Employment Law Boot Camp (Part II): Handling EEOC Conciliation and Future Litigation, and Considerations For Next Steps

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Recap:

In Part I of this Boot Camp series, we explored the initial charge and investigation process at the Equal Employment Opportunity Commission through a fictional example involving the City of Wonderland Police Department and a former female police captain, Catrina, who filed a charge alleging sex, national origin, age, and disability discrimination. You may recall that as the City Attorney, you were tasked with investigating and responding to Catrina's charge in an effort to resolve the matter at the administrative stage. But, what happens when early resolution attempts are unsuccessful? At the EEOC, the agency file will then get transferred to an investigator. What are your rights and responsibilities, and what are those of the charging party? The answer often depends on how the EEOC resolves the charge. Astute employment counsel must plan for any eventuality, as the course of future litigation or resolution efforts depend greatly on your understanding of how the process works.

What are the different things that can happen with the EEOC's Investigation?

When we left off with Catrina's charge in Part I, we had examined the intricacies of the EEOC's investigation and how you, as the handling Attorney for the City of Wonderland, could best address the claims and allegations to maximize your chances of a favorable agency decision. But once the investigation is over, what is it that the EEOC can do with the information it has gathered? At the end of an investigation, the EEOC makes a determination on the merits of the charge. Not surprisingly, the range of outcomes of the EEOC's investigation is greater than merely a favorable or unfavorable finding.

How the EEOC characterizes the investigation results can be very important to the ultimate resolution of the charge and to any litigation that might follow. If, at the end of its investigation, the EEOC concludes that the information obtained does not establish a violation of the law, the charging party will be issued a letter called a "Dismissal and Notice of Rights." This informs the charging party that he or she has the right to file a lawsuit in federal or state court within 90 days from the date of receipt of the letter. Putting aside situations in which a charge is resolved by private settlement or administrative closure (which includes a variety of non-merits-based reasons), the "Dismissal and Notice of Suit Rights" (commonly referred to as a "No Cause" Determination) is the most common investigation result. In Fiscal Year 2014, 66.5 percent of all charges alleging Title VII discrimination claims (sex, race, color, national origin, and religion), and 59.4 percent of all charges alleging violations of the Americans with Disabilities Act, nationally, resulted in "No Cause" Determinations.

These findings are the most desirable for respondents, like the City of Wonderland, because they are issued after the EEOC has investigated and looked at the available evidence. A "No Cause" Determination provides a sense of validation to the accused employer, but more importantly, it forecloses the possibility of further EEOC involvement in the employment dispute. While a charging party still has the right to bring her claim before a court of law, the "No Cause" Determination means that neither the EEOC nor the U.S. Department of Justice will bring that case on the charging party's behalf. Therefore, if the charging party wishes to seek judicial relief, she must find an attorney and pursue the matter at her own expense. Quite obviously, the "No Cause" Determination is the prime objective for all respondents in these matters.

The outcome the City of Wonderland and all respondents work to avoid at all costs is the "Reasonable Cause" Determination which is communicated to the parties through a "Letter of Determination." As the name implies, this type of finding occurs when the EEOC's investigation reveals significant problems with the employer's position such that there is reason for the EEOC to believe that discrimination has occurred. While these findings stop short of determining that discrimination *actually* occurred, they are troublesome to respondents because they trigger further intrusive EEOC administrative processes and carry the threat of culminating in

litigation brought by the EEOC itself (or the U.S. Department of Justice) on the charging party's behalf. "Reasonable Cause" Determinations carry with them increased expenses and invariably mean that if the matter is to be resolved without court involvement, the resolution is likely to be expensive. But perhaps the most misunderstood consequence of a "Reasonable Cause" Determination is the triggering of the EEOC's obligation to exhaust its resolution efforts through the process of conciliation.

What is Conciliation and Why Should we consider it?

