

EEOC Investigations

**Carolinas AGC Foundation
2014 HR and Safety
Conference**

Presented By:

Ashley P. Cuttino

**LABOR & EMPLOYMENT
LAW**

**FROM A DIFFERENT
ANGLE**

**Ogletree
Deakins**

What Is the EEOC?

- Created by Congress in 1964
- Five-person, independent commission appointed by president
- Office of General Counsel
- District offices throughout country



What Does the EEOC Do?

- Process, investigate, and conciliate charges of discrimination
- Litigate cases it brings
- Provide interpretations/guidance for employment discrimination laws
- Adjudicate federal/state employee complaints

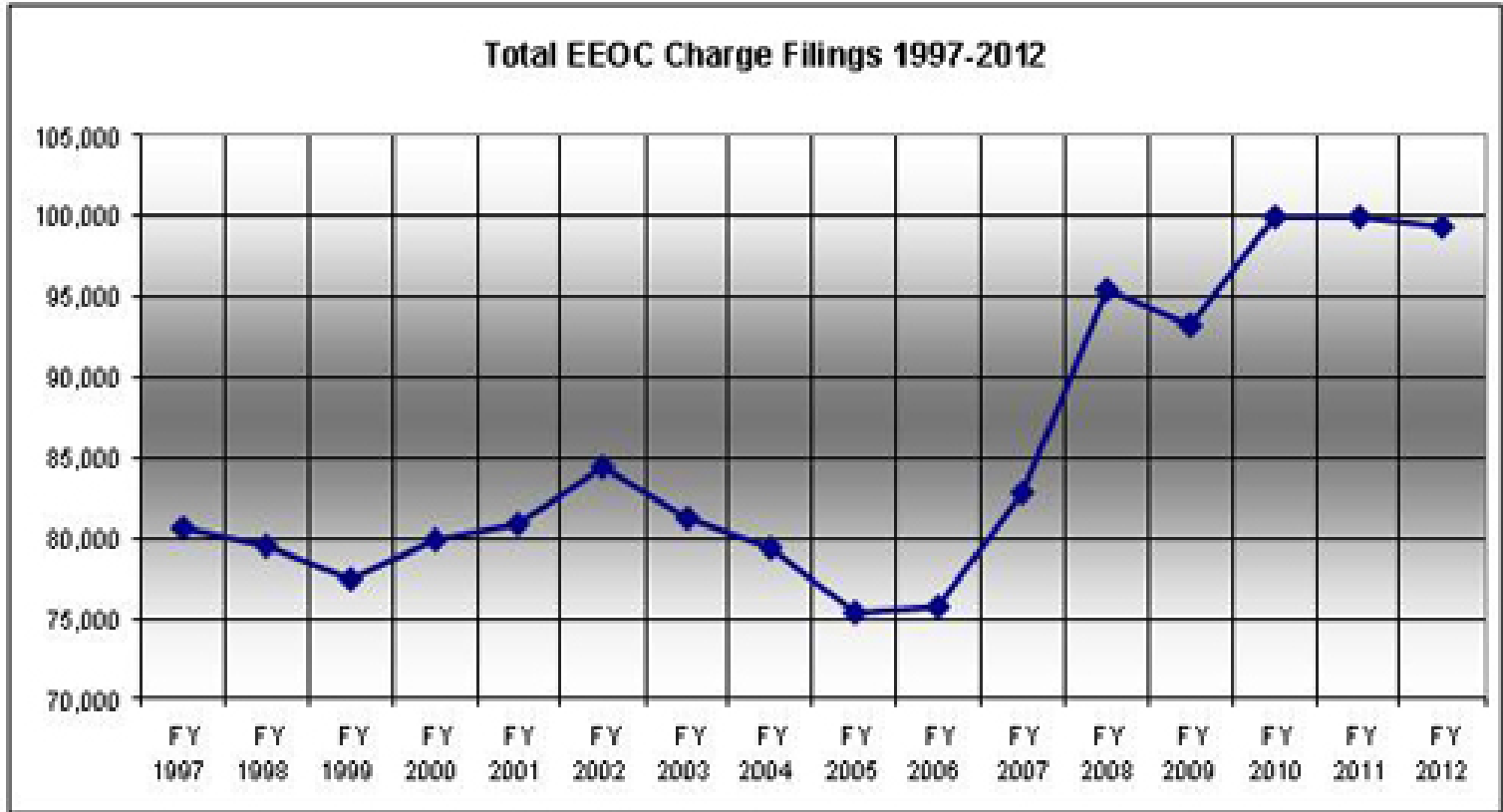


EEOC's Powers

- Commission can file charges and lawsuits
- Broad subpoena powers to investigate
- Require employers to maintain records and make periodic reports
- Intervene in private lawsuit/friend of court
- Scope of investigation limited to charge



