

# **BEST PRACTICES FOR DEFENDING EEOC and UNEMPLOYMENT CLAIMS**

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© ssociation of Corporate Counsel

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# I. EEOC/SHAC CHARGES



# TOPICS

- What does the EEOC want from you?
- Responding to a discrimination charge.
- How do I obtain information from the EEOC?
- Resolution of charges.



# What Does the EEOC Want From You?

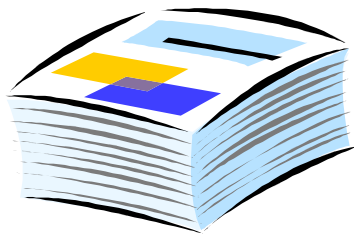
- Individual Charges of Discrimination
  - What bases are covered?
    - Title VII (race, color, religion, sex, national origin).
    - Age Discrimination in Employment Act.
    - Equal Pay Act.
    - Americans with Disabilities Act.

# What Does the EEOC Want From You? (cont'd)

- Commissioner's Charges
  - May file or charge on behalf of another person in order to protect the aggrieved person's identity.
- Directed Investigations
  - Equal Pay © ct
  - © ge Discrimination in Employment © ct

# What Does the EEOC Want From You? (cont'd)

- ◎ charge has been filed, now what?
  - Investigations by SH◎ C/EEOC:
    - Priority charge handling process.
    - Notification of charge.
      - ✦ Letter of Representation.
      - ✦ Retain relevant records/issue records hold.
      - ✦ ◎ void retaliation.



# What Does the EEOC Want From You? (cont'd)

- Request for information.
- Position statement.
- Witness interviews.



# What Does the EEOC Want From You? (cont'd)

- The EEOC has the authority to:
  - Investigate charges.
  - Subpoena evidence.
  - Expand its investigation.
  - Conduct on-site visits.





# Responding to Discrimination Charges

- @ our internal investigation

Attorney-client privilege.

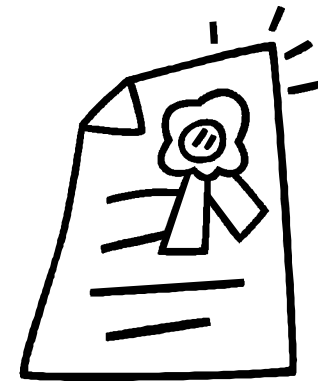
Get your story straight.

Identify and preserve documents.



# Responding to Discrimination Charges

- The Position Statement – @ our Time to Shine.
  - Make your first shot your best shot.
  - Respond fully to the charge allegations
    - ✓ Company history.
    - ✓ Company policies.
    - ✓ Facts.
    - ✓ Caselaw.



# Responding to Discrimination Charges (cont'd)

- Respond Fully to the Charge (cont'd)
  - Witness affidavits/documentary evidence.
- Know when to advance your arguments:
  - No time like the present.



# Responding to Discrimination Charges (cont'd)

- Responding to the request for information.
  - Documents.
    - Scope.
  - Witness Interviews.
    - Preparing Witnesses
    - Non-management.
    - Management.
    - Former employees.



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U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

REQUEST FOR INFORMATION

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Charging Party: [REDACTED]  
Respondent: [REDACTED]  
EEOC Charge No.: [REDACTED]

1. Give the correct name and address of the facility named in the charge.
2. State the total number of persons who were employed by your organization during the relevant period. Include both full and part-time employees. How many employees are employed by your organization at the present time?
3. Supply an organizational chart, statement, or documents which describe your structure, indicating, if any, the relationship between it and superior and subordinate establishments within the organization.
4. Supply a statement or documents which identify the principal product or service of the named facility.
5. State the legal status of your organization, i.e., corporation, partnership, tax-exempt non-profit, etc. If incorporated, identify the state of incorporation.
6. State whether your organization has a contract with any agency of the federal government or is a subcontractor on a project which receives federal funding. Is your organization covered by the provisions of Executive Order 11246? If your answer is yes, has your organization been the subject of a compliance review by the OFCCP at any time during the past two years?
7. Submit a written position statement on each of the allegations of the charge, accompanied by documentary evidence and/or written statements, where appropriate. Also include any additional information and explanation you deem relevant to the charge.
8. Submit copies of all written rules, policies and procedures relating to the issue(s) raised in the charge. If such does not exist in written form, explain the rules, policies and procedures.

