking for a “big payday” will not be successful at mediation. On the other hand, a mediator will be willing to extract a nominal settlement, with appropriate protective language for the city (e.g., no admission of liability; no public statement of discrimination; a full release of all claims), in order to mark a case down as settled rather than dismissed.

V. Right to Sue Letter

In the large majority of cases, the EEOC’s resolution will ultimately be the issuance of a “right to sue” letter. Sometimes, this letter is the result of a finding by the EEOC that there is no evidence to support the claims. Sometimes, it is the result of an investigation that neither supports nor disproves the claim. The claimant will be given 90 days to file a lawsuit in federal court, because the EEOC cannot foreclose a discrimination claim – only choose to not pursue it.

This is the closest thing to a “win” that the employer can get at the EEOC. There cannot be a final decision in the employer’s favor. However, in many cases this is the final activity in the case because the charging party will not go forward to court. One clue about the likelihood of the matter going forward is whether there is an attorney involved. The EEOC has made its process open to individuals who are not represented, the charge is made simply by filling out a form, and there is no filing fee, so there is virtually no barrier to making the complaint. Preparing a lawsuit and paying federal court filing fees, even as a *pro se* plaintiff, is a much more significant hurdle.

I have had one experience that I have never quite understood. I have asked many people, and while there is conjecture about what took place, I’ve never been given a clear answer about how events could have transpired. A client received notice that a charge had been made, and a right to sue letter had been issued. The charge was filed and the letter issued on the same day. The employee had retained counsel, and a federal lawsuit was quickly forthcoming. It appears to me that the attorney had requested that a right to sue letter be immediately issued. However, that supposition on my part has never been confirmed.

VI. Finding of Cause/Litigation by EEOC

In the relatively rare case, the EEOC will find that there is reasonable cause to believe that the employer has engaged in illegal discriminatory conduct. In those instances, the EEOC is required by Title VII to attempt to eliminate such unlawful practice by informal "conciliation."[3] As the EEOC has found cause, the conciliation is less likely to involve a neutral settlement. Instead, the EEOC is likely to require the employer to take specific steps to address what it sees as an organizational problem.

If the matter cannot be resolved by conciliation, the EEOC may bring a lawsuit in its own name against the employer. The EEOC is not required to bring suit, and in fact the agency usually does not. According to its own website, "the EEOC files suit in less than 8 percent of the cases where it believes discrimination occurred and conciliation was unsuccessful."[4]

According to the agency, the EEOC makes the determination whether to sue based on the seriousness of the violation, the legal issues involved, the impact the suit could have on efforts to combat discrimination, and the resources available to the agency.[5]

If suit is filed, the complaining party is entitled to join the suit. However, even if the complainant is not directly involved, the EEOC will look to achieve compensation for the complaining party *and* some amount of corrective action by the employer.

VII. Some closing notes

Be aware that there are some different deadlines, statutes of limitations, and even exhaustion requirements for some discrimination laws. Particularly, the Age Discrimination in Employment Act has varying requirements, and the Equal Pay Act was enacted relatively recently, and is specifically aimed at what was perceived by some to be unfair barriers to redress posed by statutory and regulatory deadlines.

I have always been wary of dealing with EEOC staff because I have anticipated I would encounter the crusader's attitude – out to stamp out discriminatory employment practices. This attitude is present in what I have, through many years and in many subject areas, dismissively labeled "true believers." The reason it is so plausible is first because actual employment discrimination is indefensible—it takes little imagination to understand how a staff person at EEOC could believe they are the forces of good combatting the forces of evil. The reason it is so worrying, however, to one representing an employer, is because these complaints are so frequently made without good cause. I would expect that EEOC staff, seeing the most despicable racist, sexist, homophobic, and xenophobic beliefs and practices, would tend to suspect those attitudes and beliefs when there is no proof they are present. However, statistics show that less than 5% of the

[3] 42 U.S.C.A. §2000e-5(b).

[4] https://www.eeoc.gov/eeoc/newsroom/wysk/conciliation_litigation.cfm, retrieved September 27, 2016.

[5] *Id.*

charges filed are sustained by the EEOC. Clearly, the EEOC staff also has frequently witnessed what we, as city attorneys, have witnessed: unhappy employees or ex-employees who ascribe their unhappy experiences to illegal motives. But even incorrect or ill-advised decisions by employers are not illegal unless they are improperly motivated. An employee who is disciplined too harshly, or who is terminated when lesser discipline would be more appropriate, does not have a legal claim on that basis alone. My experience with EEOC has been remarkably free of any "true believers," and has led me to conclude that their investigations are generally even-handed.

Finally, one recent case I had involved a complaint against a supervisor that, by the time the complaint was received, had been dismissed from employment based on issues other than those alleged by the employee. While the EEOC ultimately concluded that there was no violation alleged, the problem appeared to be based more in difficulties with the departed supervisor. At that point I consulted with the human resources department to confirm (1) the problem was with the departed employee; and (2) the complaining employee had been a valuable and improving team member. I suggested, therefore, that either HR or the city manager sit down with the employee and confirm that the problems had ended when the other employee departed, and that there were no other problems bothering the employee. It seemed to be advisable to let the employee know that by resisting the EEOC claim, we weren't dismissing her troubles, and that we were dedicated to resolving issues—even if those issues were not discriminatory.