806 How to Prevent & Respond to an EEOC Charge of Discrimination or Harassment

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Faculty Biographies

Michelle Hargis Wolfe

Michelle Hargis Wolfe is the assistant general counsel over the EEO & Administrative Claims Section, Employment Litigation Division, of Wal-Mart Stores, Inc. Her responsibilities include defending charges of discrimination filed with the Equal Employment Opportunity Commission and the state fair employment practices agencies against Wal-Mart Stores, SAM'S CLUBS and Wal-Mart's Logistics and Trucking Divisions.

Mrs. Wolfe joined Wal-Mart during its wage and hour class action litigation division. Prior to that time, her legal practice was focused on representing management clients in all facets of employment litigation and appeals with an international firm in Phoenix and local firms in Denver and her hometown of Little Rock, Arkansas.

She earned her B.A. from the University of Arkansas. She also received her M.B.A. and J.D. from the University of Denver

Kimberlee Ullner

Kimberlee Ullner is the senior attorney, labor and employment (director) for Allegheny Energy Service Corporation in Greensburg, Pennsylvania. Her responsibilities include providing legal advice and counseling to internal company personnel on labor, employment, benefits, and workers' compensation matters. She actively manages outside counsel in employment litigation matters, including developing strategy, substantively reviewing filings, and attending depositions, mediations, and court appearances. Additionally, Ms. Ullner creates and conducts internal training sessions for human resources, supervisors and personnel on labor and employment law topics. She represents the company before federal and state agencies in employment charges and claims, including conducting mediations before such agencies and labor arbitrations. She drafts, reviews, and revises employment policies, reviews and amends benefit plan documents, drafts employment-related agreements and contracts, and oversees internal investigations.

Prior to joining Allegheny Energy, Ms. Ullner worked in-house at an insurance and risk management company and in private practice in Cincinnati and Atlanta.

Ms. Ullner is active in supporting celiac disease research and support groups.

Ms. Ullner received a B.A. from Wellesley College, an A.M. from Duke University, and a J.D. from Duke University School of Law.

WHEN TO SELECT MEDIATION

I. History of EEOC Mediation Program

A. In 1991, the EEOC began pilot mediation programs in four field offices (Philadelphia, New Orleans, Houston, and the Washington Field Office), and subsequently, pilot programs were established in all District offices.

B. In 1995, EEOC adopted its policy statement on ADR (see attached) setting forth certain core principles for an ADR program.

C. The EEOC's ADR mediation program was fully implemented in April 1999.

II. When Mediation is Available

A. The EEOC offers mediation soon after the charge has been filed and prior to further investigation.

B. In 2002, the EEOC expanded its use of mediation to attempt resolution at the conciliation stage in appropriate cases.

C. In 2002 and 2003, the EEOC implemented several initiatives to further expand and promote the use of mediation and ADR. Specifically, the EEOC encouraged employers to enter into Universal Agreements to Mediate (UAMs) at the local, regional or national levels.

1. **As of September 2003, there were over 400 UAMs with local employers and 16 UAMs with national or regional employers.**
2. **In FY 2005, there were over 100 national regional UAMs and 170 local agreements.**

III. Investigation

A. Early case assessment is the key to determining when to mediate.

B. Begin the investigation immediately after you receive the Charge.

C. Look beyond the particular Charge and determine whether the facts will have a broader impact on your Company.

a. Are there class allegations?

b. Are there pattern and practice allegations?

c. Do you have a serial bad actor involved?

d. Who are the witnesses the Company will have to produce in order to resolve the Charge?

i. Time is money. Having to produce high-level executives or management-level employees may make settlement of a low-risk case cost effective.
ii. What are the relevant documents that might have to be produced for inspection (and, possibly, in subsequent litigation)?

D. The Merits of the Charge

a. If the Charge does not implicate Company-wide practices, or any other factors listed above, make a decision on its merits.

b. Remember that even the high probability of a No Probable Cause finding does not necessarily preclude a mediation election. You should still try to determine what the Charging Party's expectations are:

i. Would a nonmonetary settlement would satisfy the Charging Party?

ii. Is the cost of defense higher than the cost of settlement?

iii. Do the benefits of obtaining a Settlement Agreement (which include a confidentiality provision, a no reapply/rehire provision and a waiver of all employment claims) make settlement a better option than defending?

IV. Perceptions Regarding Mediation

A. In December 2003, the EEOC published a Report outlining the reasons why employers elected NOT to mediate.

B. According to the Report, there are three reasons why employers decline mediation:

a. The employer does not believe that the merits of the case warrant mediation;

b. The employer does not believe that the EEOC was likely to issue a "reasonable cause" finding in the particular case;

c. The perception that the EEOC mediation program requires monetary settlement.

