EEOC Practice and Procedure

-- *effectively representing your clients before the EEOC*

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Pre-Filing Considerations for Plaintiffs

Applicable Laws

- Applicable federal laws (Title VII, ADEA, ADA)
- Race/National Origin claims may be filed directly in federal court without filing a Charge with the EEOC.
- State law claims are found in the TCHRA, Chapter 21 of the Texas Labor Code. The purpose of the TCHRA is the "correlation of state law with federal law in the are of discrimination in employment. *Schroeder v. Texas Iron Works*, 813 S.W.2d 483, 485 (Tex. 1991).

Pre-Filing Considerations for Plaintiffs

Deadlines

- **EEOC.** 300 days (exceptions discussed later)
- **TWC-CRD.** 180 days (exceptions discussed later)
- **42 U.S.C. § 1981.** Race/National Origin claims only. There are no administrative prerequisites. Two or four-year statute of limitations, depending on nature of the claim.

Pre-Filing Considerations for Plaintiffs

Number of Employees

- Title VII, ADA & TCHRA. Employers must employ 15 employees. ADEA requires 20 employees
- Not jurisdictional. *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 516 (2006).

Pre-Filing Considerations for Plaintiffs

Number of Employees

- The time period within which to count such employees is for each working day in each of twenty or more calendar weeks in the current of preceding calendar year within which the employee suffered discrimination

- As a general rule, "the employment relationship is most readily demonstrated by the individual's appearance on the employer's payroll." *EEOC & Walters v. Metro. Educ. Enters., Inc.*, 117 S. Ct. 660, 666 (1997).

Pre-Filing Considerations for Plaintiffs

Where To File

- An employee may file a Charge of Discrimination with the TWC-CRD, but unless the TWC-CRD forwards it to the EEOC, it is only considered filed under state law

- Filing a Charge with the EEOC means it is also filed with the TWC-CRD under a work sharing agreement. *Price v. Philadelphia Am. Life Ins. Co.*, 934 S.W.2d 771, 773-74 (Tex. App.—Houston [14th Dist.] 1996, no writ).

Pre-Filing Considerations for Defendants

Handle Unemployment Claims With Care

- Ex-Employees typically file for unemployment. Sometimes there is a dispute over whether the termination was for "misconduct"

- "The findings of the [TWC] have no collateral estoppel effect and are not admissible evidence in this action under the statute's express command." *Grogan v. Savings of Am., Inc.*, 118 F. Supp. 2d 741, 751-52 (S.D. Tex. 1999) (quoting TEX. LAB. CODE § 213.007).

Pre-Filing Considerations for Defendants

Handle Unemployment Claims With Care

- Yet, sometimes the way an employer handles an unemployment claim has an adverse consequence in a subsequent discrimination lawsuit.

- *Hansard v. Pepsi-Cola Metro Bottling Co.*, 865 F.2d 1461, 1465 (5th Cir. 1989) (court determined that because Pepsi did not contest Plaintiff's claim for unemployment, there was evidence that the employee was terminated instead of voluntarily resigning employment.

- *Bowen v. El Paso Elec. Co.*, 49 S.W.3d 902, 910-11 (Tex. App.—El Paso 2001, pet. denied) (defendant created an issue of pretext in its sworn testimony at unemployment hearing).

