

Gavel to Gavel: Checking the box not enough

By: Chris Thurchley Guest Columnist September 13, 2017 0



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Because of the rising number of employment claims and the resulting rise in defense costs, more employers are opting to handle the investigation of and response to charges of discrimination, harassment, and retaliation themselves, rather than engaging outside legal counsel.

The approach may provide some initial advantages but there can be definite disadvantages, too. Deciding between the two approaches essentially comes down to an organization's risk tolerance.

For those employers who opt to go it alone, the most valuable advice to help them maximize their defense is to know that an employee checking a box on a form alleging a charge of discrimination is typically not enough for a viable claim. Simply checking the box and not providing any initial factual information to back the charge is a weak claim.

Every charge filed with the Equal Employment Opportunity Commission or a state fair employment practice agency, like Oklahoma's Office of Civil Rights Enforcement, has a check-the-box section on its forms where the charging party must check each type of claim they are asserting. However, that section is followed by the most critical section: the Particulars section, where the factual allegations of the charge are summarized.

In *Reveles v. Catholic Health Initiatives*, the charging party/plaintiff checked the sex and retaliation boxes but failed to include any particulars, any factual allegations that would provide the respondent employer notice of what alleged acts or omissions formed the basis for the retaliation claim. This resulted in Catholic Health prevailing and the claim being dismissed, with the legal reasoning that the plaintiff failing to provide factual allegations invoked "retaliation without providing any factual support. It therefore fails to inform the reader of the scope of the administrative investigation that can reasonably be expected to follow."

The takeaway for employers is that sufficient facts must be alleged in the initial charge. When presented with an allegation, employers should immediately make sure the particulars area of the form is completed. If not, employers should not attempt to address unknown particulars with guesswork. Instead, it is best to respond to clearly articulated claims and wait to see if the charging party amends the paperwork. And, if the charge isn't amended, it will likely be subject to dismissal when or if a lawsuit is filed.

Chris Thurchley is an attorney at GableGotwals practicing in the area of labor and employment law, Employee Retirement Income Security Act and general litigation.

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