Increase in EEOC Charges



- FY 2013: 5.7% decrease in charges *filed* but year of highest monetary recovery - \$372.1 million

Ogletree
Deakins

Best Lawyers
LAW FIRM
OF THE YEAR

U.S. News

WORLD REPORT
EMPLOYMENT LAW -
MANAGEMENT
2014

Best Lawyers
LAW FIRM
OF THE YEAR

U.S. News

WORLD REPORT
LABOR LAW -
MANAGEMENT
2014

How Charges Are Handled

- Individual files timely charge
 - Within 180/300 days
 - EEOC investigates charge
- If reasonable cause, “conference, conciliation, and persuasion”
- If no cause, dismissal and right-to-sue
- 90 days to file suit in federal court



Why Care about the EEOC?

- Employee can sue without regard to the outcome
- EEOC can't impose liability or penalties
- BUT:
 - “Cause” finding may result in suit by EEOC
 - “No probable cause” finding can have psychological and practical effects that benefit employer
 - Sloppy or incomplete investigation and inaccurate response can:
 - **Cost** employer lots of money in increased fees
 - Possibly result in employer **losing** the case in litigation
 - Evidence for lawsuit



Psychological Benefits of “No Probable Cause” Finding by EEOC

- “No probable cause” finding can give charging party a loser’s mentality
- Approximately **50%** of employees who lose at EEOC do not pursue litigation (in our experience)
- “No probable cause” finding makes case less appealing to potential lawyers
- Further reduces chances that employee will take the step of filing a lawsuit



Practical Benefits of “No Probable Cause” Finding by EEOC

- Processing and investigating a fully-answered charge requires more time and effort by EEOC
- Increases processing time at EEOC stage:
 - Reduces employee’s “heat of the moment” enthusiasm over the charge
 - Allows employee to move on to another job or interest
 - Reduces chances of lawsuit filing



EEOC Request for Additional Information

- Increasingly more routine in EEOC charges
- Do not panic but keep your antennas up!



EEOC Investigations – Employer Steps

WHAT
TO DO?

Best Lawyers®
LAW FIRM
OF THE YEAR

U.S. NEWS
WORLD REPORT

EMPLOYMENT LAW –
MANAGEMENT
2014

Best Lawyers®
LAW FIRM
OF THE YEAR

U.S. NEWS
WORLD REPORT

LABOR LAW –
MANAGEMENT
2014

Ogletree
Deakins

Step 1 – Carefully Review the Charge

- Correct employer named?
- Correct address for employer?
- Is it signed by employee?
- Is it timely-filed?
- Does employer have sufficient number of employees for coverage?
- Define parameters of investigation
- Is a response requested?
- Notify your insurance carrier



Step 2 – Deadlines, Extensions & Contact with Agency

- Calendar deadlines
- Request extension of time (if needed)



Best Lawyers®
LAW FIRM
OF THE YEAR

U.S. NEWS & WORLD REPORT
USNews

EMPLOYMENT LAW -
MANAGEMENT
2014

Best Lawyers®
LAW FIRM
OF THE YEAR

U.S. NEWS & WORLD REPORT
USNews

LABOR LAW -
MANAGEMENT
2014

Ogletree
Deakins

Step 3 – Identify Key Players

- Who knows the charging party and the key players?
- Notify key players of receipt of charge
- Notify key players you will expect their cooperation in responding to charge



Step 4 – Institute Litigation Hold

- Destruction of documents can result in “adverse jury instruction” or sanctions
- Include electronic information in “hold”
- Best practices
 - Understand retention policies and practices
 - Understand IT system, including storage, backup
 - Identify key players
 - Notify key players to hold
 - Collect documents
 - Monitor for compliance and updates



Step 5 – Conduct Thorough Investigation

- Identify and interview all key players
- Gather all relevant documents
 - Personnel file of charging party
 - Manager files/desk files
 - E-mails, memos, IMs, text messages
- Notify all witnesses that investigation is confidential as practicable and employer prohibits retaliation



Best Lawyers
LAW FIRM
OF THE YEAR

U.S. News

EMPLOYMENT LAW –
MANAGEMENT
2014

Best Lawyers
LAW FIRM
OF THE YEAR

U.S. News

LABOR LAW –
MANAGEMENT
2014

Ogletree
Deakins

Step 5 – Conduct Thorough Investigation

- Be skeptical:
 - Check verbal information against documents
 - Identify additional witnesses and compare stories
- Identify similarly situated employees and compare actions
- Consider affidavits if you expect employee will not be long-term or may become “hostile”



