# The EEOC Has Determined Your Client Violated the Law...Now What?

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***By Alan B. Graves***

The Equal Employment Opportunity Commission (EEOC) was created by the Civil Rights Act of 1964 to enforce federal discrimination laws. The EEOC is often the first place an employee turns for legal recourse. An employee takes the initial step towards bringing a discrimination lawsuit against an employer by filing a charge with the EEOC or for state claims with the appropriate state agency. For example in California this is the Department of Fair Housing and Employment (DFEH).

***Filing a Charge and the EEOC Investigation***

If an employee believes she has been victimized by a violation of an unlawful employment discrimination law enforced by the EEOC, she must file a charge with the EEOC prior to beginning litigation. The charge itself does not require much detail: primarily just a brief description of the alleged violation, the date it occurred and information about the employer. However the charge generally must be filed within 180 days of the alleged violation.

The EEOC notifies the employer within ten days asking for a response. The EEOC then begins its investigation of the alleged charges. This can include requests for information from the employee and employer, interviews with interested parties, and review of relevant documents. Once 180 days have passed since the filing of the charge the employee who filed the charge may request a letter from the EEOC granting her the right to sue independent of whether the EEOC's investigation is complete.

Upon completion of its investigation the EEOC will determine whether or not sufficient reasonable cause exists to believe a violation occurred. The employee will be given a determination letter which generally contains a summary of the investigation, including the reasons supporting the EEOC's conclusion.

If the EEOC determines there is not sufficient reasonable cause to believe a violation occurred, it will close the case and give the individual the right to file a lawsuit against the employer if they so desire. Under these circumstances, any lawsuit by the aggrieved individual must be filed within 90 days after receipt of the EEOC's determination and notice of rights.

***The EEOC Conciliation Process***

If the EEOC investigation finds reasonable cause to believe a violation occurred, the EEOC must first attempt conciliation between the employee and employer to attempt to resolve and remedy the discrimination. If conciliation is successful, then neither the employee nor the EEOC may file a lawsuit against the employer. However, if conciliation is unsuccessful the EEOC can either bring a lawsuit on behalf of the employee or release the matter to the individual to file a lawsuit independently.

For understandable reasons, if the individual proceeds to bring a lawsuit independently, the EEOC's determination letter becomes an item one party may want to introduce as evidence at time of trial. Depending on the outcome before the EEOC and the jurisdiction in which the suit arises, whether the EEOC's determination may be introduced into evidence could become a disputed evidentiary issue.

***Duty to Conciliate: A Difference of Opinion***

The EEOC has a statutory duty to attempt conciliation before filing a formal complaint. 42 U.S.C.S. §2000e-5(b). This process allows for the employer and the EEOC to negotiate how the employer might alter its practices to comply with the law, as well as what remedies will be provided to aggrieved individuals.

An employer should be encouraged to participate in the conciliation process as it can offer a speedier resolution to a claim, possibly avoid litigation and unwanted publicity, and save time and expense associated with a lawsuit. However, an employer is not obligated to resolve the employee's claim through conciliation.

Sometimes an employer may feel the EEOC moved too quickly through the conciliation process and initiated a lawsuit without giving the employer an opportunity to respond to a settlement offer from the EEOC with a counter offer. In this instance an employer may challenge the EEOC's lawsuit and force the EEOC to reopen the conciliation process.

Courts have a difference of opinion on what is required by the EEOC to meet its statutory duty in the conciliation process. Some Circuits will stay proceedings until the conciliation process is completed and often given great deference to the EEOC in meeting its obligation. Other Circuits have dismissed an EEOC lawsuit, awarded attorney fees and costs to the employer and forced the EEOC to complete the conciliation process in good faith before bringing a lawsuit. Federal case law provides the EEOC fulfills its duty to conciliate before initiating litigation if it (1) outlines to the employer the reasonable cause for its belief that the employer is in violation of [the law], (2) offers an opportunity for voluntary compliance, and (3) responds in a reasonable and flexible manner to the reasonable attitude of the employer. (*EEOC v. Asplundh* (11th Cir. 2003) 340 F. 3d 1256, 1259)

Federal appellate courts have reached varying conclusions about what this means. In evaluating whether the EEOC has met its duty, the Fifth and Eleventh Circuits state "the fundamental question is the reasonableness and responsiveness of the EEOC's conduct under all the circumstances." (Id. at 1259; citing *EEOC v. Klinger Elec. Corp*. (5th Cir. 1981) 636 F. 2d 104) This is interpreted to give the court authority to look into the EEOC's actions during its investigation and conciliation process. (*Id*.) However, a different view is expressed by the Sixth, Seventh, Eighth and Tenth circuits, holding the courts should only determine whether the EEOC made an attempt at conciliation. According to these appellate courts, the form and substance of conciliation efforts are within the discretion of the EEOC, as the agency created to administer and enforce employment discrimination laws, and consequently are beyond the scope of judicial review. Under this view, a court is not going to look too closely at the EEOC's attempt to settle claims prior to filing a lawsuit. (*EEOC v. David Lerner Associates Inc.* 2005 U.S. Dist. LEXIS 25817 at pg. 4)

***Why Does This Difference Matter?***

In instances where a defendant/employer feels the EEOC rushed to file a lawsuit, it may be prudent to file a motion to dismiss or stay the lawsuit until the EEOC has engaged fully in the conciliation process. Remember, this process provides a non-binding opportunity to resolve the matter which may provide for a cost efficient settlement and disposal of an unwanted lawsuit.

For example, in 2007 the EEOC filed a discrimination claim against Home Town Buffet in the Ninth Circuit. Home Town Buffet (HTB) filed a motion for summary judgment claiming the EEOC did not meet its statutory duty to conciliate prior to filing the lawsuit. Absent binding authority in the Ninth Circuit, the district court held the statutory scheme provides the EEOC should continue with the conciliation process until such time as it is unable to secure from the respondent a conciliation acceptable to the Commission. (*EEOC v. Home Town Buffet* (2007) 481 F. Supp. 2d 1110, 1113) The court applied a deferential standard to the EEOC's duty. (Id. at 1114) HTB argued the court should apply a reasonableness standard to the EEOC's process. (Id.) Under the deferential standard the court evaluates whether the employer was provided an opportunity to confront the issues. Conversely, under a reasonableness standard the court views the EEOC's duty differently, interpreting legislative history and holding that at a minimum the EEOC must make clear to the employer the basis for the EEOC's charges against it. Without doing this it cannot be said the EEOC has provided a meaningful conciliation. (*Asplundh, supra*. 340 F. 3d 1256 at 1259)

If conciliation does not provide a settlement between the parties, then a lawsuit ensues and now the defendant/employer must address the implications of the EEOC's investigation, including the EEOC Determination Letter, as potentially being admitted as evidence at time of trial.

During the initial process with the EEOC there are prudent and practical steps which will be important as the case unfolds. For example, if both parties agree, it is possible to participate in mediation prior to the EEOC official investigation and conciliation.

It is important if your business is involved in a potential discrimination lawsuit with an employee to seek the advice of an experienced employment law attorney from the outset to help guide your business through the EEOC investigation, conciliation, and, if necessary, civil litigation.

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*Alan B. Graves is an associate at Neil Dymott. His practice areas include business litigation, labor and employment law and general civil litigation. Mr. Graves may be reached at agraves@neildymott.com* [1]
Alan B. Graves [2]
Business [3]

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