

It ain't Over 'til it's Over (and Even Then, it Might not Be Over): How long can the EEOC Continue Investigating – after Issuing a Right-to-Sue Letter?

August 24, 2017 – Dorsey Work Watch
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EEOC charges are a fact of life for employers. Even with comprehensive equal employment policies, top-notch human resources personnel, and a great workplace culture, many employers will at some point encounter a charge of discrimination or retaliation. While any charge is an unwelcome event, the stakes increase even further if the EEOC decides to take the employer to court. The prospect of litigating against the EEOC can be daunting. So employers tend to breathe a sigh of relief when they learn that the EEOC has issued a right-to-sue letter in response to a pending charge, because this typically signals the end of the EEOC's investigation (and involvement in the matter). ***Although the charging party may still sue, after the EEOC issues a right-to-sue letter, is it safe for employers to assume the EEOC is safely in the rear view mirror?***

On August 15, 2017, the United States Court of Appeals for the Seventh Circuit decided *EEOC v. Union Pacific Railroad Company*, adding to current uncertainty about when the EEOC's authority to act comes to an end. Prior court of appeals decisions had split over the question of whether the EEOC can continue investigating after issuing a right-to-sue letter. The Seventh Circuit sided with the Ninth Circuit in holding that the EEOC *can* continue to investigate, and go on to file its own enforcement action, even after issuing a right-to-sue letter. This conflicts with an older decision from the Fifth Circuit—which held that such action exceeded the agency's authority. As with any circuit split, there is a chance the Supreme Court might weigh in.

The underlying facts are straightforward, but the procedural history is not. In 2011, two African-American men began entry-level jobs with Union Pacific. They unsuccessfully applied for promotions and were eventually terminated in October 2011, when their positions were eliminated. Both men filed EEOC charges alleging discrimination and retaliation (they had filed earlier charges after being denied the promotions). Union Pacific grudgingly responded to the charges and to the EEOC's first request for information, requiring an EEOC subpoena and enforcement action. The EEOC

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eventually issued a right-to-sue letter pursuant to 42 U.S.C. § 2000e-(5)(f)(1), which requires the agency to issue notice of a charging party's right to sue within 180 days after receiving a charge. The charging parties sued in federal court. But they ultimately lost on summary judgment, and the Seventh Circuit affirmed. Case closed, right?

Not so fast. While the lawsuit was pending in the district court, the EEOC issued a **second** request for information. When Union Pacific refused to respond, the EEOC filed suit to enforce its subpoena. Union Pacific moved to dismiss, arguing that the EEOC lacked authority to continue investigating given that it had already issued a right-to-sue letter. The district court denied the motion, and Union Pacific appealed.

The Court of Appeals framed the legal question as “whether the EEOC is authorized by statute to continue investigating an employer by seeking enforcement of its subpoena after issuing a notice of right-to-sue to the charging individuals *and* the dismissal of the individuals' subsequent civil lawsuit on the merits.” The answer, at least in the Seventh Circuit, is “yes.”

The court noted that the EEOC's governing statutes give it the authority to request information or records only in the context of investigating a charge. In other words, the EEOC cannot simply call up employers and ask to sift through their personnel files. Although the EEOC must issue a right-to-sue letter within 180 days of receiving a charge, the governing statutes are silent as to what effect such a letter has on the agency's investigative powers.

With no clear-cut statutory answer, the Seventh Circuit looked to analogous cases, including the Supreme Court's decision in *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002). In *Waffle House*, the Supreme Court held that a charging party's agreement to *arbitrate* the claims giving rise to a charge did not prevent the EEOC from pursuing victim-specific *judicial* relief on behalf of the charging party. In other words, the EEOC could go to court even though the employee could only go to arbitration. Following *Waffle House*, the Seventh Circuit itself addressed a similar issue, holding that even when a charging party *withdraws* a charge, the EEOC can continue its investigation. See *Watkins Motor Lines, Inc.* 553 F.3d 593 (7th Cir. 2009). These decisions, buttressed by the EEOC's own regulations, see 29 C.F.R. § 1601.28(a)(3), led the Seventh Circuit to conclude that the agency can continue investigating employers and subpoenaing their records even after issuing a right-to-sue letter.

But what about the fact that the charging parties' underlying case had been decided on the merits? Union Pacific argued that this resolution terminated the EEOC's authority to investigate. Once again, the Seventh Circuit disagreed. According to the court, the EEOC's authority does not derive from a charging party's *claims*; a valid *charge* irrevocably triggers the agency's investigative and enforcement powers. Tethering the EEOC to the private interests of the parties would undermine the agency's mission to serve the public interest. In short, the court held that *the EEOC* gets to decide when it is done investigating, not the parties.

This decision has at least two important implications for employers. First, EEOC charges

are serious matters with potentially significant consequences. Whether employers respond to charges themselves or engage outside counsel, they should ensure that their submissions to the agency are comprehensive and persuasive. The same goes for responses to requests for information. In 2016, the EEOC issued its first-ever nationwide procedures on how to effectively respond to charges, outlining the elements that the agency considers most important. See U. S. Equal Empt. Opportunity Comm'n, *Effective Position Statements*. Employers are well advised to familiarize themselves with these expectations to achieve the best possible result at the agency level.

Second, employers should consider pursuing a “no probable cause” finding, even after the EEOC issues a right-to-sue letter. The agency rarely pursues an investigation after issuing a right-to-sue letter, but *Union Pacific* proves that—at least for now—it can still happen. Employers and their outside counsel may want to request findings of no probable cause as a matter of course for every EEOC charge, even after the agency issues a notice of right-to-sue.

Given the disparate views among the circuit courts regarding the scope of the EEOC’s authority, employers should stay tuned for future developments in this key area. Employers should also be aware of how courts view this issue in their jurisdictions to ensure they understand the potential consequences after a right-to-sue notice issues. Finally, employers should consider seeking legal guidance when responding to any agency charge—given the high stakes involved.