Pre-Filing Considerations for Defendants

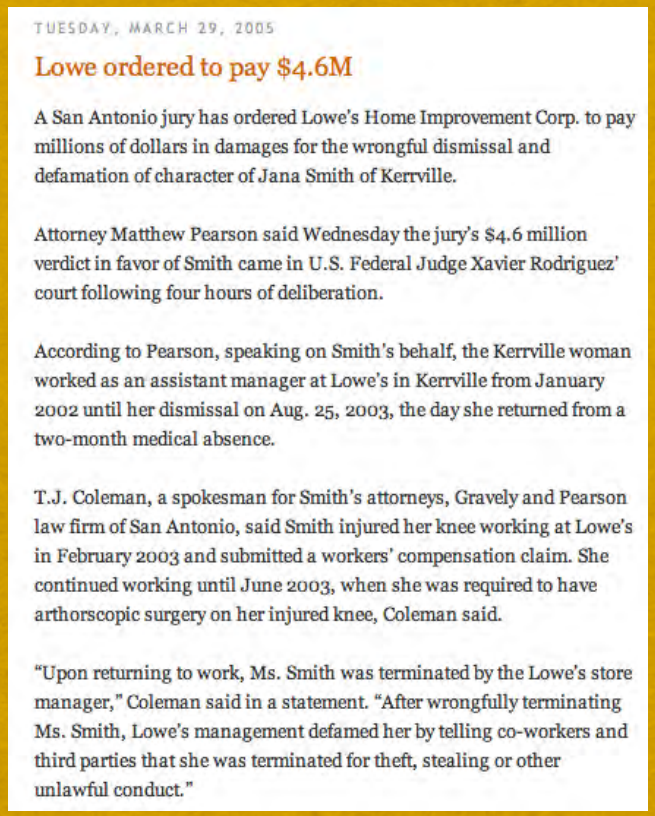
Do Not Unnecessarily Publicize Facts Regarding An Employee's Termination

- In general, employers have strong qualified immunity against defamation claims brought by ex-employees. *Frakes v. Crete Carrier Corp.*, 579 F.3d 426 (5th Cir. 2009)

- But, loose lips can still sometimes sink ships. *Frank B. Hall & Co. v. Buck*, 678 S.W.2d 612 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.) (affirming large plaintiff's verdict where ex-employer referred to plaintiff as a "crook," in a conversation with plaintiff's undercover investigator who was posing as a "prospective employer").

Pre-Filing Considerations for Defendants

Do Not Unnecessarily Publicize Facts Regarding An Employee's Termination



TUESDAY, MARCH 29, 2005

Lowe ordered to pay $4.6M

A San Antonio jury has ordered Lowe's Home Improvement Corp. to pay millions of dollars in damages for the wrongful dismissal and defamation of character of Jana Smith of Kerrville.

Attorney Matthew Pearson said Wednesday the jury's $4.6 million verdict in favor of Smith came in U.S. Federal Judge Xavier Rodriguez' court following four hours of deliberation.

According to Pearson, speaking on Smith's behalf, the Kerrville woman worked as an assistant manager at Lowe's in Kerrville from January 2002 until her dismissal on Aug. 25, 2003, the day she returned from a two-month medical absence.

T.J. Coleman, a spokesman for Smith's attorneys, Gravely and Pearson law firm of San Antonio, said Smith injured her knee working at Lowe's in February 2003 and submitted a workers' compensation claim. She continued working until June 2003, when she was required to have arthorscopic surgery on her injured knee, Coleman said.

"Upon returning to work, Ms. Smith was terminated by the Lowe's store manager," Coleman said in a statement. "After wrongfully terminating Ms. Smith, Lowe's management defamed her by telling co-workers and third parties that she was terminated for theft, stealing or other unlawful conduct."

- $4.6 million verdict against Lowe's for allegedly stating to third parties that the plaintiff was terminated for theft, stealing, or other unlawful conduct)

Filing the Charge

Exhaustion

- The Charge
- Employment discrimination plaintiffs must exhaust administrative remedies before pursuing claims in federal court.
- Exhaustion occurs when a plaintiff files a timely charge with the EEOC and receives a statutory notice of right to sue. *Dao v. Auchan Hypermarket*, 96 F.3d 787, 788-89 (5th Cir. 1996).

Filing the Charge

Exhaustion

- The Charge

- The employee may contact the EEOC via phone, mail, or online. Employee will be asked to complete a Charge Intake Questionnaire form. The EEOC uses this form to prepare a more formal Charge of Discrimination on a document called a "Form 5"

- The "Form 5" is sent to the employee to review, make any corrections, sign and date

- A "Form 5" is not mandatory. "A piece of paper that alleges discrimination and asks the agency to take remedial action suffices." *EEOC v. Watkins Motor Lines, Inc.*, 553 F.3d 593, 597-98 (7th Cir. 2009).