Issue: DISCHARGE

1. If the charging party was discharged, submit the following:
  - a. date of discharge,
  - b. reason for discharge,
  - c. statement of whether the charging party had any right of appeal, and whether the charging party made use of any appeal rights
  - d. person recommending the discharge, including name, position held,
  - e. person making final decision to discharge the charging party, including name, position held. Attach copy of any evaluation or investigation report relating to the discharge, and
  - f. copies of all pertinent documents in the charging party's personnel file relating to the subject discharge.
2. Explain your discharge procedures in effect at the time of the alleged violation. If the procedures are in writing, submit a copy.
3. Submit copies of all written rules relating to employee duties and conduct. Explain how employees learn the contents and rules.
4. List all employees who committed the same or substantially similar offense(s) that the charging party committed and the disciplinary action taken against them. Supply backup documentation for the list. Include name, position title.
5. List all the employees discharged within the relevant period. For each employee, include employee name, position title, reason for and date of discharge, and a copy of the separation notice.

Issue: SEXUAL HARASSMENT

1. State and describe respondent's policy with regard to sexual harassment at the time of the charge. Explain how this policy is/was developed, implemented, and disseminated. Submit a copy of all documents which state, describe, reference, or relate to the policy, its creation, its implementation, and its dissemination.
2. Has any applicant or employee complained or charged (either orally or in writing internally or externally) that any employee in the facility engaged in sexual harassment in connection with the employee's employment relationship? If so, submit the following information for each complaint received:
  - a. name, position, and department of complaint,
  - b. name and position for each person(s) receiving the complaint(s) and the date of the receipt of the complaint(s),
  - c. name and position of each person whose conduct was the subject of the complaint,
  - d. a detailed description of the relationship between the alleged harasser and the respondent,
  - e. a detailed account of the conduct which is subject of the complaint including the date(s),
  - f. the context in which the alleged conduct occurred, including the specific location,
  - g. an explanation of the action(s) taken to resolve this complaint, both with respect to the alleged harasser and the complainant,
  - h. the name and sex of each witness to the event(s) alleged which served as a basis for the sexual harassment complaint, and

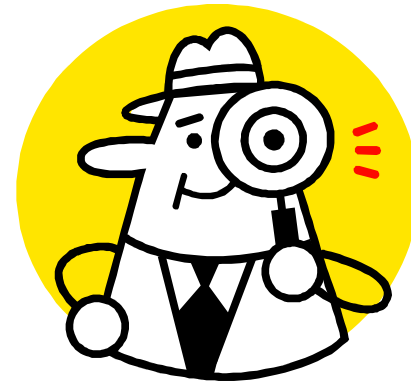
1. List by name, and position all officials of your organization who have been informed of, or knew of all the allegations of discrimination made by the Charging Party, if any. For each person listed, state the date such notification was received, the nature of the notification, and the person's response to it. Submit all documents which state, describe, reference, or relate to the notification of the Charging Party's complaint.

2. Describe any personnel action(s) involving Charging Party taken after the earliest date any person in your organization had knowledge of Charging Party's allegation(s) of discrimination. Submit all documents which state, describe, reference, or relate to these personnel actions.

# Responding to Discrimination Charges

## ■ The on-site investigation

- Infrequent.
- Negotiate.
  - Timing.
  - Duration.
  - Witness sequencing.
- Prep, prep, prep.
- Take care with conduct during the on-site.





