Charge of Discrimination Against Clinic

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Question: ***A former employee has filed a Charge of Discrimination with the EEOC against our practice, claiming she was sexually harassed by a physician who works in our clinic. What does it mean and what should we do?***

For those of you who have had the misfortune of having an employee or former employee file a Charge of Discrimination against your practice, take some comfort in the fact that you are not alone. Each year, thousands of EEOC Charges are filed against employers. Medical practices are not immune. It is very easy for an individual to file the Charge, but unfortunately, it is often time-consuming and difficult for an employer to defend against claims of discrimination, however baseless.

Initiating the Claim

An applicant, employee, or former employee (the "Claimant") who believes that his or her employment rights have been violated because of race, color, sex, religion, national origin, age, disability, or retaliation may file a Charge of Discrimination with the EEOC. Harassment on the basis of those protected categories is a form of unlawful discrimination.

A Claimant may file a Charge simply by submitting information on the EEOC website or by giving his or her version of events to an intake officer at the local EEOC office. A Charge is accepted for filing based solely on the Claimant's version of events. A Claimant is not required to produce witnesses or submit proof of unlawful discrimination.

Once a copy of the Charge is sent to the employer, the employer becomes the "Respondent" in the EEOC investigation. That is all that is necessary to result in a costly, time-consuming headache for the employer. In contrast, the Claimant does not need to expend any more effort than to attend a meeting with an EEOC representative. The Claimant is not required to retain counsel, and is not required to pay for the EEOC process.

Mediation

After you have been notified that a Charge of Discrimination has been filed, the EEOC will advise you if your case is eligible for mediation. The mediation program is free, and is conducted by a neutral third party. If the parties agree to mediation, the employer is generally not required to produce documents or prepare a response to the Charge, because the mediation process takes place before the investigation is conducted. The process is confidential, and information learned during the process will not be used against the employer by the EEOC investigator in the event mediation is not successful. If the mediation is successful, the EEOC Charge is dismissed, and no lawsuit can be filed by the Claimant.

Mediation is optional, and is not advisable in every circumstance. For example, if the Claimant is less than honest, has motives that are purely financial, or has unrealistic expectations, the mediation can be divisive and counterproductive. In some cases, if the Claimant receives a quick financial settlement from your practice through the mediation process, it may encourage others to file their own EEOC Charges against the practice.

The Investigation

After a Charge is filed, an investigator is assigned to the case. The Respondent will be asked to provide information to the investigator to help determine whether the Claimant's Charge has merit. The investigator will determine what information to request from the Respondent. The type of information requested will vary, depending on the EEOC local office and the type of Charge that has been filed. In general, you can expect to be asked for the following:

Position Statement

You as the Respondent will be asked to submit a Position Statement. That Statement is your chance to respond to the allegations made by the Claimant, and to give your version of events. It is also your chance to add information that you believe will help the investigator get a balanced, accurate picture of the situation. Your Position Statement should be well-written and complete, and should provide the facts necessary to refute the Claimant's Charge, and to demonstrate that there was no violation of the law.

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You may be tempted to hand off the EEOC Charge to your office administrator and direct him or her to file a response and get it out of your life as quickly as possible. However, drafting a first-rate Position Statement is critical, and can be difficult for someone who is unfamiliar with employment law and the EEOC process. Missteps in drafting the Position Statement can adversely affect the investigator's decision, and may come back to haunt you and your practice in a subsequent lawsuit.

Request for Information

The EEOC may also serve a Request for Information ("RFI"), which is a list of questions to answer, together with a list of documents you must produce. Those documents may include personnel records of the Claimant, applicable portions of your employee handbook, and other employment records relevant to the Claimant's allegations.

Responding to the RFI can be a daunting and time-consuming task. It is often frustrating to be required to respond to questions and to produce documents that seem irrelevant or harassing. Don't be tempted to simply refuse to respond, or to be argumentative or evasive in your responses. That will only exacerbate the situation, and will not make the EEOC go away. In fact, if you refuse to comply, the EEOC may use its subpoena power to obtain the documents without your consent.

If information requested seems too broad or is too difficult to produce, you may contact the EEOC investigator and attempt to work out a compromise. The key with responding is to be cooperative and to demonstrate to the investigator that you are taking the Charge seriously.

On-Site Visit

In some cases, an EEOC investigator may request an on-site visit, to review documents and to interview employees. You and/or your counsel may be present when the investigator interviews a member of your management staff. However, you are not allowed to be present during interviews of employees who are non-management personnel. In fact, the investigator may interview your past and current non-management employees without your permission.

The Decision

After the investigator has completed a review of the information submitted by both the Claimant and the employer, the investigator reaches a decision on the merits. The EEOC may make one of the following findings:

- If the investigator determines there is no reasonable cause to believe discrimination has occurred, the EEOC will send a "Dismissal and Notice of Right to Sue" to both the Claimant and the employer, notifying the parties that the EEOC is closing their file without taking further action.

  Unfortunately, even if the EEOC determines there is no evidence the respondent/employer violated discrimination laws, the Claimant is still entitled to file suit in federal or state court. The Claimant has 90 days from the date the Dismissal and Notice of Rights letter is issued to file suit in state or federal court. If no suit is filed within that time frame, the Claimant is forever barred from bringing any further action based on the discrimination claims.