Filing the Charge

Exhaustion

- The Charge
- Once the Charge is filed, the employee is called the "Charging Party" and the employer is considered "the Respondent"
- Many times, the employer will be given an opportunity to mediate through the EEOC's Mediation Program
- Otherwise, the Charge will be referred to an investigator to commence an investigation

Filing the Charge

Exhaustion

- The Charge
- The EEOC will typically determine either (a) that it is unable to conclude a violation has occurred or (b) that a violation has occurred.
- If the former, the EEOC will issue a "Right to Sue" letter. This officially exhausts the remedies of the Charging Party
- Exhaustion is also required to bring a claim under the TCHRA. The requirement is mandatory, but not jurisdictional. *In re USAA*, 307 S.W.3d 299, 310 (Tex. 2010). State law charges must be sworn.

Filing the Charge

Exhaustion

- Defining The Scope of The Charge In Subsequent Private Litigation

- Sometimes a lawsuit contains allegations different or more broad than the Charge.

- On the one hand, an EEOC Charge should be "liberally construed," *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455, 465 (5th Cir. 1970), but on the other hand, the "primary purpose of Title VII is to trigger the investigatory and conciliatory procedures of the EEOC, in [an] attempt to achieve non-judicial resolution of employment discrimination claims." *Pacheco v. Mineta*, 448 F.3d 783, 788-89 (5th Cir. 2006).

Filing the Charge

Exhaustion

- Defining The Scope of The Charge In Subsequent Private Litigation

- "[T]he crucial element of a charge of discrimination is the factual statement contained therein." *Manning v. Chevron Chem. Co.*, 332 F.3d 874, 879 (5th Cir. 2003).

- In determining exhaustion of remedies, a court may consider documents beyond the "four corners" of the Charge, including the Intake Questionnaire and attached statements. *Clark v. Kraft Foods, Inc.*, 18 F. 3d 1278, 1280 (5th Cir. 1994).

Filing the Charge

Exhaustion

- Defining The Scope of The Charge In Subsequent Private Litigation

- Courts have considered information outside the Charge when (1) the facts set out in the document are a reasonable consequence of a claim set forth in the EEOC Charge and (2) the employer had knowledge of the contents of the document during the investigation (even if the employer never saw the document).

- One final note: Sometimes plaintiffs try to blame the EEOC investigator for the failure to include all the bases of discrimination, but this tactic usually fails.

Filing the Charge

Exhaustion

- Defining The Scope of The Charge In Subsequent Litigation **In A Governmental Enforcement Action**

- In an enforcement action brought by the EEOC, the scope of the EEOC letter of determination and/or scope of matters "conciliated" (rather than the scope of the Charge) is relevant to the scope of the litigation. *EEOC v. Brookhaven Bank & Trust Co.*, 614 F.2d 1022, 1024 (5th Cir. 1980).

- "If the employer has notice of the Charge and has been offered an opportunity to remedy the problem without litigation, it should not be allowed to avoid enforcement of the law because the original charge filed with the EEOC b[y] the aggrieved party is slightly different from the complaint filed in court by the EEOC." *Id.* at 1025.

Filing the Charge

Exhaustion

- Defining The Scope of The Charge In Subsequent Litigation **In A Governmental Enforcement Action**

- "If upon investigating a particular charge of discrimination (which itself might be relatively minor) the EEOC discovers other discriminatory practices, surely the EEOC should not be prevented from taking appropriate action on those newly discovered practices …" *EEOC v. Huttig Sash & Door Co.*, 511 F.2d 453, 455 (5th Cir. 1975).

Filing the Charge

Exhaustion

Exceptions To The Charge Filing Requirement

Post-Charge Retaliation

- If a Charge is filed, and the employee is later terminated while the Charge is under investigation, the Charging Party is not required to file an amendment to the Charge or filing another charge. *Gupta v. East Tex. State Univ.*, 654 F.2d 411, 414 (5th Cir. 1981).

- *Gupta* does not apply if the alleged retaliation occurred *before* the Charging Party ever filed an EEOC Charge.

Filing the Charge

Exhaustion

Exceptions To The Charge Filing Requirement

The Single Filing Rule

- In certain circumstances a plaintiff may "piggyback" on the allegations contained in another Title VII plaintiff's EEOC Charge. *Price v. Choctaw Glove & Safety Co.*, 459 F.3d 595, 598 (5th Cir. 2006).

