Sexual Harassment and Retaliation

A Practical Handbook for Plaintiff and Defense

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TORT TRIAL & INSURANCE PRACTICE

CHAPTER 4

Responding to the Charge and the Complaint

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Defending your first sexual harassment case can be daunting—the drama among the participants may cause excessive stress for your client and witnesses, the factual elements of the claims may be complex and extensive, and the administrative process may be entirely new and unfamiliar. Further, discrimination law under Title VII of the Civil Rights Act of 1964 (Title VII) is a constantly evolving topic as the Equal Employment Opportunity Commission (EEOC) and the courts have added different interpretive glosses to the statutory text.[1]

This chapter will provide guidance on two related topics: responding to a sexual harassment administrative charge and responding to a sexual harassment complaint filed in court. How the employer responds to the charge of discrimination frequently shapes its defenses to the administrative charge and eventually the lawsuit. Although this chapter will mainly discuss procedure and case law related to claims under Title VII[2], attorneys should be aware that many sexual harassment cases are brought under state or local law.[3] Some state statutes, including those in California and Hawaii, are more protective of complainants than federal law. Many state statutes, for example, may not have damages caps as Title VII does.[4] Knowing the key differences between your state and local law and Title VII is critical in forming the defense strategy for your client.

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1. For example, several circuit courts of appeal have held that discrimination based on sexual orientation or transgender status qualifies as sex discrimination. *See, e.g.,* E.E.O.C. v. R.G & G.R. Harris Funeral Homes, Inc., 884 F.3d 560 (6th Cir. 2018) (Title VII prohibits discrimination based on transgender identity as unlawful sex discrimination); Zarda v. Altitude Express, Inc., 883 F.3d 100 (2d Cir. 2018) (*en banc*) (employee entitled to bring Title VII claim for discrimination based on sexual orientation); Hively v. Ivy Tech Community College of Indiana, 853 F.3d 339 (7th Cir. 2017) (*en banc*) (Title VII prohibits discrimination based on sexual orientation).

2. 42 U.S.C. §§ 2000e–2000e-15 (West, WestlawNext through P.L. 115–223).

3. *See, e.g.*, Illinois Human Rights Act, 775 Ill. Comp. Stat. 5/1-101 through 10/104 (West, WestlawNext through P.A. 100–1114, of the 2018 Reg. Sess.) and Chicago, Illinois Municipal Code §§ 2-160-010 through 2-160-120.

4. *See* 42 U.S.C. § 1981a(b)(3) (West, WestlawNext through P.L. 115–223).

I. RESPONDING TO THE ADMINISTRATIVE CHARGE

Before a charging party may take her case to federal court under Title VII, she[5] must first exhaust her administrative remedies. Typically, the charging party will file a charge of discrimination with the EEOC and/or with an appropriate state fair employment practices agency. Failure to file a charge with the EEOC will bar the charging party from pursuing her case in federal court.

A. Evaluating the Charge

Once the charge has been filed, the employer (known as Respondent at the administrative level) will be sent a copy of the charge along with procedural information from the EEOC. At that time, the employer will come to you, the litigator who will handle the case, to conduct an initial review of the charge and either perform or supervise the subsequent investigation.

The defense attorney's first order of business should be to identify any weaknesses and potential defenses on the face of the charge itself. These weaknesses may include whether the right entity is named as the defendant employer or whether the charge was filed within the proper limitation period. In states where a state or local agency also enforces a prohibition against the same type of employment discrimination (deferral states), a charging party may file a charge for events that occurred in the 300 days prior to the filing date.[6] Otherwise, the charging party must file within 180 days of the unlawful discrimination. Events that occurred prior to that date are time-barred and the employer's response to the charge should make note of that defense.

The employer must also have 15 or more employees working for 20 or more weeks to be considered an "employer" under Title VII.[7] If the company does not employ enough employees, this should be brought to the investigator's attention immediately. Some state and local fair employment practices statutes have jurisdiction over smaller employers, so the defense attorney should be mindful of the varying laws the client's employer may be subject to.[8]

Additionally, the attorney should determine whether the charging party has alleged any facts that invoke the continuing violation doctrine or has only alleged discrete acts of unlawful discrimination. The continuing violation doctrine provides that when a plaintiff alleges a hostile work environment claim, "as long as the employee files her complaint while at least one act which comprises the hostile work environment claim

5. Although the authors on occasion use feminine pronouns to refer to the hypothetical charging party or plaintiff, sexual harassment claims are by no means filed solely by women against men. *See* "Charges Alleging Sex-Based Harassment FY 2010-FY2017," Equal Employment Opportunity Commission, https://www.eeoc.gov/eeoc/statistics/enforcement/sexual_harassment_new.cfm.

