

## **Representing Clients During the EEOC Process**

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**January 10, 2003  
NAPAS Program Management Conference  
San Diego, California**

- 1. Understand how the U.S. Equal Employment Opportunity Commission (EEOC) processes charges (or complaints) of discrimination. In some cases, the state fair employment practice agency (FEP) will be the agency that does the initial investigation. Therefore, you also need to determine the differences between how the EEOC and FEP agency operate. See Tab 1: Arizona Center for Disability Law Guide: “How to Enforce Your Employment Rights Under the ADA”.**

- ‘ Intake procedures
- ‘ How cases are triaged
- ‘ The deadlines for objecting to discovery requests
- ‘ Whether charging party’s attorney may obtain a copy of the respondent’s position statement and if so, how
- ‘ How your EEOC District Office or state FEP agency view charges written by charging party or charging party’s attorney rather than their own staff

**2. Know the applicable deadlines for filing a charge of discrimination with the EEOC.**

**Filing Limitation Period.** The deadline for filing a charge of discrimination could be as short as 180 days or up to 300 days from the date the charging party knew or reasonably should have known about the discrimination. The deadline is 300 days unless the state FEP does not have jurisdiction of that type of discrimination. For example, if your state law prohibits employment discrimination on the basis of a physical disability only, then persons filing a charge of employment discrimination on the basis of a mental disability would have 180 days to file a charge of discrimination. Under those same facts, a person filing on the basis of a physical disability would have up to 300 days to file a charge of discrimination.

**What Constitutes Filing A Charge for Purposes of the Filing Limitation Period.** The safest course of action is to make sure that the charge of discrimination is received by the EEOC prior to the deadline. However, jurisdictions have made different rules about what action will constitute filing a charge. In some jurisdictions - - for example - - the deadline will be satisfied when the EEOC receives a completed EEOC questionnaire that is signed and dated by the charging party and sufficiently states the basis of the charge. Check your jurisdiction for the applicable rule.

**3. Charges may be filed with the EEOC in person, via mailing an EEOC questionnaire, and by telephone. Because of the importance of the charge, in many cases you will want to attend the telephonic or in-person interview of the charging party. You will also probably want to complete the questionnaire and bring it to the meeting or mail it immediately following the meeting.**

**4. Request in writing any necessary accommodations your client may need from the EEOC or state FEP to participate in the intake and in the remainder of the administrative process.**

**5. Work with your client to completely and accurately fill out the EEOC questionnaire. See Tab 2: Blank EEOC Questionnaire. You may wish to interview the client, prepare the questionnaire based on the interview and then review the questionnaire with the client to make any necessary revisions. Include in the questionnaire:**

- ‘ a list of witnesses including the name, home address (if available), home telephone number (if available), position at the company if employed by the company, and a summary of the information s/he has relevant to this case;
- ‘ a list of documents that either are provided with the questionnaire or which will be

provided in the future; and

a chronology of relevant events. See Tab 3: Sample Chronology.

If there is a reason the client cannot read the questionnaire (e.g. ASL is the primary language and not proficient in written English or has severe dyslexia) then you will want to add a statement clarifying that point. For example: “This EEOC questionnaire was completed and read using an ASL interpreter.” followed by the client’s signature and date.

4. If this is a case in which you need to make an argument about why the ADA protects your client as an individual with a disability or why this conduct constitutes discrimination, enclose the questionnaire with a cover letter setting forth your argument and the applicable law.

5. In some cases, you may prefer to prepare a charge and have your client sign the charge and return it to the EEOC. However, you should follow this practice only after you know how well received it will be when prepared by you as opposed to the EEOC staff. Also, you may want to wait to do that until you are familiar with the level of detail and information that the EEOC puts in the charge. For example, most EEOC charges do not contain a lot of detail.

6. If the EEOC prepares the charge you will want to review the charge with the client to ensure that it is accurate and contains every basis for discrimination, each type of discriminatory or retaliatory conduct, and all necessary allegations to support each type of discriminatory conduct. See Tab 4: Blank copy of the EEOC charge form.

If an individual claims she was subjected to harassment as a female with a disability, then both the boxes for “gender” and “disability” should be checked.