# How Do I Obtain Information From the EEOC?

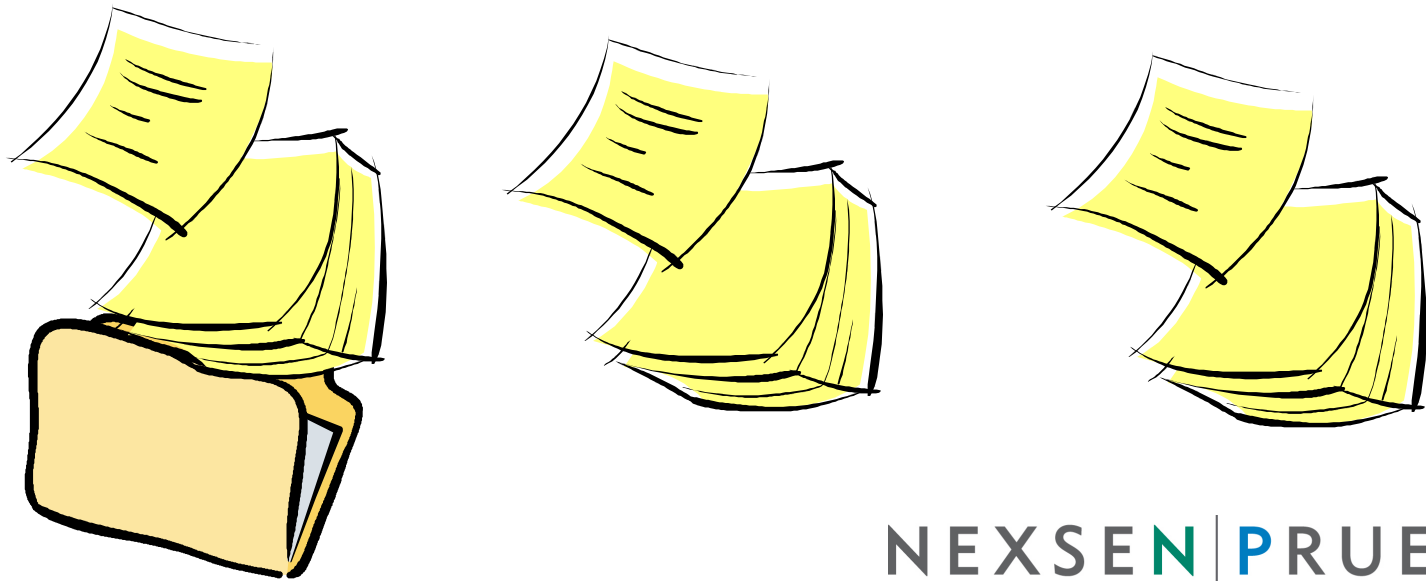
## ■ Relationship with investigator.

- Positive.
- ☉ void appearance of retaliation.
- ☉ allow them to do their job, while still protecting your business.
- Do not ignore due dates or telephone calls.



# How Do I Obtain Information from the EEOC? (cont'd)

- Scorched-earth strategies.
- Post-suit filing.
  - Freedom of Information © ct.



# Resolution of Charges

- Best case – “no cause” finding.
  - Notice of right to sue.
- Mediate to resolution.
- Pre-determination settlement.
- “Cause” finding.
  - Conciliation process.
  - What if conciliation fails?
    - Notice of Right to Sue.
    - EEOC may file its own lawsuit.
    - Individual.



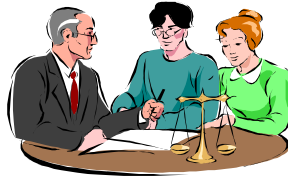
# Responding to Discrimination Charges (cont'd)

- 90-day statutory period after a right-to-sue letter issues.



# II. UNEMPLOYMENT CLAIMS

Before the Department of Employment and Workforce (“DEW”)



# Purpose of the Unemployment Compensation System in South Carolina

Provides compulsory unemployment reserves to be used for the benefit of persons who are unemployed “through no fault of their own”



# Procedural Steps for Granting Unemployment Benefits



# Claimant's Request for Determination

## Filing Information Form

The Claimant must provide information related to the termination of employment, including the Claimant's belief regarding why he/she was terminated.

The Employer then provides information on the form regarding the Claimant's employment and makes a statement explaining the reasons for the Claimant's termination of employment.



# Interview With Claimant By DEW

At this interview, the Claimant is provided with the Employer's statement and given a chance to rebut the information.



# Initial Determination

© written determination is issued providing claims information and an explanation for either granting or denying the Claimant's request for benefits. The Claims © djudicator makes one or more of the findings as to the Claimant's eligibility.



# Potential Findings:

1. The Claimant is eligible for unemployment benefits without disqualification.



US-103  
24. MAY 2007

SOUTH CAROLINA EMPLOYMENT SECURITY COMMISSION  
P.O. BOX 995, COLUMBIA, S.C. 21 2

[REDACTED]

DATE OF THIS NOTICE [REDACTED]

GREENWOOD SC 29646

CLAIMANT'S NAME		SOCIAL SECURITY NUMBER		EFFECTIVE DATE	DISQUALIFICATION END		
[REDACTED]		[REDACTED]		[REDACTED]	[REDACTED]		
Q. NO.	TYPE	CATEGORY	WEEKLY BENEFIT AMOUNT	EMPLOYER POTENTIAL ENTITLEMENT	100% REDUCTION OF	NET TOTAL BENEFITS	BENEFIT YEAR END
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]

DETERMINATION BY CLAIMS ADJUDICATOR ON CLAIM FOR BENEFITS

- You are eligible for benefits from the above effective date.
- You have been disqualified from receiving benefits or have been found to be ineligible for benefits for the following reason(s):

YOU WERE DISCHARGED FROM YOUR JOB WITH YOUR MOST RECENT WORK FIDE EMPLOYER FOR NEGLECT OF DUTY. THE RECORD SHOWS THAT YOU FAILED TO ALWAYS ACT IN THE BEST INTEREST OF YOUR EMPLOYER. SUCH BEHAVIOR CONSTITUTES DISCHARGE FOR CAUSE IN CONNECTION WITH THE WORK UNDER THE SOUTH CAROLINA CODE, SECTION 41-25-130(9). YOU ARE DISQUALIFIED FOR 10 WEEKS. YOUR MAXIMUM BENEFITS ARE ALSO REDUCED BY 10 TIMES YOUR WEEKLY BENEFIT AMOUNT.