6. 42 U.S.C. § 2000e-5(e)(1) (West, WestlawNext through P.L. 115–223).

7. 42 U.S.C. § 2000e (West, WestlawNext through P.L. 115–223).

8. *See, e.g.*, Illinois Human Rights Act, 775 Ill. Comp. Stat. 5/2-101(B)(1)(b) (an "employer" for sexual harassment complaints is any company employing one or more employees).

is still timely, 'the entire time period of the hostile environment may be considered by a court for the purpose of determining liability.'"[9] The Supreme Court in *Morgan* distinguished discrete acts that form the basis for traditional discrimination claims from continuing conduct that forms the basis of hostile work environment claims. Only hostile workplace claims are subject to the continuing violation doctrine. This should indicate to the defense attorney that there is a way to attack the charge. If the plaintiff has alleged only one specific discrete act of unlawful discrimination, for example, then a charge alleging a hostile work environment may be very weak as the factual allegations do not suggest a continuing course of discriminatory conduct.

Finally, the defense attorney must evaluate the scope of the charge to determine which protected classes and wrongful actions are implicated in the charge. The facts alleged in the charge itself will indicate the scope of the EEOC's investigation, potentially the employer's investigation, and the possible future lawsuit filed by the plaintiff. The charge contains boxes that the charging party must check to indicate which protected class is implicated in the charge or upon which basis the charge is brought. If the charging party fails to check the appropriate boxes, her claim may be significantly narrowed. For example, if the charging party fails to check the box for "sex" and in her narrative statement alleges retaliation based upon a prior complaint of sex discrimination, only the retaliation claim may be viable.[10] The attorney should also carefully examine all the allegations to which the employer must respond, as well as any details described in the employee's narrative. These allegations will be the starting point for the internal investigation into the charge.

B. Conduct the Investigation and Draft the Position Statement

After reviewing the administrative charge, the defense attorney's next objective is to learn as much as possible about the facts and circumstances of the case. The attorney should speak to the appropriate point of contact with the employer to gather information about the charging party, the events and circumstances implicated in the charge's allegations, and the factual bases for the charging party's claims. It is often helpful to make a personal visit to the worksite to conduct the investigation. Identifying and interviewing witnesses with personal knowledge of the events is critical. Do not make the mistake of relying solely on a secondhand account from upper management. Early interviews of critical witnesses may prevent loss of key evidence due to memory lapse, employee turnover, or even worse, spoliation.

In addition to witness interviews, you will need to gather pertinent documents. It is critical to issue a litigation hold letter to the company to ensure compliance with the duty to preserve evidence. The litigation hold letter and any follow-up guidance should

9. Heath v. Bd. of Supervisors for S. Univ. & Agric. & Mech. Coll., 850 F.3d 731, 736 (5th Cir. 2017), *as revised* (Mar. 13, 2017), quoting National R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 117, 122 S. Ct. 2061, 153 L.Ed.2d 106 (2002).

10. *See, e.g.*, Richter v. Advance Auto Parts, Inc., 686 F.3d 847, 852 (8th Cir. 2012) ("[r]etaliation claims are not reasonably related to discrimination claims").

include specific instructions regarding electronic data (e.g., advise the client to turn off all auto-archive or auto-delete functions for relevant custodians for the duration of the case). The defense attorney should also inquire into personal devices such as cell phones, which may have relevant text messages or voicemails that must also be preserved and collected.

The first documents to gather are typically the employee's personnel file, the employee handbook, and any documents regarding the employee's performance, attendance, or disciplinary actions. You should also gather parallel information on any similarly situated employees to bolster the defense of nondiscrimination. In gathering the documents, ensure you have all documentation of any adverse employment actions, whether implicated in the charge or not. These will include demotions, salary reductions, and terminations, but may also include seemingly minor incidents such as oral and written warnings or a change of workstation. Finally, collect any applicable policies from the employer that were not in the employee handbook, such as the nondiscrimination and anti-harassment policy, anti-retaliation policy, acceptable use policy for computers or other employer technology, or leave of absence policy.

Witness interviews should be conducted after an initial review of the documents. Your interview list should include all individuals mentioned in the charge, decision-makers, and supervisors of the charging party, as well as anyone having relevant information. This may include coworkers, contractors, or vendors. Conducting witness interviews early in the process will lock in testimony and preserve evidence in the event the witnesses are later unavailable.

