

A Charge-d Atmosphere: A Few Pointers When A Current Employee Files A Charge

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Most employers have had to respond to a discrimination charge filed with the U.S. Equal Employment Opportunity Commission (EEOC) and/or a corresponding state agency. A large percentage of such charges are brought by terminated employees, claiming that a termination was discriminatory. When that happens, employers gather documentation, provide requested information and prepare a position statement. A significant amount of the time, the charge is dismissed and the employer prevails. But some charges are brought by current employees, alleging discrimination in the form of:

- Failure to accommodate a disability
- Sexual harassment or an otherwise unlawful working environment due to membership in a protected class
- Discrimination in pay
- Failure to obtain a promotion

Any action – big or small, real or perceived – taken against an employee has the potential of a [retaliation claim](#). Once a claim is filed, the employee is now in an additional class protected by law – the class of people who have exercised their legal right to file a charge. Retaliation charges often are trickier to defend than the core charge; it is usually easier to demonstrate the non-discriminatory reason for a job decision than it is to “un-prove” the closeness in time of a job action to a charge. Employers faced with this situation should consider the following points:

1. As with a member of any other protected class, the employee needs to meet the conduct, attendance and performance standards to which all employees are held. Because of the potential of a charge, the employer needs to be able to **prove** consistency, so documentation is more important than ever.
2. At the same time, the employer does not want to be seen as nitpicking the charging party/employee, so it is usually not advisable to over-communicate in a manner or frequency different than with any other employee. Therefore, the above-noted documentation might be in the form of internal notes.
3. Determine the strategy for communication with managers and employees who have the most contact with the charging party. If they

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are unaware of the charge, is it better they remain unaware so they cannot be accused of taking action in retaliation for the charge? Or is it better to make them aware and document that they have been told the employee has a right to file a charge, and the company will not tolerate retaliation against the employee? More often the managers are or will become aware of the charge, so I typically lean towards the latter, but that decision should be made with each charge.

4. What, if any, communication will there be with the employee about the charge? Typically, I think it is beneficial to tell the employee that we will cooperate with the agency and respond to the charge, we respect your right to file a charge, and tell us if you feel that anybody is treating you differently because of the charge. Often it is harder to show retaliation if the employer just owns the situation right up front than pretends it is not happening. But again, make sure this decision is made intentionally.

As the above items and issues should indicate, this is one of the trickiest areas of employment law. Therefore, consulting with counsel is usually advisable.