\_\_\_\_ LAST SEPARATION FROM NON-LIABLE EMPLOYER

\_\_\_\_ CLAIMS ADJUDICATOR

MAILING DATE [REDACTED]

IMPORTANT: THIS DETERMINATION WILL BE THE FINAL DECISION OF THE COMMISSION UNLESS YOU FILE AN APPEAL SETTING FORTH IN DETAIL THE GROUNDS FOR APPEAL WITHIN TEN (10) CALENDAR DAYS, INCLUDING WEEKENDS AND HOLIDAYS, FROM THE MAILING DATE SHOWN ABOVE. IF THE TENTH DAY FALLS ON A SATURDAY, SUNDAY, OR HOLIDAY, THE APPEAL PERIOD IS EXTENDED TO THE NEXT BUSINESS DAY. YOUR APPEAL MAY BE FILED IN PERSON AT ANY EMPLOYMENT SECURITY OFFICE, OR BY MAIL, ADDRESSED TO THE APPEAL TRIBUNAL - P.O. BOX 995, COLUMBIA, SOUTH CAROLINA 29922. FOR ADDITIONAL INFORMATION OR ASSISTANCE IN FILING AN APPEAL, CONTACT YOUR LOCAL EMPLOYMENT SECURITY OFFICE.

**2. The Claimant is found to have voluntarily quit employment without good cause.**

(a) Reasons which usually do not constitute good cause are:

- personal illness (unless the illness is directly related to or caused by the employment);
- loss or lack of transportation;
- relocation.

**(b) Reasons which may constitute “good cause” are:**

- a significant reduction in wages or salary;
- significant changes in working hours;
- a substantial change in other terms of employment;
- violation of an agreed-to condition of employment;
- sexual or racial harassment;
- illness or disability related to work;
- new: individuals who voluntarily quit work for a compelling family reason will not automatically be disqualified if they continue to meet the “able and available” work search requirements.

### **3. The Claimant is found to have been discharged “for cause;”**

- chronic absenteeism;
- chronic tardiness;
- insubordination
- unjustified refusal to follow reasonable instructions or normal procedures;
- violations of reasonable published rules or regulations


and . . .

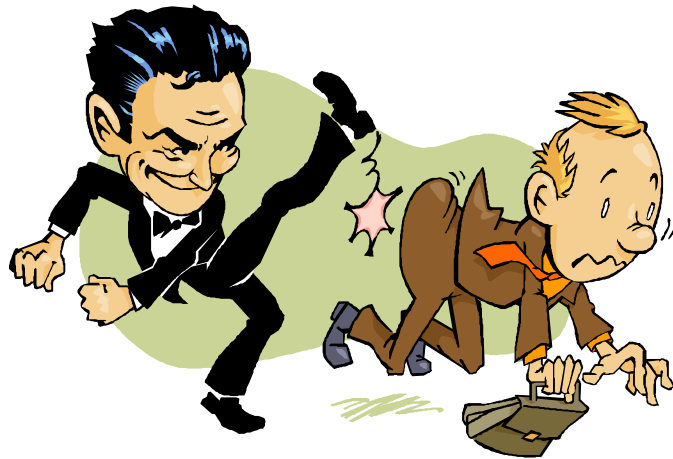
## “For Cause” Disqualification (cont’d)

- “Discharge for gross misconduct”
- Consuming alcohol or being under the influence of alcohol in violation of company policy;
- © ssault or battery of an employee or customer;
- Insubordination, meaning a willful failure to comply with lawful, reasonable orders of management directly related to employment and as set forth in a job description; and
- Willful neglect of duty directly related to the job as set forth in a job description.



# Burden of Proof:

Where the Employer contends that the Claimant was discharged for cause, the Employer has the  burden to establish that the Claimant was discharged for cause.