Although a full discussion of retaliation is outside the scope of this chapter, during the internal investigation into the complaint or charge of sexual harassment or discrimination, the employer's attorney should make it very clear that any adverse employment actions taken against the charging party may be considered retaliation for engaging in protected activity. A weak sexual harassment case may be converted into a compelling retaliation case under Title VII if any of the employer's supervisors take actions against the charging party or against witnesses supporting the charging party that may be considered retaliation. Emphasizing this point during interviews may prevent that bad outcome.

C. Participate in the EEOC Process

Upon receiving the charge, the employer's attorney should consider whether mediation at the EEOC is a worthwhile route to resolving the dispute. The EEOC asks both the employee and employer whether they are interested in voluntary mediation. If either party refuses to mediate, the charge is referred to an investigator. If the parties agree to mediate, the EEOC will refer the charge to an internal mediator. If mediation fails, then the charge is referred back to an investigator. The mediation itself is free and can potentially resolve disputes faster than proceeding through the charge process.

If mediation is not pursued, the employer must submit a position statement that responds to the charge. The position statement should identify, explain, and expose the weaknesses in the charge. It should also highlight information from the employer's

internal investigation that refutes or undermines allegations in the charge. This often includes attached documents such as employee demographic charts, information from personnel files of similarly situated employees, and policies from the employer. The position statement's function is to illustrate why no discriminatory, harassing, or retaliatory actions occurred and give the investigator a reason to recommend a "no cause" finding. When drafting the position statement, the attorney should also be sure to gather any specific information and documents requested by the EEOC to provide along with the position statement itself. In many cases, the investigator will perform an on-site visit to the employer's worksite to conduct employee interviews. Although the defense attorney may be present for any interviews with management personnel of the employer, the EEOC investigator is permitted to interview nonmanagement personnel without the employer's attorney or other representative present.[11]

The employer's attorney should be diligent and thorough in conducting or overseeing the internal investigation and providing responses to the EEOC's requests for information. Although this process may be time-consuming, a proper response to the EEOC is more likely to generate a finding of no cause and increase the likelihood of resolving the dispute favorably to the employer prior to any litigation being filed.

After submitting the position statement and supplying the requested information to the EEOC (a process that can occasionally go through several rounds of additional information requests), the investigator will ultimately make a recommendation to the EEOC of a finding of "cause" or "no cause" with respect to the charge of discrimination. If the EEOC determines that there is no reasonable cause to believe unlawful discrimination occurred, then the charging party will receive a Notice of Right to Sue, which informs the charging party of her right to file a complaint in federal court within 90 days of receipt of the notice. The employer is also given a copy of the right to sue letter.

If, however, the EEOC determines that there is reasonable cause to believe unlawful discrimination occurred, then the employer and charging party will receive a Letter of Determination, which states that discrimination occurred and invites the parties to join the agency in the conciliation process. This is an informal process wherein the EEOC and charging party work with the employer to reach a confidential settlement before a lawsuit is filed. The EEOC is required to engage in conciliation in good faith. Defense counsel should document all negotiations in the conciliation process. The Supreme Court in *Mach Mining, LLC v. E.E.O.C.* held that a court may review the EEOC's efforts at conciliation to determine whether the process had been undertaken in a good faith effort to resolve the dispute prior to filing suit.[12] If conciliation fails, then the EEOC can choose to file a lawsuit on the charging party's behalf or the charging party will be given a right to sue letter.

Although beyond the scope of this chapter, from the employer's standpoint, an individual lawsuit filed by the charging party is nearly always preferable to a lawsuit filed by the EEOC, which typically occurs in a higher profile case in which the EEOC wants

11. *See* "What You Can Expect After a Charge is Filed," Equal Employment Opportunity Commission," https://www.eeoc.gov/employers/process.cfm (April 17, 2018).

12. 135 S. Ct. 1645 (2015).

to make an example. An EEOC lawsuit will generally be accompanied by significantly more publicity, experience, resources, and manpower than an individual lawsuit. Many of these suits are multi-plaintiff or class action lawsuits alleging a pattern or practice of discrimination. Sexual harassment suits may be brought by the EEOC on behalf of a group of aggrieved persons without certifying the case as a class action and complying with Fed. R. Civ. P. 23.[13]

II. RESPONDING TO THE COMPLAINT

A. Evaluate the Complaint for Potential Defenses

Once the EEOC or appropriate state agency has issued a Notice of Right to Sue to the charging party, he or she has 90 days in which to file a lawsuit in court. Although plaintiffs may file their lawsuits in state court, particularly where state law is more plaintiff-friendly than federal law, the typical sexual harassment case is filed in federal court.