If the EEOC issues a Letter of Determination, the letter will include an invitation to the parties to join the agency in seeking to settle the charge through an informal and confidential process known as conciliation. Conciliation is a voluntary process that resembles mediation, but without the neutral third party communicating settlement offers and responses. The parties must agree to any resolution negotiated through conciliation and neither the EEOC nor the respondent can be forced to accept any particular terms. The EEOC is required to attempt to resolve its findings of discrimination on charges through the conciliation process prior to bringing any action in court. In other words, the "conciliator" is the EEOC, usually the investigator that had recommended a finding of reasonable cause of discrimination. Recently, the Supreme Court affirmed federal courts' authority to review the adequacy of the EEOC's conciliation efforts, putting more pressure on the federal agency to ensure that the Commission gives employers an opportunity to resolve claims before the courts get involved. *See Mach Mining, LLC v. EEOC,* 575 U.S. ___ (2015).

For many employers, conciliation feels like a forced settlement. Often, the terms initially offered are draconian, consisting of expensive training obligations, conspicuous postings of employee rights, and most significantly, a substantial monetary payment to the charging party. While it is true that resolution of a charge through conciliation generally carries greater obligations on the employer and larger monetary payments than a private settlement of the claim, resolution through the administrative conciliation process often cost respondents far less than litigating the matter at a later time in court. Furthermore, the EEOC strongly encourages parties to take advantage of the conciliation opportunity because the next step is for the EEOC to consider the matter for litigation. Finally, if a charge is not resolved through the conciliation process, then the EEOC, itself, may step in the shoes of the charging party and sue the employer with the help of the Commission's litigators. Compared to defending a lawsuit, conciliation may be the more efficient, effective, and inexpensive method of resolving employment discrimination charges, despite some of the frustrations in dealing with what appears to be unreasonable demands for settlement by the charging party and her counsel. The tricky part of conciliation is, if the charging party is represented by an attorney, the opposition may have a "pie in the sky" initial settlement demand simply because the claimants and her counsel know that the EEOC had already found cause and has now been emboldened to push the envelope in conciliation for a more than ridiculous monetary settlement demand. In such situations, it is critical that the employer's counsel get fully prepared to call the charging party's lawyer to the mat at the conciliation when an initial six-figure settlement offer is made through the EEOC.

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How to Approach Conciliation.

If the EEOC makes a "Reasonable Cause" Determination against the City of Wonderland, the responsible City employment counsel should first approach the decision of whether to participate in conciliation by putting aside any personal feelings about the determination. For example, the City of Wonderland's Police Chief may be disappointed that the personnel issue made it this far through the EEOC process and now has disdain for Catrina, who was provided an inordinate amount of peace officer training, promotions and support over her long tenure. Once the Letter of Determination is issued, there is no opportunity to reargue the finding and, despite any disagreements with the propriety of that finding, the task at hand is to determine the best way to resolve the matter. In some instances, conciliation may not make sense. Start with a thorough review of the Letter of Determination and any specific factual findings to which the EEOC points in support of its conclusions (there may not be much). Do an honest analysis of the agency's reasoning, including critically reading and checking the cite history of any cases cited by the investigator in support of the findings. It is not uncommon for the EEOC to view crucial facts in a manner that is calculated to provide support for the charging party's side of the dispute; however, the reviewing city attorney should honestly evaluate the reasoning, putting aside any natural biases. Furthermore, the astute employer's counsel will understand that "easy" defense cases rarely reach the conciliation phase; in cases that reach conciliation, there is usually one or more sufficiently adverse facts that regardless of the finding, if the matter ends up in court, it will present a challenge to defend.

If any reasoning and factual support cited in the decision reasonably support the decision, then it may make sense to take advantage of the conciliation process. First, the respondent loses nothing by listening to the demands of the charging party and the EEOC. There is no compulsion to agree, and if the conciliation process fails, the worst that can happen is that the federal agency files suit, a prospect that is equally likely if conciliation had been refused in the first place. It should be noted that in Fiscal Year 2014, the EEOC reported 1,138 unsuccessful Title VII conciliation efforts and filed 76 lawsuits with Title VII claims. Thus, less

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than 10 percent of unsuccessful conciliations resulted in lawsuits filed by the agency. Of course, this statistic does not included private lawsuits filed by charging parties, which are decidedly more common. Although the threat of litigation initiated by the EEOC may be relatively low, private lawsuits are substantially more likely when a Reasonable Cause Determination has been made.

