

EEOC PRACTICE AND PROCEDURE

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I. PREFILING CONSIDERATIONS

A. Plaintiff

As with any potential claim, the employee's attorney must evaluate the employee's claims against the proper employer, review the facts in conjunction with the legal authority, perhaps interview witnesses, if any, early on, determine the employee's employment status (must not be an independent contractor), ascertain the number of employees of the employer, assess damages, and be aware of any deadlines or limitations periods for filing a Charge of Discrimination among other things. Pertaining to the filing of a Charge of Discrimination, counsel for the employee must first determine whether the claim asserted requires the filing of a Charge of Discrimination as an administrative prerequisite for eventually filing a lawsuit.

Some particular considerations include the following:

1. Laws That Apply

The federal laws that apply to the filing of claims of discrimination for employees against their respective employer are: Title VII of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991, 42 U.S.C. § 2000e, *et seq.* (color, gender, national origin, race, and religion); The Americans with Disabilities Act, 42 U.S.C. § 12101, *et seq.* (disability); and the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621, *et seq.* (age). State law is found in the Texas Commission on Human Rights Act, Chapter 21 of the Texas Labor Code (age, color, disability, gender, national origin, race, and religion) ("TCHRA"). In order to eventually pursue such claims in court of competent jurisdiction, an employee must bring these claims within a Charge of Discrimination to be filed with the Texas Workforce Commission Civil Rights Division ("TWC-CRD") or U.S. Equal Employment Opportunity Commission ("EEOC"). As a side note, race, color, and national origin discrimination claims may be pursued directly in a lawsuit filed in a court of competent jurisdiction under the Civil Rights Act of 1866, 42 U.S.C. § 1981, if timely filed.

As for state law, the purpose of the TCHRA is the "correlation of state law with federal law in the area of discrimination in employment." *Schroeder v. Texas Iron Works*, 813 S.W.2d 483, 485 (Tex. 1991). There are two identified purposes to the TCHRA. One is to "to provide for the execution of the policies embodied in Title VII" and the second is "to create an authority that meets the criteria" under Title VII and the ADEA. *Id.*

2. Number of Employees

Under Title VII, the ADA and the TCHRA, the employer must have at least 15 employees. The ADEA requires at least 20 employees. The time period within which to count such employees is viewed as 15 (20 under the ADEA) or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year within which the employee suffered discrimination. Title VII – 42 U.S.C. § 2000e(b); ADA – 42 U.S.C. 12111(5)(A); ADEA – 29 U.S.C. § 630(b). The threshold number of employees under Title VII is not jurisdictional under federal law. *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 516 (2006). The Court ruled in *Arbaugh* that Title VII's "employee-numerosity requirement," which limits potential defendants to those maintaining at least fifteen employees, is not a limit on a court's

jurisdiction to hear Title VII claims. The requirement is instead a substantive element of a Title VII claim, which means that a defendant must raise the issue prior to verdict or the requirement will be waived.

The Supreme Court has held that the “ultimate touchstone” in determining whether an employer has a sufficient number of employees to satisfy the jurisdictional prerequisite for coverage under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e(b), is “whether an employer has employment relationships with 15 or more individuals for each working day in 20 or more weeks during the year in question.” *Equal Employment Opportunity Commission and Walters v. Metropolitan Educational Enterprises, Inc.*, 117 S. Ct. 660, 666 (1997). The Court adopted the EEOC’s position that employees should be counted whether or not they are actually performing work for or being paid by the employer on any particular day.

The method the Court adopted is often called the “payroll method” because “the employment relationship is most readily demonstrated by the individual’s appearance on the employer’s payroll.” *Id.* at 663-64. However, the Court stressed, “what is ultimately critical is the existence of an employment relationship, not appearance on the payroll.” *Id.* at 666. The Court upheld the EEOC’s interpretation, reasoning that “an employer ‘has’ an employee if he maintains an employment relationship with that individual” on the day in question. *Id.* at 664. The Court rejected Metropolitan’s interpretation that an employer “has” an employee for a particular working day only when it is actually compensating the employee for that day. *Id.* at 664.

The Court also disagreed with Metropolitan’s argument that the EEOC’s interpretation rendered the statutory phrase “for each working day” superfluous. Without the phrase, the Court said, it would be unclear how to count an employee who departs in the middle of a calendar week or an employee who departs after the end of the workweek, but before the end of the calendar week. *Id.* at 664-65. The Court held that “all one needs to know about a given employee for a given year is whether the employee started or ended employment during the year and, if so, when. He is counted as an employee for each working day after arrival and before departure.” *Id.* at 665-66.

The Court noted Metropolitan’s argument that the EEOC’s interpretation could produce some “strange consequences,” such as counting an employee who works irregularly only a few days a month. *Id.* at 665. However, the Court observed that Metropolitan’s approach “produces unique peculiarities of its own.” *Id.* at 665. For example, by counting employees only on the days that they are compensated, a half-time worker who works every morning would be counted, while one who works on alternate days would not. *Id.* at 665. Also, Metropolitan’s approach “would turn the coverage determination into an incredibly complex and expensive factual inquiry.” *Id.* at 665. “For an employer with 15 employees and a 5-day workweek, the number of daily working histories [that would have to be examined] for [a] two year period is 7,800.” *Id.* at 665.