Step 6 – Prepare a Thorough Response

- Identify your company and what it does
- Identify key players and their roles
- Tell a coherent story
- Answer each factual allegation
- Explain why charging party cannot establish a *prima facie* claim
- Articulate legitimate non-discriminatory reason for each adverse employment action



Step 6 – Prepare a Thorough Response

- Point out inconsistencies or misrepresentations in charge
- Explain that the reason for the adverse action was not only legal but fair
- Highlight company's training, policies and practices
- Include key documents as attachments
 - Not necessarily all requested documents
- Reserve right to amend
- Invite investigator to contact



Step 6 - Your position statement stays with you forever

- Position statement and documents are “FOIA-able” by charging parties and their lawyers
- Any mistakes or incompleteness may be exploited by employee’s lawyers later
- Apparent failure to undertake complete investigation can:
 - Show lack of commitment to non-discrimination principles
 - Damage credibility in lawsuit
- Well-done investigation and position statement show employer takes complaints seriously



Step 6 - “Anything you say can and will be used against you in a court of law”

- Position statement and documentation may be admitted as evidence – at trial or to defeat summary judgment motion
 - “An employer’s position statement in an EEOC proceeding may be admissible to the extent that it constitutes an admission, or to show that the employer has given inconsistent statements in justifying its challenged decision, which may tend to prove that its stated reasons are pretexts.”

Frazier v. Ind. Dep’t of Labor, 2003 U.S. Dist. LEXIS 9073 (S.D. Ind. March 17, 2003)



Step 6 - Beware of Forked Tongues

- Discrepancies between reasons for the challenged employment decision articulated in the EEOC position and other testimony or evidence:
 - Are admissible
 - Diminish employer's credibility
 - Will be exploited by employee's lawyer



Step 6 - Beware of Forked Tongues: Examples

- *EEOC v. Ethan Allen, Inc.*, 44 F.3d 116 (2d Cir.1994).
 - Position statement said **sole** reason for discharge was “decrease in the duties of his special projects position”
 - Later, employer blamed plaintiff’s work performance problems, aversion to paperwork, and unwillingness to travel
 - At trial, employer said it compared plaintiff’s performance with younger employee, and decided that the younger employee’s experience and qualifications were better than the plaintiff’s
 - Court of Appeals held that the employer’s inconsistent reasons were sufficient basis to have allowed the jury to decide the case



Step 6 - Even Minor Inconsistency Can Have Serious Consequences

- *Smith v. Shenandoah Valley Juv. Detention Home*, 2005 U.S. Dist. LEXIS 2095 (W.D. VA 2005)
 - Employer fired the plaintiff for false sick leave report
 - Position statement said employer got tip concerning false report on July 12, and immediately investigated
 - Tip actually received weeks later; employer didn't begin investigating until October
 - **No dispute** that the employee had falsified report
 - Court still denied the employer's motion for summary judgment because of inconsistent statements



Step 7 – Circulate Draft Response

- Reduces errors
- Avoids inconsistencies
- Holds managers accountable for actions and for information provided



Step 8 – Evaluate Settlement and Mediation Possibilities

- Opportunity for free and early discovery
- Assess how serious opponent is
- Obtain additional time to respond
- Mediation may be able to bring charging party to reality



Best Lawyers®
LAW FIRM
OF THE YEAR

U.S. News

WORLD REPORT
EMPLOYMENT LAW –
MANAGEMENT
2014

Best Lawyers®
LAW FIRM
OF THE YEAR

U.S. News

WORLD REPORT
LABOR LAW –
MANAGEMENT
2014

Ogletree
Deakins

Step 9 – Be Prepared for Next Step

- You should be legally prepared if you followed these steps
- Prepare yourself and your company that employee can sue no matter the result of the EEOC charge



What Is an Onsite Investigation?

- In-person visit by EEOC investigator
- Part of investigation of charge
- Face-to-face interviews with managers & employees
- Examining documents
- Inspecting/touring facilities



If Employer Refuses to Comply

- EEOC may
 - Issue subpoena
 - Draw adverse inference against employer to support cause determination
 - Issue cause determination and authorize direct lawsuit by Commission



On-Site Investigations – Generally

- Relatively few done although increasing
- Most occur in Category “A” charges
 - “Category A” charges fall within the EEOC’s national or local enforcement plans and are identified as likely resulting in a “cause” finding
- Advance notice almost always given, and usually scheduled to not disrupt operations



On-Site Investigations – Components

- Respondent interview(s)
 - If management employees, employer has right to have company spokesperson or attorney present
- Tour of Facilities
 - Informal, to obtain general understanding of operations and how policies applied
 - Employer’s “tour conductor” leads tour
 - Includes employer’s attorney