Second, conciliation inevitably delays the EEOC's decision about on whether or not to file suit and further delays any suit that might be brought by the charging party on her own. This additional time may be used effectively to prepare for an eventual civil suit, whether that suit is filed by the EEOC or the charging party. When litigation is imminent, additional time to prepare can be critical to a defendant's success.

Finally, conciliation offers substantial opportunity to resolve a troublesome charge without the unpredictable and emotional involvement of judges and juries. While the resolution may be more onerous and more costly than a similar private settlement obtained before the EEOC's determination, the process offers some certainty of resolution at a "reasonable" price. Conversely, future litigation could easily result in substantial defense fees and ultimately, an unfavorable jury verdict punctuated by high compensatory damages awards that are invariably the product of juror emotions.

Given that conciliation is voluntary and carries no obligation to agree, there is almost no downside to participating if a "Reasonable Cause" Determination is issued; but it can be a frustrating process and test of the employer's patience. The conciliation process, however, provides one last bite at the apple to settle a difficult case containing unfavorable evidence against the employer before the higher–stakes game in a federal lawsuit, and if approached rationally and open-mindedly, conciliation can serve to resolve these cases at a much more reasonable price than litigation will provide.

Litigating Discrimination Claims in Court.

In some cases, however, litigation cannot be avoided: An irrational or angry charging party and an opposing counsel that is a "true believer" will not listen to a reasonable offer, or the EEOC won't budge on its back pay request and training requirements. In such instances, the employer may have no choice but to litigate. In some of those instances, the litigation may be commenced by the EEOC on the charging party's behalf, but in the overwhelming majority of instances, any litigation that results from a charge of discrimination will be a private lawsuit filed by the charging party and his or her attorney. The approach to a government lawsuit can be quite different than a typical private suit. For example, the City of Wonderland's decision-makers, whether it is the mayor or a delegated authority, may direct their employer's counsel to defend the case to the bitter end so as to send a message to other police officers thinking about filing a claim that the City is willing vigorously defend against claims filed by employees. Or, perhaps, one member of city council will be so offended by Catrina's disparaging statements made against the City of Wonderland that he or she will harbor negative feelings and take the Reasonable Cause Determination personally. Although reasonable minds usually prevail, the temptation to take an aggressive stance against the EEOC and a Charging Party for a claim that has been determined as one of reasonable cause is usually pretty high and requires an objective legal assessment of options and potential outcomes.

Litigating Discrimination Lawsuits against the EEOC and Private Litigants

Lawsuits filed by the EEOC are rare occurrences and have become rarer in the past several years. The average number of lawsuits filed by the agency has hovered around 150 per year since Fiscal Year 2012, approximately half the average total number of lawsuits filed each year between 1997 and 2012. Nevertheless, if a charge resulting in a Reasonable Cause Determination is not resolved, either through private settlement or thorough the EEOC's mediation or conciliation efforts, the respondent employer risks facing an agency-driven civil lawsuit.

Whether the EEOC will file suit on behalf of the charging party depends entirely on the review of the matter performed by agency attorneys and criteria determined by each EEOC office's regional director. While any case could be at risk for an agency-driven lawsuit, the likelihood of such action is greatly increased in instances where: (1) there are class action issues or multiple plaintiffs involving a pattern or practice of bad behavior; (2) the respondent employer is a large or well-known company; (3) novel or unprecedented issues exist which might provide the EEOC with an opportunity to achieve favorable court resolution to advance the agency's policies; or (4) the respondent employer has a history of having meritorious charges filed against it. This is not to say that the absence of any/all of these four factors will ensure that the EEOC won't file suit on the charging party's behalf. There have been instances in which an agency-directed lawsuit is filed on behalf of an individual charging party in what appears to be a routine and unremarkable case. For whatever reasons, occasionally, the EEOC chooses to champion a case that otherwise does not meet its usual criteria. Employers, private and public, should not assume that their case will not draw the attention of the EEOC's litigation unit.