- This exception only applies if the non-filing plaintiff is similarly situated to the filing plaintiff, the EEOC charge provided notice of the collective or class-wide nature of the charge, and the individual who filed the EEOC charge filed a lawsuit that the non-filing plaintiff is permitted to join. *Id.* at 599.

Filing the Charge

Mediation

- EEOC offers mediation for most Charges through the EEOC's mediation program
- It is voluntary and confidential, and if mediation is successful, there is no investigation
- It is free, efficient, and can help avoid future litigation.
- If the employer decides to go to mediation, please bring a settlement release with you because employers typically want a broader, all-inclusive, release (the EEOC release only releases the claim(s) at issue in the Charge)

Filing the Charge

Timeliness

General Rule

- **EEOC.** 300 days in deferral states (like Texas);
  - 180 days in non-deferral states
- **TWC-CRD.** 180 days

Filing the Charge

Timeliness

Exceptions To The General Rule

- **Continuing Violation Theory.** The 300-day filing period is not jurisdictional, but rather operates as a statute of limitations that is subject to equitable doctrines such as tolling or estoppel. Such doctrines must be applied sparingly. *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 113-14 (2002).

- For example, when a plaintiff asserts a hostile work environment based on facts that extend over time, a court may consider the past allegations (i.e., the ones outside the 180 or 300 day limitation) under a continuing violation theory.

Filing the Charge

Timeliness

Exceptions To The General Rule

- **Continuing Violation Theory**
- Wise for plaintiffs to check the "continuing violation" box on the Form.
- The continuing violation theory does not apply if (1) the separate acts forming the supposed "continuing violation" are unrelated or (2) the employer takes intervening corrective action between incidents. *Stewart v. Mississippi Transp. Comm'n*, 586 F.3d 321, 328 (5th Cir. 2009).

Filing the Charge

Timeliness

Exceptions To The General Rule

- **Equitable Tolling or Equitable Estoppel.** The Fifth Circuit primarily applies equitable tolling or estoppel when "the plaintiff is actively misled by the defendant about the cause of action or is prevented in some extraordinary way from asserting his rights." *Coleman v. Johnson*, 184 F.3d 398, 402 (5th Cir. 1999)

- *See, e.g.*, court applied equitable estoppel in ADEA case after Charges were untimely filed with EEOC because the employer had given them releases, which they signed, waiving ADEA claims. The releases, however, failed to comply with the OWBPA. *Tyler v. Union Oil Co. of Cal.*, 304 F.3d 379, 385 (5th Cir. 2002).

Filing the Charge

Timeliness (Exceptions To The General Rule)

- **Relation Back Theory**

- (1) If the Charging Party timely filled out an Intake Questionnaire, but the Form 5 was filed in an untimely manner, then that may be sufficient. *Price v. SW Bell Tel. Co.*, 687 F.2d 74 (5th Cir. 1982).

- (2) Sometimes a Charging Party amends a Charge outside the 180-day or 300-day period. Generally, amendments that raise a new legal theory do not "relate back." *EEOC. v. Miss. Coll.*, 626 F.2d 477, 483-84 (5th Cir. 1980). Except it can "relate back" if the facts supporting both the amendment and original charge are essentially the same. *Hornsby v. Conoco, Inc.*, 777 F.2d 243, 247 (5th Cir. 1985).

Filing the Charge

Timeliness

Lily Ledbetter Fair Pay Act

- In 2007, the Supreme Court interpreted Title VII to mean that a plaintiff could not sue over an alleged discriminatory pay decision made 20 years earlier, which the plaintiff alleged caused her current pay to be affected. *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007).

- Congress and the President disagreed, and enacted the Fair Pay Act ("FPA"). It amended the statutes to indicate that a Charge is still timely, so long as it was made within 180 or 300 days of when the Charging Party was affected by it.

Filing the Charge

Timeliness

Lily Ledbetter Fair Pay Act

- Whether other claims that affect compensation, but are not in and of themselves compensation-setting decisions, are covered by the FPA is subject of debate in the courts.

- Appellate courts have tended to disallow failure to promote claims to be tagged onto an FPA claim. *Noel v. Boeing*, 622 F.3d 266 (3d Cir. 2010) (black Haitian mechanic could not use the FPA to support his failure-to-promote claim under Title VII); *accord Almond v. Unified Sch. Dist. No. 501*, 2011 WL 5925312 (10th Cir. Nov. 29, 2011).