On-Site Investigations –Witness Interviews

- EEOC objectives
 - Understand employers' records and data
 - Test accuracy of records and data
 - Obtain information and assess witness credibility
 - Test discrimination theories and defenses
- Employees (past or present), management, representatives
- EEOC *not* required to identify witnesses prior to visit
- See EEOC Compliance Manual § 23.8 for model questions
- Investigator writes affidavit – employee should:
 - Review for accuracy and make changes if inaccurate
 - Sign the confidentiality statement accompanying the affidavit



On-Site Investigations – Employer Advantages

- Actually seeing work location seems less hostile than EEOC charge might indicate
- Exposes investigator to broader work environment (e.g., minorities, women, etc.)
 - Influence investigator to issue “no cause” finding
- Opportunity to introduce investigator to most credible and persuasive witnesses or prevent potential witnesses from speaking



On-Site Investigations – Employer Disadvantages

- Shows that EEOC is committed to the charge and investigation
- Could lead to discovery of additional victims or evidence during the investigation and by publicizing investigation within workplace
- View physical site where alleged events occurred – “put a face to the claim”



Other EEOC Investigation Issues



Best Lawyers®
LAW FIRM
OF THE YEAR

U.S. NEWS & WORLD REPORT
U.S. News

EMPLOYMENT LAW -
MANAGEMENT
2014

Best Lawyers®
LAW FIRM
OF THE YEAR

U.S. NEWS & WORLD REPORT
U.S. News

LABOR LAW -
MANAGEMENT
2014

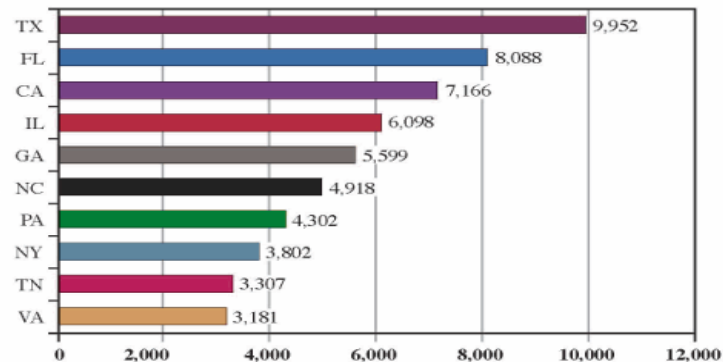
Ogletree
Deakins

Charlotte EEOC Office

- Aggressive investigation of charges
- Jurisdiction over NC, Greenville, SC counties, and Richmond, VA counties
- Lynette Barnes, Charlotte Regional Attorney:
 - “The EEOC will continue to aggressively prosecute cases where employees are subjected to severe discrimination.”

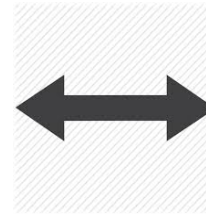
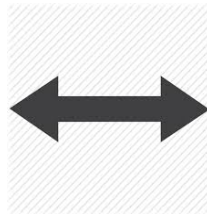


EEOC CHARGES - TOP 10 STATES



Inter-Agency Cooperation

- EEOC and other U.S. agencies are increasingly working together in enforcing laws
- *E.g.*, the EEOC, DOL, and INS are working together to identify and export illegal immigrants discovered during audits and charge investigations



New EEOC Pregnancy Enforcement Guidelines (July 14, 2014)

- Increased focus on pregnancy-related impairments as covered “disabilities” under ADAAA protection
- Increased focus on providing reasonable accommodations to pregnant employees
 - E.g., modified schedule, teleworking, light duty, workplace policies & tasks



Executive Order – July 21, 2014

- Prohibits federal contractors from discriminating based on sexual orientation
- Prohibits federal agencies from discriminating based on sexual orientation
- Applies to government and 30,000 companies employing 28 million workers (1/5 of US workforce)



Ogletree
Deakins

Best Lawyers®
LAW FIRM
OF THE YEAR

U.S. NEWS & WORLD REPORT
USNews

EMPLOYMENT LAW -
MANAGEMENT
2014

Best Lawyers®
LAW FIRM
OF THE YEAR

U.S. NEWS & WORLD REPORT
USNews

LABOR LAW -
MANAGEMENT
2014

Questions?

- Ashley P. Cuttino
 - ashley.cuttino@odnss.com
 - 864-240-8302



EEOC Investigations

**Carolinas AGC Foundation
2014 HR and Safety
Conference**

Presented By:

Ashley P. Cuttino

**LABOR & EMPLOYMENT
LAW**

**FROM A DIFFERENT
ANGLE**

**Ogletree
Deakins**