

# HOW SHOULD AN EMPLOYER RESPOND TO AN EMPLOYEE'S FALSE EEOC CHARGE?

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Some employers have the urge to immediately terminate an employee who has made an unfounded discrimination complaint. In other situations, an employer may gather more information but decide not to discipline. Under either approach, an employer must proceed with caution. A recent decision from the U.S. Court of Appeals for the Second Circuit provides some insight as to how employers may be able to minimize the risk of a retaliation claim when confronted with a false Equal Employment Opportunity Commission (EEOC) charge.

## The Facts

In *Cox v. Onondaga County Sheriff's Department*, several white officers shaved their heads to show their solidarity with a cancer patient. After rumors surfaced that the white officers were racist "skinheads," those officers filed an internal complaint alleging that a black officer started the rumors. The plaintiffs did not allege — in the initial complaint or during interviews conducted shortly thereafter — that the black officer was confrontational in any way. But when the plaintiffs later filed a sworn charge with the EEOC, they claimed that the black officer was confrontational.

The employer filed a misconduct complaint and explained to the white officers that they could be subjected to discipline for filing a false report. While the department's investigation determined that a false report had been made, it took no official action against the officers. The plaintiffs nevertheless filed a lawsuit in federal court claiming retaliation. Those claims were dismissed by the district court.

## The Second Circuit's Ruling

The Second Circuit separately analyzed the investigation and the threat of discipline. The court found that an investigation itself is not retaliatory per se. With that said, an investigation can be retaliatory if it: 1) results in a "hostile work environment, constructive discharge, or other employment consequences of a negative nature," or 2) is conducted in such an "egregious manner" that it could dissuade a reasonable worker from making or supporting an EEOC claim. On these facts, the Second Circuit concluded that the employer's investigation did not rise to the level of an adverse employment action.

In contrast to an investigation, a threat of discipline usually counts as an adverse employment action to establish a *prima facie* case of retaliation. But that is not enough to get the plaintiffs past summary judgment on the facts of this case. The Second Circuit found that informing the plaintiffs of the possible results of the investigation was "fair to them" and went on to discuss the reasonableness of the employer's action in finding that plaintiffs had failed to carry their burden.

## Practical Tips for the Employer

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Employers have every right to investigate whether an employee has filed a false charge with the EEOC; however, the Cox opinion demonstrates that an employer must proceed with caution. With that in mind, I offer the following tips for employers to minimize the risk of a retaliation claim when investigating a false EEOC charge:

1. Follow written policies and practices for conducting investigations. A plaintiff will likely cite any deviation from policy or practice as evidence of retaliation. In *Cox*, the court noted that the employer followed an established written policy.
2. Gather all facts before discussing discipline with the employee. Here, it did not matter that the plaintiffs were ultimately not disciplined. The mere threat of discipline was enough to establish an adverse employment action. Before even discussing discipline, it is advisable to determine whether there is overwhelming evidence that the employee actually made a false statement.
3. The employer should not condition the investigation on the employee dropping his or her EEOC charge. The court distinguished this case from a case in which the employer had threatened that it would not pursue an investigation if the employee dropped his EEOC charge. Not only does such a threat increase the likelihood of a retaliation claim, but a thorough investigation is the hallmark of a strong defense to an underlying discrimination claim.
4. Contact legal counsel for advice concerning the best course of action. The Second Circuit (which covers New York, Vermont, and Connecticut) noted some variation in how other circuit courts have dealt with similar issues, so understanding the applicable legal framework is critical.