



## Starting With the EEOC Charge...

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**Fisher Phillips** To Terminate Or Not To Terminate . . .

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**Fisher Phillips** Delivering The Message

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### If You Ignore It, It Will Not Go Away

- Stone-walling is not an effective tactic. The EEOC can issue subpoenas.
- Notify Management/Legal Counsel
- Ensure Litigation Hold Is Sent



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### Document And Computer Evidence Retention

Litigation Holds: Once a charge is filed, a company has an obligation to preserve tangible and electronic records that relate to the employee's claims. The scope of records may include e-mails, personnel file and other records for the employee and comparable employees. Inadvertent destruction of records, even pursuant to a policy, can have grave consequences to an employer's defense including court sanctions, prohibitions on presenting a defense, and jury instruction allowing an adverse inference to be drawn from the absence of the record.

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### EEOC Charge Process In A Nutshell

- Charge within 300 days from discriminatory event
- EEOC sends "Notice of Charge of Discrimination"
- Option to mediate
- Requests statement of position/information request
- Position statement to EEOC



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### EEOC Charge Process In A Nutshell

- EEOC may conduct on-site investigation:
  - Presence of counsel for management interviews
  - Not for non-management interviews
- Notice of Right to Sue – 90 days to file suit from receipt of letter

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### FCRA Complaint

- Dual filing
- 365 days to file
- Automatic right to sue after 180 days
- Four-year statute of limitations, if “no cause” determination is not issued within 180 days of filing of complaint

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### General Themes

- Regard the administrative proceeding as a useful opportunity, prior to commencement of formal litigation, to gather facts and prepare defenses while memories are fresh and employee-witnesses are available.
- Respond with a view toward litigation in court.
- Respond specifically to the allegations.

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### Objectives

- Obtaining a “No Cause” determination
- Dissuading employee from filing suit
  - When told that they don't have a case by an independent third party, many employees will drop the matter
- Preserving facts and defenses if suit is filed



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### Keep In Mind . . .

- You're stuck with what you submit (or you will suffer the consequences)
- Lying in a position statement – not a good thing to do



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### How Much Information Do I Provide?

#### Two General Theories

**Theory # 1:** Act as if you have the right to remain silent – tell the EEOC you did not discriminate and provide no additional information

- Disadvantages:
  - More likely to have an on-site investigation
  - More likely to have a reasonable cause finding
  - More likely to irritate the EEOC toward your company
  - More likely to have the EEOC file suit on the employee's behalf
- Advantages:
  - Less likely to provide an inconsistent position that can be used against you later

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### How Much Information Do I Provide?

**Theory # 2** – Provide a detailed statement of position

- Disadvantages
  - Increased likelihood of inconsistent positions during litigation
  - Educating plaintiff's counsel
  - Unintentionally making admissions that you violated the law
- Advantages
  - Increased likelihood of dismissal of charge
  - Increased likelihood that neither the EEOC nor the employee will file suit

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### How Much Information Do I Provide?

Only submit those documents or portions of files necessary to respond to specific issues

- Personnel Files
- Handbooks

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### Analyze The Issues

- Current Employee
  - Prompt Remedial Action
  - Retaliation
- Former Employee
- Systemic/Class Allegations
- Work Product



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## Plan Your Investigation

- Assemble documents
- Conduct interviews
  - Notes
  - signed statements
- Review policies



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## Use The Investigation

- To determine potential employer liability and exposure.
- To respond to the Charge by gathering relevant evidence to defend a potential lawsuit.
- To discover pertinent facts to support/rebut the allegations of discrimination, harassment or retaliation.
- To determine whether the Charging Party and other similarly- situated employees who have engaged in comparable misconduct or violations of work rules have been treated in a consistent manner.
- To determine whether settlement or mediation of the claim is a possibility.
- To document the employer's prompt corrective action.

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## Mediation

- Advantages
  - Fact-finding
  - Confidential
  - Forum for voicing complaint
  - Possible early, inexpensive resolution
  - Alternative resolutions
  - Avoid position statement
  - No public record if settles
- Invited or Can Request
- EEOC Will Not Mediate Certain Claims



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## Back To Our Story . . .



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## Position Statement

U.S. Equal Employment Opportunity Commission  
 Miami District Office  
 100 SE 2nd Street Suite 1500  
 Miami, Florida 33131

RE: Colette Wolf v. Company  
 EEOC Charge No.: 510-2016-00009

Dear Mr. Investigator:

This letter is intended as the statement of position of the Company in connection with the charge of discrimination filed by Colette Wolf. Ms. Wolf claims that the Company discriminated against her because of her age (age 58) and alleged disability. The Company adamantly denies that it discriminated against Ms. Wolf. As is more fully set forth below, all employment actions taken with respect to Ms. Wolf were based on legitimate, non-discriminatory business reasons, and were in no way based upon her age or disability.

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## Position Statement

- Three people who participated in decision to terminate were all over 40.
- Unaware of cancer diagnosis at the time of her termination.
- Poor performance; note to personnel file.
- Denial of age-related remarks.
- Handbook provides for termination after excessive absences.

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## A Year Goes By, Then . . .

- Notice of Right to Sue
- Lawsuit
- Discovery:
  - And now Cathy the HR Manager gets deposed (and it's going to be painful).