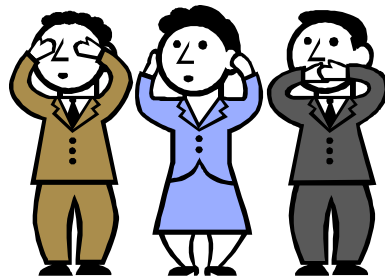
# Appeal of Initial Determination

- The Claimant or Employer who disagrees with the Initial Determination has a right to appeal.
- ☉ hearing is scheduled before an ☉ dministrative Hearing Officer (“Hearing Officer”) of the DEW.
- The Hearing Officer conducts a “hearing” and renders a decision based on the testimony and the written record presented.



# The Initial Appeal Before the Administrative Hearing Officer

- The Hearing Officer hears all evidence related to the claim.
- The hearing before the Hearing Officer may not always comply with judicial procedures or rules of evidence.
- © Il parties have the right to be represented by legal counsel or other representatives.



# The Issues Before the Hearing Officer

Generally, the Employer will be asked to explain why the Claimant was terminated.



# Documentary Evidence

- Bring original;
- Bring copies;
- Bring any witness who drafted or signed originals;
- Bring handbooks/rules.

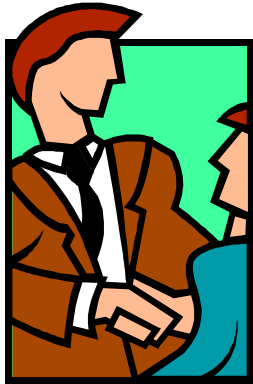


- Witnesses
- Bring witnesses who:
  - Saw;
  - Heard;
  - © cted;
  - Wrote;
  - No Hearsay!!



# Hearing Officer's Questions

- Be polite (yes sir/no ma'am)
- Be straightforward



# Questioning the Claimant

- Write out questions beforehand;
- You can ask leading questions;
- Determine which documents to show Claimant (if any).





# Questioning Your Own Witnesses

- Write out questions before hearing;
- Determine which documents the witness will testify about.
- Practice testimony before hearing.

3...2...1...0



# Decision of the Hearing Officer

- The written decision issued by the Hearing Officer will include a statement of facts and a separate statement of conclusions of law.



Appeal No: 0901908

DECISION NO: 2009-A-2744

SOUTH CAROLINA  
EMPLOYMENT SECURITY COMMISSION

**DECISION OF APPEAL TRIBUNAL**

Hearing Date: February 24, 2009

[REDACTED]

CLAIMANT

[REDACTED]

EMPLOYER

APPELLANT: Claimant

SS NO: 247-31-8720

**APPEARANCES**

FOR THE CLAIMANT: Present with Legal Counsel  
(Elected Not to Participate)

FOR THE EMPLOYER: Two Witnesses  
with Legal Counsel  
(No Testimony Taken)

**FINDINGS OF FACT**

This case was set for a hearing on February 24, 2009, at 2:15 P.M. I find that notice of the hearing was mailed to the appellant's address of record on February 13, 2009. The appellant did not appear at the call of the case. After waiting for the required ten (10) minutes, I find that the appellant has abandoned the appeal. The case is dismissed.

**DECISION**

In the absence of testimony, the Tribunal affirms the claims adjudicator's determination mailed January 28, 2009, holding the claimant indefinitely disqualified from receiving benefits effective January 4, 2009, until she requalifies, upon a finding the claimant voluntarily quit without good cause.

This will be the final decision of the agency unless you file an appeal to the full Commission setting forth in detail the grounds for appeal within ten (10) calendar days, including weekends and holidays, from the mailing date. If the tenth day falls on a Saturday, Sunday, or holiday, the appeal period is extended to the next business day. Your appeal may be filed in person at any Employment Security office, or by mail, addressed to "Commission Appeals," PO Box 995, Columbia, South Carolina 29202. For additional information or assistance in filing an appeal, contact your local Employment Security office.

*Robert J. Inman*

Robert J. Inman  
Administrative Hearing Officer

RJI: sas  
Decision Mailed: 2-26-09  
Mailed on the above Date By: [REDACTED]

# Appeal to the Appellate Panel

- The Hearing Officer's decision is appealable to the Appellate Panel (f/k/a "The Full Commission").
- Must file appeal within ten (10) calendar days of the decision
- Hearing transcript of appeal tribunal below will be issued.



# Hearing Before Appellate Panel

- 3 Panel Members generally participate (2 required for forum)
- No new evidence can be presented!
- Each party generally provided 8 minutes to state position
- Panel Members may question parties
- Know your record!



# Appeal to the Administrative Law Court

- Appellate Panel's decision is now appealable to the Administrative Law Court.
  - Must file appeal within thirty (30 days) of Appellate Panel's decision.



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