



CHECK THE CHARGE CLOSELY: CHECKING A BOX IS NOT ENOUGH Limit Your Statement of Position to the “Particular” Allegations

By Chris Thrutchley | June 26, 2017

Because of the rising number of employment claims that have been filed over the years and the resulting rise in defense costs, more and more employers have started handling the investigation of and response to charges of discrimination, harassment, and retaliation themselves, rather than engaging the assistance of outside counsel. There are certainly some advantages to that approach, but there can be definite disadvantages, too. It comes down to your risk tolerance. To help those of you who choose to go it alone, this alert highlights an important issue to which you should pay attention in maximizing your defense against charges: **checking a box on the charge of discrimination is not enough to state a viable claim, and it’s not enough to obligate you to address the box in your statement of position in response to the charge.**

Every charge filed with the EEOC or a state fair employment practice agency, like Oklahoma’s Office of Civil Rights Enforcement, has a check-the-box section where the charging party must check each type of claim they are asserting. In the example below, the charging party has asserted a disability and a retaliation claim. But that section of the charge is followed by the most critical section, the “Particulars” section. The “Particulars” section is the area of the charge where the factual allegations must be summarized. It begins with the phrase: “THE PARTICULARS ARE (if additional paper is needed, attach extra sheet(s)): . . .”

DISCRIMINATION BASED ON (Check appropriate box(es))		DATE(S) DISCRIMINATION TOOK PLACE
<input type="checkbox"/> RACE	<input type="checkbox"/> COLOR	Earliest
<input type="checkbox"/> SEX	<input type="checkbox"/> RELIGION	Latest
<input type="checkbox"/> NATIONAL ORIGIN	<input type="checkbox"/> AGE	11-2016
<input checked="" type="checkbox"/> RETALIATION	<input checked="" type="checkbox"/> DISABILITY	02-2017
<input type="checkbox"/> OTHER (Specify)	<input type="checkbox"/> GENETIC INFORMATION	<input type="checkbox"/> CONTINUING ACTION
THE PARTICULARS ARE (If additional paper is needed, attach extra sheet(s)):		

In *Reveles v. Catholic Health Initiatives*, No. 16-cv-2561-WJM-CBS, 2017 WL 2672112 (D. Colo. June 21, 2017), the charging party/plaintiff checked the “sex” and “retaliation” boxes. *Id.* at *6. But she 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 a retaliation claim. Courts liberally construe charges, “[b]ut liberal construction in this context means construing the charge to embrace the *legal theories* that can reasonably be discerned from the *facts alleged*.” *Id.* at *7 (quoting *Jones v. Needham*, 856 F.3d 1284, 1290 (10th Cir. 2017) (emphasis in original)). “Reveles’s Charge invokes ‘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.” *Id.* The court thus dismissed Reveles’s retaliation claim for failure to fulfill her obligation to exhaust her administrative remedies as to that claim. Facts must be alleged in the charge. Checking a box is not enough.

STEPS TO TAKE

- **When you get a charge, make sure the “particulars” support each box that is checked.**
- **Don’t guess and attempt to address unknown particulars in your statement of position.**
- **Instead, respond to what’s clear and wait to see if the charging party amends the charge.**
- **If the charge isn’t amended, it will likely be subject to dismissal when a suit is filed.**

Chris Thrutchley is an attorney of GableGotwals who assists and represents clients in the area of Labor and Employment Law, ERISA and general litigation. For help auditing and updating your employment practices and your intellectual property protection strategies contact **GableGotwals**. We will be glad to assist you.



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