- If the EEOC investigator determines that there is reasonable cause to believe unlawful discrimination has occurred, the parties will be notified, and the EEOC will make efforts to reach a conciliation agreement with the employer. Conciliation is a voluntary process and may include remedies such as payment of financial compensation to the Claimant, rehiring the Claimant, imposition of training requirements on the employer, and future monitoring of the employer's employment practices by the EEOC.

- If conciliation efforts between the employer and the EEOC fail, the EEOC may elect one of two options. In relatively few cases, the EEOC may file suit against the employer with the EEOC as the named Plaintiff. In the alternative, it will issue the Dismissal and Notice of Rights letter, setting out the findings of discrimination, and then close the file. The Claimant then has 90 days from the date of the Notice to file suit.

- Most EEOC offices are inundated with EEOC Charges, and the backlog can delay investigations and findings on cases. After a Charge has been pending for 180 days without a decision being rendered, a Claimant can request that the EEOC close the file, issue the Dismissal and Notice of Right to Sue, and then file suit against the employer before a decision is reached.

No Claimant may file suit without first receiving a Dismissal and Notice of Rights.

Five Tips To Minimize Your Risks

If the EEOC determines an employer has violated discrimination laws, it can impose significant remedies. Depending on the facts, the EEOC may order the employer to hire, promote, or reinstate the Claimant, it may impose wage adjustments, and/or it may award monetary damages. If the Claimant files suit and prevails in a federal and state

court proceeding, the Claimant may be awarded past and future lost wages, interest, compensatory damages and in some cases, punitive damages.

In short, the stakes are high when a Charge is filed. You as the employer do not have control over the filing of a Charge, but you can minimize the damage once a Charge is filed. The following are some suggestions:

1. Take it seriously.

Don't be tempted to treat the EEOC Charge as just one more administrative hassle. Assign responsibility for gathering information and drafting the response. Review and revise it carefully. Respond promptly, but don't hesitate to contact the EEOC and request additional time to file the requested response.

2. Consider retaining counsel.

Getting input from an experienced employment attorney who is familiar with the EEOC process can be well worth the expense. It can reduce the time your administrator is taken away from office duties to prepare the response. Even more important, however, is that an employment attorney can handle the landmines inherent in the process. Counsel will know what information must be divulged, will understand how to draft a persuasive Position Statement, and will know how to respond to the RFI appropriately without exposing you to unintended consequences.

Involving counsel in the process does not have to be expensive. To keep the cost to a minimum, you should designate one person, such as your office manager, to prepare drafts, gather the relevant documents, and create a rough draft for review by counsel. Counsel will know what revisions and additions should be made, and can fine-tune the response. Counsel will also know what documentation should be submitted, and will know how to prepare the response so that it is factual and persuasive.

Often, it will be necessary to gather information directly from employees to prepare the Position Statement. If those interviews are conducted by counsel and reduced to writing, the statements will be protected by the attorney client privilege. If they are taken by a staff member, the employer may be required to produce those statements in the event of a subsequent law suit.

3. Keep the claim process confidential, and be careful not to retaliate.

In many cases, the Claimant who filed the Charge is a current employee who remains on the job while the claim is pending and the investigation is conducted. Other current employees may be asked by the EEOC to participate in the investigation by submitting statements or information that may be adverse to the employer's interests. It is crucially important that steps be taken to ensure that no one on your staff does anything that can be construed as retaliatory against the Claimant or witnesses. This is easier said than done, since the situation often involves strong emotions on both sides.

Keep the claim process as confidential as possible. Identify the individuals that must be involved in the response process, and caution them to maintain confidentiality. You and your office manager should monitor the office carefully and take steps to keep the rest of the office staff from discussing the claim. Managers and coworkers should be reminded to treat everyone with respect, regardless of their personal feelings about the claim. Keep all files related to the Charge and response in a locked filed cabinet and strictly limit access to that information.

4. Know the applicable document retention laws, and comply with them.

Once a Charge is filed, you must retain personnel and employment records relating to the issues under investigation as a result of the Charge, including those documents related to the Claimant and coworkers or other individuals alleged to have been the subject of discrimination. Those records must be kept for at least 91 days following the date the Dismissal and Notice of Rights is issued or until final disposition of the Charge or lawsuit, whichever is longer.

Under several different federal laws, employers are required to keep certain employment records for a set period of time regardless of whether an EEOC Charge has been filed. Not all federal laws apply to all employers, and many states have additional, more expansive laws. Experienced employment counsel should be consulted to advise you regarding which laws apply, what documents must be retained, and for what period of time the documents must be kept.

5. Review and revise your employment policies

During an EEOC investigation or subsequent law suit, employers will be asked to produce proof that adequate training programs are in place and that the employer maintains employment practices that comply with state and federal laws. It is never too late to review existing policies and practices, and to update to bring them into compliance. Failure to do so may result in the loss of legal defenses at trial.

If you have employment law questions you would like addressed, send them to asipp@asipp.org, indicating the questions are for *ASIPP News*.