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### I. SUMMARY OF EMPLOYMENT

Colette Wolf was hired by the Company and held the position of Team Lead. Ms. Wolf reported directly to Charles Caulkins. During the relevant time period, Ms. Wolf's performance was dismal. Her sales numbers were down and she was constantly missing work. The Company's handbook states that termination is warranted for poor performance and excessive absenteeism. The Company sent a note to Ms. Wolf documenting her poor performance. It is important to note that Mr. Buchsbaum, Mr. Caulkins, and Mr. Stutin, all over the age of 40, participated in the decision to terminate Ms. Wolf. Despite her claims to the contrary, the Company was unaware that Ms. Wolf was diagnosed with cancer at the time of her termination. The Company adamantly denies that Mr. Buchsbaum made any age related remarks.

Cathy, Steve, and Charles, all over the age of 40, participated in the decision to terminate Colette.

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Colette's performance was dismal during the last three years of her employment with the Company. Indeed, Steve sent a note to her personnel file documenting her poor performance.

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**I. SUMMARY OF EMPLOYMENT**

Colette Wolf was hired by the Company in 2008. During the relevant time period, Ms. Wolf held the position of Sales Representative, who in turn reported directly to Mr. Charles Caulkins, who served as Human Resource Manager. Ms. Wolf's performance was consistently poor. Her sales numbers were low, and she was constantly missing work. The Company's handbook states that termination will occur after excessive absenteeism. As a result of Ms. Wolf's poor performance and excessive absenteeism, the Company made the decision to terminate her employment.

It is important to note Ms. Stutin, Mr. Buchsbaum, and Mr. Caulkins, all over the age of 40, participated in the decision to terminate Ms. Wolf.

Despite her claims to the contrary, the Company was unaware that Ms. Wolf was diagnosed with cancer at the time of her termination.

The Company adamantly denies that Mr. Buchsbaum made any age related remarks.

**The Company's handbook states that termination will occur after excessive absenteeism.**

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Despite her claims to the contrary, the Company was unaware that Ms. Wolf was diagnosed with cancer at the time of her termination.

The Company adamantly denies that Mr. Buchsbaum made any age related remarks.

**The Company was unaware that Colette was diagnosed with cancer at the time of her termination.**

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**The Company adamantly denies that Steve made any age related remarks.**

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9  
AVOIDABLE MISTAKES  
ON THE FRONT LINES OF WORKPLACE LAW™

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#1 AVOIDABLE MISTAKES  
Problems With The Paperwork



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No Documentation

- If it was important, why didn't you write it down?

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### Poor Notes From Critical Meetings or Events

- Illegible
- Don't identify note taker
- Don't include a date
- Waste of time and expense for attorney and those assisting
- Presents an even bigger problem where the notes have independent legal significance



"Here are the minutes from our last meeting. Marty wasted 12 minutes, Justice wasted 7 minutes, Carl wasted 27 minutes, Ellen wasted 9 minutes..."

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### Practical Advice

- Date notes
- Identify note taker
- Type the notes

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# #2

## AVOIDABLE MISTAKES Manager Fails To Verify Easily Verifiable Fact



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- Confusing and potentially prejudicial

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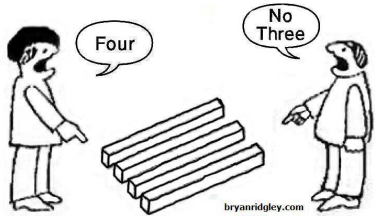
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### Practical Advice

- Re-verify all critical facts before committing them to the "record."



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### #3 AVOIDABLE MISTAKES Know What Your Policies Say



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- Do not take actions that contradict your company's established policies.

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### Practical Advice

- Review policies at issue
- Keep copies of the policies out when completing corrective action documents

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# 4

AVOIDABLE MISTAKES

High Ranking Manager Signing Off On Termination Decisions Without Knowledge Of The Facts



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- Anyone who signs a termination form:
  - needs to know the facts
  - should expect to be deposed

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### Practical Advice

- Establish a procedure where the manager presenting the termination:
  - fully documents the facts in writing
  - meets personally with those signing off

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#5

AVOIDABLE MISTAKES

### Managers Making Errant Remarks Under The Guise Of Joking



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- Errant comments can turn a good case into a bad case.

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### Practical Advice

- Zero tolerance -- no room in the work place for these types of comments

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### #6 AVOIDABLE MISTAKES Managers Retaining Their Own Personal Files On Team Members



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- Considered "company" files
- Must disclose to attorney
- Failure to disclose:
  - embarrassing at a deposition
  - could subject company to court sanctions

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### Practical Advice

- When a document request comes in:
  - request all managers, group leaders, etc. to disclose **all** files
  - not just "official" files

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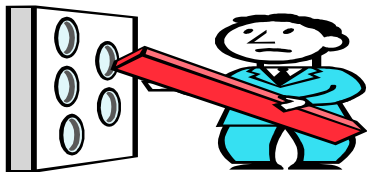
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### #7 AVOIDABLE MISTAKES Not Righting A Wrong



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- After acquired evidence exonerates a team member
- But, manager refuses to remedy situation
- No one wants to take someone back

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### Practical Advice

- When you see a mistake has been made, do the right thing.
- Don't cover it up or attempt to explain the mistake away.

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#8

AVOIDABLE MISTAKES

### Refusal To Concede A Bad Fact



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- Not all facts are in your favor.

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### Practical Advice

- Concede bad facts when necessary.
- Don't attempt to argue them away.

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#9

### AVOIDABLE MISTAKES Failure To Prepare For A Deposition



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- Too busy
- Been through it before
- I know the facts

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### Practical Advice

- Correct your manager's priorities

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### Final Questions

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**THANK YOU**  
FOR THIS OPPORTUNITY

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