If an individual claims failure to accommodate and disability-related harassment, then both of those allegations need to be contained in the charge with sufficient facts to support each allegation.

If you represent an individual who has already filed the charge of discrimination, you will wish to review it after interviewing them to ensure that it covers all of the necessary information. If it does not contain every applicable basis for discrimination and all necessary allegations to support those claims, then you must write to the EEOC and ask that the charge be amended. Similarly, if new events occur that equate to a new type of discrimination you will want to inform the EEOC and ask that the charge be amended or a second charge filed.

The circuit court of appeals vary in the rules for when an individual can sue on a claim of discrimination not specifically contained in the charge of discrimination. You need to become familiar with the rules in your jurisdiction in the event that you represent an individual after the charge - - which did not contain all of the allegations or basis for discrimination - - has been closed.

7. Make an informed decision with your client about whether to request mediation from the state FEP agency or the EEOC. This will depend in part upon the mediation program at that agency, but may also depend upon the nature of the claim, the employer’s attitude and the type

of relief sought. Mediation is almost always a worthwhile effort in a situation where there is a continuing employment relationship. See *An Evaluation of the Equal Employment Opportunity Commission's Mediation Program*, September 20, 2000 located at <http://www.eeoc.gov/mediation/report/index.html>.

**8. After the charge has been filed and the investigation begun, here are some ways in which you can help your client:**

- ‘ **Cooperate with the agency to obtain information the agency requests.**
- ‘ **Make timely and legitimate objections to requests for information from the agency. In some cases you may have a legitimate objection to information the agency requests. If so, you will want to make the objection in writing within the deadline set forth by state or federal regulation. One obvious objection is attorney/client privilege.**
- ‘ **Prepare your client if s/he is going to be interviewed. In interviews the witnesses are generally sworn in and the interview is tape recorded. If your agency is representing the client, you have a right to attend.**
- ‘ **Request a copy of the Respondent's position paper and respond to any legal arguments and determine if any additional evidence is needed to rebut factual allegations. (If the District EEOC office or state FEP agency has a practice of not disclosing the Respondent's position statement the investigator will usually summarize the position and arguments and even cite cases used by the Respondent.)**
- ‘ **Prepare your witnesses for interviews or obtain witness statements, but be careful how you prepare them because the interviewer may ask them about the content of the preparation.**
- ‘ **Respectfully ask the investigator to include specific requests for production of documents if there are documents in the respondent's possession you believe will prove discrimination.**

**9. The goal is a “reasonable cause finding of discrimination. With a reasonable cause finding, the EEOC will attempt conciliation and the employer is usually more receptive to resolving the matter. Even if conciliation is unsuccessful, the reasonable cause finding may be admissible evidence and may defeat a motion to dismiss or a motion for summary judgment. The circuit court of appeals vary in how they treat a reasonable cause finding. The Ninth Circuit Court of Appeals treats a cause finding in an ADA case as per se admissible. It is judicial error to exclude a reasonable cause finding from evidence. The Ninth Circuit has also ruled that summary judgment is not appropriate where there is a non-conclusory reasonable cause finding from the EEOC. Be aware of the rules in your jurisdiction with respect to admissibility of EEOC findings.**

**10. If a charge is dismissed without a reasonable cause finding, you may ask for reconsideration. See Tab 5: Notice of Dismissal form. Usually reconsideration is not granted. However, if there is either new evidence or a new legal development that the agency did not**

**consider it is possible a dismissal can be rescinded and the charge reopened for investigation. Keep in mind that the 90 day limitation period for bringing a lawsuit under the ADA is not tolled and is still running while the EEOC reconsiders the matter.**

**11. Due to limited resources most state protection and advocacy agencies will not have the resources to represent all callers in the EEOC process. Therefore, it is helpful to develop materials that can be disseminated to callers which explains the process to them and tells them what they can do to improve the chances of a cause finding. See Tab 1 and Tab 6: Arizona Center for Disability Law guide: “Taking Action: How to File A Charge When You’ve Been Treated Unfairly by An Employer Because of A Disability” (low literacy guide).**