Defendant's Notice of Charge and Response

Document Hold

- Once a Charge is filed, the employer has a duty to preserve hard and electronic documents and records relating to the employee's claims. 29 C.F.R. § 1602.14
- A "litigation hold" letter should be sent to key employees advising of the types of documents that must be preserved until the final disposition of the matter
- An employer's non-compliance may have serious consequences once litigation commences. *Rimkus Consulting Group v. Cammarata*, 688 F. Supp. 2d 598 (S.D. Tex. 2010)

Defendant's Notice of Charge and Response

Investigation by Employer

Privilege Issue In the Investigation Itself

- When a lawyer directs the investigation, the lawyer's work product and communications are privileged. *Robinson v. Time Warner, Inc.*, 187 F.R.D. 144 (S.D.N.Y. 1999)
- The privilege may be waived. *EEOC v. Outback*, 251 F.R.D. 603 (D. Colo. 2008) (assertion of the *Faragher/Ellerth* affirmative defense constituted a waiver of privilege)
- Employers may want to work through a "proxy" investigator in harassment claims

Defendant's Notice of Charge and Response

Investigation by Employer

Conducting A Robust Investigation

- Investigator should gather copies of all relevant documents (including personnel files, policies, comparator information, and demographic information)
- Investigator should interview witnesses (preferably under privilege), inform them if it is privileged, and advise the witness of the company's anti-retaliation policies (if any), preferably in writing

Defendant's Notice of Charge and Response

Investigation by Employer

Conducting A Robust Investigation

•Employers should look to see whether employee violated a published rule, was the rule applied consistently, was there prior or progressive disciplinary history, how long has the employee been employed, what is the prior written performance of the employee, did the employer seek out the employee's side of the story?

•Was the degree of discipline imposed on the employee related to the seriousness of the proven offense, the employee's past record, and the employee's length of service?

Defendant's Notice of Charge and Response

Privilege Issues In Deciding What To Provide To The EEOC

- Analyze the EEOC's RFI to determine if a response can be made without producing otherwise confidential or proprietary information
- The EEOC will typically disclose all information in the Charging Party's file to the Charging Party. EEOC Compliance Manual, §§ 83.5-83.7.
- Courts are split on whether production to a federal agency waives the privilege. "[T]he case law addressing the issue of limited waiver is in a state of hopeless confusion." *In re Columbia/HCA Healthcare*, 293 F.3d 289, 294-95 (6th Cir. 2002)

Defendant's Notice of Charge and Response

Response

- Employer's will be asked to prepare a position statement, usually within 2-3 weeks(Ex. B at 4). from receipt of the Charge, but the EEOC is typically lenient in granting an extension
- The position statement should respond fully to each allegation. Context is always helpful.
- The employer must take care to provide an accurate statement. First, it's the right thing to do. Second, inaccurate statements may be used against the employer in subsequent litigation. *McInnis v. Alamo Comm. College Dist.*, 207 F.3d 276, 283 (5th Cir. 2000) (reversing summary judgment in a discrimination case because position statement "contained false statements …").

Plaintiff's Rebuttal

Obtaining the Employer's Position Statement

- After both the Charge and Position Statement have been filed, the EEOC will review both and decide if it has enough information or if it needs to make follow up requests
- Counsel for the Charging Party should request the Position Statement, but disclosure may vary from district office to district office

Plaintiff's Rebuttal

Preparing a Rebuttal

- There is no formula for a rebuttal
- The Charging Party might find it helpful to address:
  - the employee's positive role in the company;
  - pretext;
  - the employer's factual statements;
  - the law;
  - Whether there are witnesses to the claims (and you should decide whether to obtain and provide affidavits rebutting the employer's evidence)

Handling the EEOC's Follow-up Investigation Efforts

RFI/RFP

- Once the Charge is received, the EEOC investigator will typically make an initial recommendation. EEOC Compliance Manual, § 2.7(g)
- Thereafter, the EEOC often prepares a written investigative plan. EEOC Compliance Manual, § 22.2
- Many times, this will include a Request for Information ("RFI") or a Request for Production ("RFP")