In any lawsuit brought by the federal government, the dynamics are significantly different than in private lawsuits brought by charging parties. First, the EEOC has the benefit of having worked up the case for many months with information provided by both sides. The charge investigation process allows free discovery for the EEOC and provides a solid base from which to establish the agency's theory of the case. In many instances, EEOC-driven lawsuits may focus less on discovery of the particular facts pertaining to the charging party, but more heavily on the employer's past employment practices, its policies, and the broader impact of those policies and practices on the employer's employees.

Second, the EEOC is a federal government agency with the full power, force, and resources of the federal government behind it. Because the agency files so few lawsuits, it can afford to litigate discovery disputes and other issues that can be less intrusive in private lawsuits. While the costs associated with litigating these disputes against the EEOC may not rise as dramatically for municipal employers like the City of Wonderland as they do for private sector employers that must hire and pay outside counsel, the EEOC's methodical and measured approach to litigating its cases can prove wearisome and onerous. When litigating such cases, the responsible City Attorney should be prepared for a thorough and prepared opponent who is guided by objectives that are meant to achieve relief for both the charging party and the agency. Therefore, injunctive relief and other relief not specific to the charging party will often be sought.

Any employer's counsel, whether on the City payroll or external counsel, should approach a government-initiated lawsuit with an understanding that addressing the claims of the individual employee is only the tip of the iceberg. The EEOC will push for non-monetary concessions, including the posting and training requirements it sought during conciliation. Any resolution short of a defense verdict or successful dispositive motion will have to include these considerations. Furthermore, the government will seek to defray its costs by seeking attorneys' fees and, if the case is brought in conjunction with a private suit, there will be a request for fees by the plaintiff's private attorney as well. It doesn't take much to see that litigating against the EEOC can get expensive and cumbersome very quickly. In all such cases, therefore, the City Attorney should seek to limit the issues in the case as much as possible to the individual plaintiff's circumstances.

The fact that lawsuits by the EEOC may be difficult and expensive does not imply that the reverse is true for private lawsuits. Although the added layer of federal government bureaucracy may not be present, private lawsuits – which account for the vast majority of discrimination claims that appear in court – may be equally contentious and expensive. In almost all such cases, when the EEOC has found Reasonable Cause,

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the EEOC's Letter of Determination may become an important evidentiary issue. Plaintiffs will want to introduce that letter as evidence of discrimination, while defendants universally seek to exclude the letter as inadmissible hearsay. Most courts will permit the letter's introduction into evidence for dispositive motion and trial purposes, a fact that should be heavily considered at the outset, as inclusion of the letter often destroys the chances of filing a successful summary judgment or other dispositive motion and may highly influence any jurors who hear the case.

Any employer's counsel should have a firm grasp on the facts of the case by virtue of thorough and thoughtful collection of evidence during the EEOC's investigation. Any harmful facts or facts that will be contested should be outlined and studied so that the attorney for the City can devise a theory of the case that minimizes the importance of such facts and highlights the favorable facts. Thorough discovery on these points is crucial to successfully defending a discrimination claim, and a well-conducted deposition can be the difference between achieving summary judgment and facing trial. In all such cases, a methodical approach is recommended.

Initial Case Considerations.

When the lawsuit is received, the City Attorney should meticulously review the claims for any potential defects or affirmative defenses and develop a plan to attack each individual claim. Any claims that arguably can be attacked on a motion to dismiss should be flagged and considered for such a motion to narrow the important issues and focus the case on the claims that truly matter. The attorney must carefully consider affirmative defenses and always include the "mixed motive" defense that the challenged employment action(s) would have occurred whether or not any discriminatory animus existed. This defense, if sufficiently proven, may allow a defendant found liable for discrimination to avoid damages (but not attorneys' fees).

Discovery Issues

Once the plan of attack is devised and the answer has been filed, the attorney must undertake carefully constructed discovery to support its plan. In most cases, the liability evidence is readily available. In employment disputes like Catrina's most of the documentary evidence will already be in the Defendant City's possession. Items such as performance reviews, employment history, prior discipline, etc., are often found in the defendant's own records. Furthermore, investigation reports, witness statements, and other event-specific evidence often is available in the EEOC's investigation file. Therefore, the majority of discovery, both written and oral, will focus on three areas: (1) defining the discriminatory conduct; (2) plaintiff's allegations of damages; and (3) efforts to reduce or mitigate damages.