Upon service of the complaint, the employer's attorney should examine the face of the complaint for defenses. The first consideration is once again timeliness—has the plaintiff filed the complaint within the 90-day period after receiving the Notice of Right to Sue? Title VII plaintiffs must file their lawsuits within 90 days of receiving a Notice of Right to Sue from the EEOC.[14] The "mailbox rule" creates a legal presumption that an addressee receives a letter within five days of the letter having been placed in the mail properly stamped.[15]

The defense attorney should also evaluate whether there are any improper defendant, co-employer, or joint employer issues. An improper defendant may, for example, be an individual supervisor in addition to the company. Under Title VII, individual supervisors cannot be sued for discrimination.[16] By contrast, individual supervisors may be named under certain state fair employment practices statutes.[17] A savvy plaintiff may file suit in state court under state law and join as a defendant an individual supervisor to defeat an employer's removal motion by destroying diversity jurisdiction. In assessing the complaint, the defense attorney should evaluate whether removal may be an option and whether the joinder of any individual supervisors in state court could be fraudulent.[18] An extraordinarily weak cause of action brought against an individual

13. E.E.O.C. v. Pitre, Inc., 908 F. Supp. 1165, 1173 (D. N. Mex. 2012).

14. 42 U.S.C. § 2000e-5(f)(1) (West, WestlawNext through P.L. 115-223); Madden v. Value Place Prop. Mgmt., LLC, No. 1:12CV21, 2012 WL 3960416, at *2 (N.D. Ind. Sept. 7, 2012).

15. *Id.* at *3.

16. Discriminatory acts of supervisors may be imputed to the employer under vicarious liability in some circumstances—*see* Vance v. Ball State Univ., 570 U.S. 421 (2013).

17. *See, e.g.*, Asplund v. iPCS Wireless, Inc., 602 F. Supp. 2d 1005, 1010 (N.D. Iowa 2008) (noting that Iowa's fair employment practices law allows for employment discrimination claims against "persons" whereas Title VII permits claims only against "employer[s]").

18. *See, e.g.*, Saginaw Housing Com'n v. Bannum, Inc., 576 F.3d 620, 624 (6th Cir. 2009) ("Fraudulent joinder occurs when the non-removing party joins a party against whom there is no colorable cause of action.").

supervisor under state law may indicate fraudulent joinder and could preserve the employer's ability to remove the case.

Another issue to assess is whether there is a potential joint employer who may also be a proper defendant. Joint employer issues may arise when workers are employed by temporary staffing agencies but are staffed to specific worksites where both companies "share or co-determine those matters governing the essential terms and conditions of employment."[19]

B. Consider Whether a Motion to Dismiss Is Appropriate

The employer's attorney may determine that a motion to dismiss the complaint is appropriate. Motions to dismiss based upon Fed. R. Civ. P. 12(b) are potentially useful, particularly for failures in the pleading, which cannot be cured. Such a motion for failure to exhaust administrative remedies, for example, may be dispositive of the entire dispute if the last event in question occurred prior to 300 days before the filing of the charge.

Similarly, if the complaint alleges facts or legal theories that are not found within the scope of the charge, or reasonably related to those in the charge, it may be dismissed. Claims not included in the EEOC charge may only be pursued in federal court if they are "reasonably related" to the claim filed with the EEOC. A claim is "considered reasonably related if the conduct complained of would fall within the scope of the EEOC investigation which can reasonably be expected to grow out of the charge that was made."[20] State tort claims such as battery, defamation, and invasion of privacy may be added under supplemental jurisdiction without exhausting administrative remedies.[21]

Although motions to dismiss based on a failure to state a claim may be successful, the defense attorney should bear in mind that if a complaint is dismissed, the court will often allow the plaintiff to replead and the process may be repeated. If this seems likely, it may be more efficient and cost-effective for the defendant employer to simply answer the complaint and assert affirmative defenses.

C. Removal

In the event the plaintiff has filed her lawsuit in state court, the defendant has the option to remove the case to federal court if (1) the plaintiff has alleged federal causes of action, such as under Title VII (granting the federal court federal question jurisdiction under 28 U.S.C. § 1331) or (2) if there is diversity jurisdiction under 28 U.S.C. § 1332. Diversity

19. Butler v. Drive Auto. Indus. of Am., Inc., 793 F.3d 404, 408 (4th Cir. 2015), quoting Bristol v. Bd. of Cnty. Comm'rs, 312 F.3d 1213, 1218 (10th Cir. 2002) (*en banc*).

20. Gomez v. New York City Police Dep't, 191 F. Supp. 3d 293, 299 (S.D.N.Y. 2016) (claim of sexual harassment dismissed as EEOC charge only alleged failure to accommodate a disability and wrongful termination on the basis of disability, not sexual harassment).