Handling the EEOC's Follow-up Investigation Efforts

RFI/RFP

- There are few limits to the EEOC's investigatory powers. EEOC has the power to demand and review "any evidence of any person being investigated or proceeded against that relates to unlawful employment practices, and is relevant to the charge under investigation." 42 U.S.C. § 2000e-8(a).
- "[C]ourts have generously construed the term 'relevant' and have afforded the Commission access to virtually any material that might case light on the allegations against the employer." *EEOC v. Shell*, 466 U.S. 54, 68-69 (1984).
- Therefore, it is important for the employer to build credibility with the investigator and to avoid disruptive or dilatory behavior

Handling the EEOC's Follow-up Investigation Efforts

RFI/RFP

- Usually, a phone call with the investigator can take care of either overbroad or needlessly burdensome requests. Most investigators will work with employers to reasonably tailor the EEOC's requests
- It is often helpful to explain the documents you produce to the EEOC in a "context cover letter," otherwise the employer risks the drawing of incorrect conclusions

Handling the EEOC's Follow-up Investigation Efforts

Interviews and On-site Investigations

- Usually, interviews and on-site investigations by the EEOC will be scheduled in advance and with minimal interference. EEOC Compliance Manual, §§ 23.6, 25.2(a)
- But, the EEOC may choose to show up unannounced, especially when it anticipates a lack of cooperation. EEOC Compliance Manual, § 25.2(b)(1)
- Employers do not have a right to be present for the interviews of non-management employees, EEOC Compliance Manual, § 23.6(c), but many times the investigator will allow a representative to attend but only as a silent observer

Handling the EEOC's Follow-up Investigation Efforts

Subpoenas

- The EEOC's subpoena power is broad, but does not confer "unconstrained investigative authority" upon the EEOC. *EEOC v. Shell*, 466 U.S. at 64-65.
- The EEOC instructs its investigators to send subpoenas only "after other investigative methods have been attempted." EEOC Compliance Manual, § 24.1.
- There are limits. *EEOC v. Southern Farm Bureau Cas. Ins. Co.*, 271 F.3d 209 (5th Cir. 2001) (affirming district court's refusal to enforce the EEOC's subpoena where the Charge raised race discrimination but the subpoena sought information regarding sex discrimination).

Dismissal and Timely Filing of Suit

Initiated by the EEOC

- After the completion of the investigation, the EEOC will make a decision to whether to recommend dismissal or find "cause." If a dismissal is in order, the EEOC will issue a "Right to Sue" letter

- For Title VII claims, the Charge should be on file 180 days before a Right to Sue letter should issue. 42 U.S.C. § 2000e-5(f). If the EEOC does not wait 180 days, it risks losing its exclusive jurisdiction. *Emmanuel v. Cognizant Tech. Solutions*, 2008 WL 4826022 (N.D. Tex. 2008)

Dismissal and Timely Filing of Suit

Initiated by the EEOC

- For ADEA claims, no Right to Sue letter is required. Rather, "[f]or cases arising in Texas, a complainant [simply] must file [an EEOC charge] within 300 days of the last act of discrimination" and "then wait sixty days before filing a civil action." *Julian v. City of Houston*, 314 F.3d 721, 725-26 (5th Cir. 2002).

Dismissal and Timely Filing of Suit

Initiated by the Charging Party

- The Charging Party may request a Right to Sue letter so that he/she may be able to proceed to litigation without waiting for the EEOC to conclude its investigation

- Procedures for requesting a Right to Sue letter seem to vary between District offices.

Dismissal and Timely Filing of Suit

Employer's Considerations

- Even after a Right to Sue letter is issued, an employer could be held liable if it retaliates against the employee (or ex-employee) for having filed an EEOC Charge in the first place. *Robinson v. Shell*, 519 U.S. 337, 346 (1997) ("employees" includes former employees).

- If an employee fails to sue under an EEOC Right to Sue letter, he/she may still bring suit in state court. A letter from one agency does not trigger the time frame to sue under the other. *Jones v. Grinnell Corp.*, 235 F.3d 972, 975 (5th Cir. 2001).