C. In most cases, none of these reasons, standing alone, should form the basis of a decision as to whether to mediate.

V. Realities Regarding Mediation

A. Since 1999, the EEOC had mediated more than 50,000 cases, and achieved a 70% settlement rate.

1. In almost half of the mediated cases, settlement involves a non-monetary benefit.

2. In 13.5% of the cases settled, the only benefit is non-monetary.

B. Mediated cases were resolved in an average 85 days (versus 160 days for non-mediated case in FY 2003.

C. 91% of Charging Parties and 96% of Respondents indicate that they would use the EEOC mediation process again, even where the results were different than they anticipated.

D. In FY 2005, EEOC resolved over 7,900 charges and secured over $115 Million in benefits for Charging Parties.

E. In FY 2005, 12,500 Employers agreed to mediate charges.

EFFECTIVE GRIEVANCE COMPLAINT PROGRAMS TO PREVENT EEOC CHARGES

I. Classic Grievance Complaint Programs

A. Three-Tier Process

1. Informal Process.

a. Direct discussions with immediate supervisor or a level above the supervisor.

b. If the issue is not resolved, then discussions with senior management.

2. Mediation (Non-Binding)

3. Binding Arbitration.

B. Examples

1. *Alcoa* – Three Step "Resolve It" Program:

a. Discussions with Senior Management.

b. Mediation.

c. Binding Arbitration.

2. *Bank of America*- Three Step Process:

a. Discussions with management.

b. Discussions with the Personnel Office.

c. Discussions with an Ombudsman who reports to Personnel but is free to interview anyone. The Ombudsman has no power to overturn a manager's decision but can escalate the discussion to senior management.

3. *Johnson & Johnson* – "Common Ground" Program:

a. Open Door – discussion with supervisor, a level above the supervisor, HR personnel or any other level necessary.

b. Facilitation – an individual who is trained to ensure all options of communication are exhausted.

c. Mediation – If mediation is unsuccessful, the employee can pursue court action.

C. *Alternative Complaint Programs*

1. *General Electric* *("GE")*- Five Level System:

a. Level "0" – Informal.

b. Level "1" - Written statement to an administrator.

c. Level "2" - Employee submits a Resolve Submission Form to the program administrator.

d. Level "3" – Mediation.

e. Level "4"- Arbitration.

2. *Shell*'s "Resolve" Program:

a. Early Workplace Resolution- meeting with person complained of, assistance from a supervisor or intervention by HR or upper management.

b. Hotline- "Shell Ombudsman."

ii. Offers confidentiality in answering any questions.

iii. Offers support and advice.

c. Mandatory Mediation

d. Optional Arbitration. (Note: Employee has the option of enforcing the arbitration agreement or filing suit in court).

3. *United Parcel Service* *("UPS")* 5-Step Process:

a. Open Door.

b. Facilitation- Employee contacts his/her Regional Employee Relations Manager who will ensure the Open Door Policy has been exhausted.

c. Peer Review – A panel of three employees; two selected by the employee and 1 selected by the employer make a non-binding decision.

d. Mandatory Mediation.

e. Final and Binding Arbitration (This step is optional).

4. *Wal-Mart Stores, Inc. and Pfizer* – "Open Door" Policy: Employees take problems to higher levels of management.
5. Allegheny Energy – "Open Door" Policy, Issue Resolution Review (3 peers and 2 managers serve on panel to review complaint and issue decision that is binding within the company. Employee can still sue).

II. Deciding on a Program for Your Company

A. Issues to Consider:

1. To Whom Would the Program Apply?
2. What Issues Would the Program Cover?
3. What Issues Would Be Specifically Excluded?
4. What are the Costs (including fees for mediators, lost time for employees, time to prepare)?
5. What Incentives/Reasons are there for Employee Participation?
6. How will the Company Implement and How Long will Implementation Take?
7. Is the Company Able to Obtain and Maintain Consistency in Responses (tracking)?

B. To Whom Would the Program Apply?

1. Many companies have their programs only apply to United States based employees. (International Legal Issues are a concern).
2. The Program usually excludes upper level executives. (Although, many upper-level executives may have contracts with binding arbitration provisions).

C. What Issues Would the Program Cover?

1. Claims covered by the Equal Employment Opportunity Commission.
2. Common Law Claims. For example: wrongful termination claims.

D. What Issues Would Be Specifically Excluded?

1. Workers' Compensation.
2. Challenges to Employer's Business Decisions.
3. Unemployment Compensation.
4. Unfair Competition.
5. Trade Secrets.
6. Certain Wage & Hour Claims (e.g., class actions).

E. Costs.

1. Most companies with mediation or arbitration programs have the employee pay a small portion of the costs.

   a. Alcoa: Employees pay $100 for mediation and $200 for arbitration.

   b. Anheuser-Busch: Employees pay $50 for mediation and $125 for arbitration.

   c. Other companies have employees pay fifty percent of the arbitration costs.

d. Companies such as Johnson & Johnson, Shell and UPS do not require employees to pay a fee.

