

DEFENDING DISCRIMINATION CLAIMS

Being the subject of a charge of discrimination launched by a disgruntled employee was once a rare event for an employer. But, now, employers frequently are being required to defend themselves before state and federal discrimination agencies. This is occurring because there are more state and federal discrimination laws than ever before and employees are more aware of their rights and avenues of redress. Charges of discrimination are on the rise.

Not only does the Federal EEOC investigate employee charges of discrimination, but so do other agencies, such as the Ohio Civil Rights Commission. In addition, some cities, such as Dayton, have their own agency, like the Dayton Human Relations Council. Therefore, an employer can find itself being required to wage a successful defense against three different agencies at relatively the same time.

Because the efforts of these agencies can result in an employer eventually paying substantial damages to an alleged discriminate, the investigatory stage of the proceedings is very important and must be treated with respect and care. While most employers hire employment law counsel to guide them through the maze of regulatory requirements, some attempt to defend themselves. If you are going to “take on” these agencies, here are some helpful hints:

- From the very outset, be careful of what you say and do in defense of the charge of discrimination – attempting to show good faith by fully cooperating with the agency may result in admissions against interests, which cannot be overcome.
- Acknowledge to the agency the receipt of the charge and do this in writing – in the letter, designate a certain individual who will be the only person to speak on behalf of your company – this avoids conflicting statements.
- Avoid speaking with anyone from the agency until the matter is fully investigated and your defense plan is devised – some agencies will call you while the charging party is in their office for the purpose of attempting to adjust the dispute informally – avoid meaningful discussions with the agent until you have time to investigate.
- Analyze the charge to fully understand all of the claims – both factually and legally – if you are unsure of the specific claims, make the agency give you more details. They will be willing to speak by telephone with you.
- Review the complete personnel file of the charging party and all documents related to the claim.
- After understanding the allegations and available defenses, determine whether to focus on contesting the charge or settling. Remember, an otherwise cheap settlement may become very expensive, if you lose control of your employees by giving in to their pressures.

- Determine the procedural properness of the charge – some claims have a 180-day statute of limitations and other claims can be filed only in a certain fashion.
- Speak with the immediate supervisor of the charging party and alert the supervisor to the charge – have the supervisor treat the charging party as “business as usual” – retaliation by the employer’s agents can result in additional charges of discrimination.
- Submit a position statement with relevant documents attached, but don’t complete the agency’s request for information. The information requested is overly broad and can result in more claims being launched against you. Also, the time limitations they impose are unrealistic and can be extended easily. Remember, a position statement is the most important part of your defense.
- Avoid gathering written statements from employees without advice of counsel – never offer any written statements of employees, especially affidavits. You have no obligation to do this even though the agency will say otherwise. These statements may come back to haunt you.
- Attempt to avoid an on-site investigation by the agency – offer to meet in their offices to avoid exposing them to all of your employees – avoid employee interviews, but, if they occur, speak with the employees first in order to ensure that you have their hearts and minds. Negotiate a limit on the number interviewed.
- Avoid fact finding conferences conducted at the agency during the investigation – in these conferences the charging party and the agent confront the employer in a “mini-arbitration” setting and the investigator attempts to intimidate the employer in hopes of extracting a settlement.
- Establish and maintain your credibility throughout all phases of the investigation.
- If settlement occurs, require a full release – many agencies have limited releases which do not fully protect the employer.

Robert T. Dunlevey, Jr.
DUNLEVEY, MAHAN & FURRY
A Legal Professional Association
937 / 223-6003