- Race/National origin claims do not require exhaustion, so companies may be sued in some cases up to four years later. 42 U.S.C. § 1981.

Cause Findings

- The EEOC will often issue a preliminary determination letter, advising one or more parties of where it is leaning
- If the EEOC determines that the evidence establishes that discrimination has occurred, then the parties will be informed in a Letter of Determination.
- Once it issues the Letter of Determination, it will then attempt conciliation to develop a remedy for the alleged discrimination. 42 U.S.C. § 2000e-5(b). A lawsuit cannot be filed by the EEOC unless the Commission is "unable to secure from the respondent a conciliation agreement." 42 U.S.C. § 2000e-5(f)(1).

Cause Findings

Conciliation

- A good-faith attempt at conciliation requires the EEOC to (1) outline its reasonable cause that the law has been violated; (2) offer an opportunity for voluntary compliance; and (3) respond in a reasonable and flexible manner to the reasonable attitudes of the employer. *EEOC v. Klinger Elec. Corp.*, 636 F.2d 104, 107 (5th Cir. 1981).

- Failure to conciliate is non-jurisdictional. A court can order a stay while conciliation occurs. *Agro Distribution, LLC*, 553 F.3d at 468.

Cause Findings

Conciliation (Practice Tips)

- For employers, there are many good reasons to try and conciliate. A lawsuit brought by the EEOC will be public, the EEOC will issue a press release, and settlement will also include a press release
- Settlement will be by a Consent Decree filed with the federal court. Those can be burdensome with lots of provisions that employers would balk at in a private settlement.

Cause Findings

Conciliation (Practice Tips)

- Private Plaintiffs do not have a duty to enter conciliation in good faith.
- Takeaway: Private plaintiffs can file suit without a cause finding, and even if there is a cause finding, they do not have an obligation to engage in settlement negotiations reasonably. But, the EEOC in an enforcement action can be penalized if it does not carry out its statutory duty of good faith conciliation

Litigation

By the EEOC

- When the EEOC brings suit, the Charging Party is barred from separately filing a cause of action, and their only recourse is to intervene in the EEOC's suit. *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 291 (2002).
- State statute of limitations do not apply. *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 372 (1977).
- EEOC can bring a "pattern or practice" suit and does not need to meet the procedural requirements of FRCP 23. *General Tel. Co. of NW v. EEOC*, 446 U.S. 318, 321-22 (1980).

Litigation

By the EEOC

- There are some limits.
- If an EEOC investigation only focuses on a local or regional area, it cannot thereafter file suit based on nationwide allegations of discrimination. *EEOC v. Outback Steak House of Florida, Inc.*, 520 F. Supp. 2d 1250 (D. Colo. 2007)
- Cases are all over the board on whether the EEOC can resurrect stale claims of discrimination in a pattern or practice case

Litigation

By A Private Party

- When the Charging Party receives her "Right to Sue" letter from the EEOC, he/she must file suit in a court of competent jurisdiction within 90 days

- Under the TCHRA, an employee (1) must file a complaint with the TWC-CRD within 180 days of the discriminatory act; (2) allow the Commission to dismiss the complaint or resolve it within 180 days; and (3) file suit no later than two years after it is filed. Tex. Lab. Code § 21.256; *Rice v. Russell-Stanley, LP*, 131 S.W.3d 510, 513 (Tex. App.—Waco 2004, pet. denied). Under Texas law, one does not need to obtain a right-to-sue letter, one needs only to be entitled to one. But, if one is issued, suit must be filed within 60 days. Tex. Lab. Code § 21.254

Litigation

By A Private Party

- **Admissibility of an EEOC Cause Determination**
- "As a general rule, EEOC determinations are findings of fact, although not binding on the trier of fact, are admissible as evidence in civil proceedings as probative of a claim of employment discrimination. *DeCorte v. Jordan*, 497 F.3d 433 (5th Cir. 2007).
- They are likely inadmissible if they are unreliable, or merely contain legal conclusions. *Weathersby v. One Source Mfg. Tech., LLC*, 378 Fed. Appx. 463, 465 (5th Cir. 2010).
- All subject to Rule 403. *Harris v. Mississippi Transp.*, 329 Fed. Appx. 550, 554-55 (5th Cir. 2009).

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