2. Who Pays the Legal Fees, if any?

a. Some companies require the employee to pay the entire cost of his/her own legal fees, if any.

b. General Electric reimburses employees, up to $2,500 in legal fees, if both parties reach an agreement in mediation.

F. Reasons For Employee Participation.

1. Confidentiality and safeguards against retaliation.

2. Recognition to encourage supervisor and management participation.

3. An employee fee to ensure the employee has a stake in the outcome. (Example: GE pays legal fees up to $2,500 if mediation is successful).

G. Implementation.

1. A company must garner support from management by giving management some type of commendation for use of the system.

2. Communicate to employees and front-line supervisors. (Example: A Chief Executive Officer issues a statement to employees with a commitment to the program).

III. TRENDS

A. From 1997-2002, the American Arbitration Association's ("AAA") employment caseload statistics rose from 1,342 in 1997 to 2,133 in 2002 -- a 159% increase.

(This does not include statistics from other National Arbitration Firms such as JAMS and the National Arbitration Forum).

B. A 1997 survey of Fortune 1000 corporations conducted by Cornell University concluded that ADR processes are well established in corporate America. This conclusion was based on responses from 600 of these companies.

C. 1998 Survey of companies found that 89.2% used mediation because it saved money. *See* David B. Lipsky & Ronald L. Seeber, *The Appropriate Resolution of Corporate Disputes: A Report on the Growing Use of ADR by U.S. Corporations* Table 15, at 17 (Cornell/PERC Inst. on Conflict Resol., 1998).

IV. POSITIVE AND NEGATIVE ISSUES

A. The United States Postal Service mediation program reduced EEO complaints by 26%.

76% of claims were resolved.

90% participant satisfaction. (Time period for statistics: 1997 -2002).

B. Johnson & Johnson reports fewer than 2% of the disputes that enter its program proceed to the arbitration stage.

C. Shell had less than 1% of its disputes go to arbitration.

D. *EEOC v. Waffle House, Inc.,* 534 U.S. 279 (2002). The United States Supreme Court found that the EEOC can pursue victim-specific relief on behalf of an employee who has waived the right to a judicial forum in an arbitration agreement.

HOW TO OBTAIN A NO PROBABLE CAUSE DETERMINATION

I. Investigate Thoroughly

A. Early Case Assessment.

1. Know what cases to mediate.

2. Partner with other parts of the Company to identify larger issues that could be impacted by defending the claim.

B. Know the Charging Party's (future Plaintiff) Case.

1. The burden to identify alleged comparators rests with the Charging Party, but know who they are.

2. Lodge relevant objections, but turn over information that is not privileged or otherwise proprietary in nature.

C. Comparator Evidence.

1. Identify the information in the Position Statement.

2. Lodge the objections and distinguish the facts.

II. Respond Promptly and Thoroughly

A. Limit the Need for Extensions.

1. Drive efficiencies in-house.

2. Visit the Agencies and Foster Positive Relationships.

3. Call the Investigator and discuss the charge – take every opportunity to plead the company's case.

B. Identify all Relevant Policies, Business Practices and Procedures Up-Front.

1. Identify all training on the policies that the Charging Party Received (and hopefully acknowledged).

2. Thoroughly review the Charging Party's personnel file, manager's local file and any other documentation. Be particularly familiar with the employee's discipline history.

C. Cite Case Law Persuasively (parentheticals).

III. Participate in On-Site Investigations.

A. Make sure Witnesses are Prepared.

B. Counsel Present for All Interviews (and at least Management, if the Agency rightfully refuses to permit counsel to be present for hourly).

C. Do Not Forget the Document Review/Audits in Advance.

D. Mark All Documents Confidential. If possible, Require Investigator to Review Documents in Presence of Company Representative – Investigator Can Take Notes, but Not Copies.

E. Issue Non-spoliation Memorandum to All Relevant Witnesses/Managers/IT Personnel Immediately Upon Receipt of Charge.

IV. Respond to Requests for Information

A. Respond timely.

B. Respond persuasively, as if each submission is self-explanatory.

C. Respond thoroughly, but distinguish favorable facts.

V. Keep Track of Witnesses

A. Consider obtaining written statements from witnesses, if witnesses may be unavailable/unfriendly in future. Remember, written statements will be discoverable in future litigation.

B. Provide appropriate periodic updates to Witnesses and Business Leaders so they continue to have an interest in the matter and continue to keep their eyes and ears open for developments (i.e., what they hear through the grapevine can inform regarding damage mitigation efforts – did the charging party find another job?)

VI. Stay Involved in the Case

A. Partner with Decision Makers regarding Adverse Employment Actions taken against Charging Party.

B. Track Information to Determine Whether there are Larger Issues at the Facility.

VII. Assess Defensibility and Potential Risks/Liability at Every Step.

VIII. Follow-Up

A. Force the Agency to Render a Decision.

B. Ask the Agency if it Needs Additional Information.

C. Offer Additional Information that is helpful to the Company's Defense and be sure it is presented in a way that clearly tells the Company's story.