21. *See, e.g.*, Young v. Howard Indus., 2013 WL 6095472 (S.D. Miss. November 20, 2013) (dismissing Title VII claim for failure to exhaust administrative remedies but permitting state law intentional infliction of emotional distress claim to proceed).

jurisdiction is less common in employment cases, as the plaintiff-employee is typically a citizen of the same state as the defendant employer and claimed damages do not always exceed the jurisdictional threshold. Under 28 U.S.C. § 1446(b)(1), the defendant has 30 days from receipt of the complaint to file a notice of removal. Receipt of a courtesy copy starts the clock on removal.[22]

The state law causes of action asserted by the plaintiff may be litigated under the supplemental jurisdiction of the federal court. In the event only state law claims have been asserted, a defense that asserts federal question jurisdiction is not sufficient to remove the case to federal court. "Federal jurisdiction cannot be predicated on an actual or anticipated defense: 'It is not enough that the plaintiff alleges some anticipated defense to his cause of action and asserts that the defense is invalidated by some provision of [federal law].'"[23] Additionally, if the federal court dismisses the federal claim, the case may be remanded to state court to litigate the state law causes of action.

D. Drafting the Answer and Affirmative Defenses

As an initial matter, an attorney who has been intimately involved in the employer's investigation and administrative process prior to the lawsuit has a significant advantage over an attorney brought in only when a lawsuit is filed. The former has the advantage of having either participated in or closely supervised the investigation, including witness interviews, document gathering, and drafting the position statement. The attorney may even have discussed the case details with the EEOC investigator, which may give insight into the how the case is viewed at the EEOC in the event that the agency participates in the lawsuit.

However, frequently an employer will not retain an attorney until a lawsuit is filed, preferring to handle the internal investigation and administrative process with either a human resources professional or other management personnel. In this situation, the attorney must first evaluate the investigation and position statement drafted by the employer and identify any potential minefields created by that process. If the defense attorney is new to the case, then he or she must become familiar with the facts behind the complaint in order to draft the answer. The attorney must also interview a representative of the employer most familiar with the facts and circumstances alleged in the complaint to determine whether to properly admit or deny each of the complaint's allegations.

In federal court, the defendant employer typically must answer the complaint within 21 days of service, unless service was waived or some other extension has been granted.[24] Always be sure to check the court's local rules for any changes to the time to respond to a complaint. The answer filed by the employer in court must admit, deny, or

22. *See* 28 U.S.C. § 1446(b)(1) (West, WestlawNext through P.L. 115–223) (time period to file removal motion begins when the defendant receives the complaint "through service or otherwise").

23. Vaden v. Discover Bank, 556 U.S. 49, 60, 129 S. Ct. 1262, 1272 (2009).

24. *See* Fed. R. Civ. P. 12(a)(1).

affirm a lack of knowledge sufficient to admit or deny in response to every allegation in the complaint under Fed. R. Civ. P. 8(b). The answer should also include any affirmative defense that may be viable. A failure to assert such a defense in the answer will result in waiver of that defense. Some of the most common affirmative defenses in sexual harassment cases are as follows:

- Statute of limitations bars all or part of the claims (including claims arising more than 300 days before the filing of the charge; the complaint was not filed within 90 days of the issuance of the Notice of Right to Sue).
- Failure to exhaust administrative remedies.
- Claims are barred that are beyond the scope of the charge filed in the administrative agency.
- Claims against defendants not named in the administrative agency charge are barred.
- Claims are barred because the plaintiff had not suffered any adverse action related to those claims.
- Claims are barred in whole or in part as a result of the plaintiff's own acts or omissions being the proximate cause of any damages sustained.
- Claims of lost wages are barred as the plaintiff has not suffered lost wages.
- Failure to mitigate damages.
- Damages for mental anguish or emotional distress, if any, resulted in whole or in part from acts or events that are unrelated to the defendant's conduct or actions.
- The employer acted reasonably in preventing and responding to claims of harassment, and the charging party acted unreasonably in not utilizing the internal complaint procedure (the *Faragher-Ellerth* defense).

III. CONCLUSION

Preparing and executing a defense to a sexual harassment charge and/or complaint requires a thorough understanding of the facts and law of the case. This chapter has given a high-level overview of how to approach an internal investigation and some initial attacks to be made upon a complaint filed in court. However, each sexual harassment case is a fact-intensive inquiry that will require careful witness interviews, discussions with decision-makers, and negotiations with the EEOC and plaintiff's counsel. A successful defense attorney will engage in the investigation process with equal vigor and attention to detail as the potential litigation process. Careful investigation and responses to charges may result in early and cost-effective conclusion of meritless claims.