With respect to the first item, plaintiffs through counsel often file complaints that contain general allegations of discrimination only, and their EEOC charges often contain little additional detail. Although the EEOC's investigation file may contain additional allegations and specific facts, in most instances, defense counsel will not have a firm grasp on *all* of the acts by his/her client that the discrimination plaintiff contends contributed to the discrimination he/she allegedly suffered. The City attorney can utilize written discovery first to inquire into the number of discriminatory acts, a description of them, the identities of witnesses to such acts, and a variety of additional useful information to begin narrowing the scope of the discrimination claim.

In addition, employer's counsel will want to send interrogatories inquiring into medical/psychological treatment for alleged mental anguish, as well as document requests for doctor's/counselor's notes, bills, etc. In situa-

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tions involving plaintiffs that have been terminated, like Catrina, employer's counsel must not forget to inquire into the plaintiff's job hunting efforts and ask for documentation of those efforts, such as job applications, cover letters, evidence of interviews and networking efforts, new employer records confirming salary/wages and other benefits, and a host of other items that can be used to challenge a plaintiff's allegations of damages.

Some cases may involve expert testimony, such as economics experts who will opine about the plaintiff's future earnings and earning capacity and make calculations intended to establish the plaintiff's damages. In other cases, the plaintiff might retain an expert in counseling or psychology who will discuss the "devastating impact" of the discriminatory act(s) of the defendant on the plaintiff and validate his/her request for exorbitant compensatory damages. In such cases, employer's counsel should be prepared to retain defense experts or rebuttal experts to challenge those opinions and offer explanations that support more reasonable damages numbers.

Depositions

In most single-plaintiff cases, the employer's counsel will have few depositions to take. Usually, the plaintiff will be deposed and perhaps a witness or two. Counsel should carefully plan depositions around information obtained in written discovery. Again, much of the plaintiff's deposition should be devoted to ferreting out all allegedly discriminatory acts and locking down the plaintiff's allegations so that the universe of discriminatory conduct is explicit and can be directly addressed in dispositive motions or with counter-evidence at trial. The goal is to know everything the plaintiff will put before the jury so that there are no surprises or allegations that the defense attorney has not already heard and prepared for. Additionally, deposition of the plaintiff can be used to test the reasonableness of efforts to reduce actual or compensatory damages through job-searches and medical/counseling treatment. For instance, if Catrina testifies that she saw a counselor twice a week for a year to address her severe mental anguish over being discharged from the City of Wonderland's Police Department, her testimony may seem reasonable at first blush. However, at the deposition, Catrina may very well testify that despite her counseling, she did not seem to get any better, but kept going to the counselor because she was hoping it would eventually help. At trial, a shrewd employer's counsel might argue that Catrina's continued counseling with that same counselor for a year was unreasonable because it clearly wasn't working, yet she failed to do something else, such as medication or a new counselor, to try to mitigate her damages.

Therefore, it is critical that a City attorney or employer's counsel that is defending or overseeing an employment discrimination lawsuit have a strong knowledge of the underlying facts and a firm grasp on the important legal issues to maximize the City's chances once the matter moves from the administrative EEOC process to the judicial system in state or federal court.

Conclusion

There is no guarantee that the City of Wonderland will successfully resolve Catrina's allegations with the EEOC. While the City can point to Catrina's foul language and her violation of workplace rules as legitimate reasons for her discharge, Catrina has good evidence concerning the proximity of her harassment complaint and the date of her discharge. In our example, Catrina's early settlement – before filing her charge – may preclude her from suing if the charge is not resolved; however, it cannot preclude the EEOC from investigating, issuing a Letter of Determination, and bringing suit on its own. The City of Wonderland must plan for any eventuality and be prepared to litigate should informal attempts to resolve the matter fail. The discrimination arena is fraught with landmines that can sink even the most well-intentioned attempts to resolve EEOC claims. Preparation, forethought, and knowledge of the process is key to successfully defending against such claims and achieving a resolution that is best for the local government. ML



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