3. Filing with Federal or State Commission

Although an employee may file his or her Charge with the TWC-CRD, such filing is only considered to be filed under state law, unless the TWC-CRD forwards it to the EEOC. Whereas,

filing such Charge with the EEOC can be considered as being filed under state and federal law pursuant to a work-sharing agreement between the EEOC and TWC-CRD. In other words, a charge filed with the EEOC, and forwarded by the EEOC to the TWC, satisfies the filing requirements of the TCHRA. See *Price v. Philadelphia Am. Life Ins. Co.*, 934 S.W.2d 771, 773–74 (Tex. App. – Houston [14th Dist.] 1996, no writ). However, this paper focuses mostly on the EEOC, as most of the Charges are filed with this Commission. A discussion of deadlines under each law will be discussed below. Nonetheless, maintaining both claims under state and federal law affords the employee the opportunity to keep his or her options open when strategic considerations as to whether the suit should be filed in state or federal court come into play.

B. Defendant

There are at least two main issues employers should be cognizant of when they terminate an employee, even before the employee has filed an EEOC charge or initiated any other action. First, the employer should be careful in the way in which it handles unemployment claims. Second, the employer should give care not to say things about the departed employee that could be used by the ex-employee to bring a defamation lawsuit.

1. Handle Unemployment Claims With Care

Usually, the ex-employee files his or her unemployment claim before they file their EEOC charge. It is not unusual for an employer to terminate an employee for what it believes to be “misconduct,” only to have the Texas Workforce Commission conclude that the employer did not prove “misconduct,” and to award the ex-employee benefits. This is usually not a huge problem for employers because, as a general rule, “[t]he findings of the Texas Workforce Commission have no collateral estoppel effect and are not admissible evidence in this action under the statute’s express command.” *Grogan v. Savings of America, Inc.*, 118 F. Supp. 2d 741, 751-52 (S.D. Tex. 1999) (quoting TEX. LAB. CODE ANN. § 213.007) (“A finding of fact, conclusion of law, judgment, or final order made under this subtitle [Collateral Estoppel Doctrine Inapplicable] is not binding and may not be used as evidence in an action or proceeding ... even if the action or proceeding is between the same or related parties or involves the same facts.”) (emphasis added)). See also *Atkinson v. Denton Pub. Co.*, 84 F.3d 144, 150 (5th Cir. 1996); *Comeaux v. Uniroyal Chemical Corp.*, 849 F.2d 191, 194 (5th Cir. 1988) (holding that finding in state unemployment compensation proceeding that black employee had not violated safety rule prior to his discharge did not have collateral estoppel effect in employee’s subsequent Title VII action as to issue of whether termination was for legitimate, nondiscriminatory reasons).

On occasion, however, the way an employer handles an unemployment claim has adverse consequences on the employer in its defense of the employee’s subsequent discrimination lawsuit. For example, in *Hansard v. Pepsi-Cola Metropolitan Bottling Co., Inc.*, 865 F.2d 1461, 1465 (5th Cir. 1989), an issue in the case was whether Hansard was fired (as he claimed) or whether he voluntarily quit (as Pepsi claimed). Hansard had filed for unemployment and claimed he was fired in his unemployment filing. Pepsi did not respond to or otherwise challenge Hansard’s unemployment claim. After Hansard won his age discrimination case at trial, Pepsi appealed, continuing to argue that Hansard had not been fired, but instead voluntarily resigned. In rejecting Pepsi’s argument, the Fifth Circuit noted that there was evidence that

Hansard was fired, including Pepsi's failure to contest Hansard's claim for unemployment benefits in which he alleged that he had been fired.

Another example of an employer's handling of an unemployment claim resulting in problems for its defense of the employee's subsequent discrimination lawsuit is *Bowen v. El Paso Elec. Co.*, 49 S.W.3d 902 (Tex. App.—El Paso 2001, pet. denied). In that case, the female African-American plaintiff was fired and immediately filed for unemployment benefits with the Texas Workforce Commission. The defendant contested Bowen's right to benefits and eventually an appeal was taken, in which sworn tape-recorded testimony was taken from Bowen and from the defendant's witnesses. Later, the trial court granted summary judgment for the defendant. In reversing that ruling, the El Paso Court of Appeals ruled that the defendant had created an issue of pretext in its sworn testimony during the unemployment appeal hearing. The court stated:

The Company here gave a number of reasons for Ms. Bowen's termination, only two of which were given to her when she was told of the decision: that she is not a team player and did not work harmoniously with others. At the Texas Workforce Commission hearing, the reasons were expanded to include: (1) failing to follow instructions, specifically discussing the "pushing" incident with her former supervisor and bothering Cordova while she was working on a special project; (2) failing to promote or display harmony, which was explained as people being afraid of her after the "pushing" incident; (3) absenteeism; and (4) failing to report the "Chaka Khan" letter to her supervisor. The Company also presented evidence, however, that the "pushing" incident had nothing to do with Bowen's termination, and the Company cleared her of any blame for that incident after investigation. Although Blackburn cited absenteeism as a reason for dismissal, the only evidence of Bowen's absences from the workplace indicate they were at the Company's direction, or were excused. Moreover, no mention was made of absenteeism until the TWC hearing. Finally, Bowen reported the "Chaka Khan" letter to her supervisor within two days after receiving it, apparently only after making an attempt to resolve the matter without involving management. We think this evidence is sufficient to raise a fact question on pretext, and in light of *Reeves*, we must reverse.

Id. at 910-11.

2. Do Not Unnecessarily Publicize The Facts Regarding An Employee's Termination

Employers generally enjoy a strong qualified immunity against defamation claims brought by ex-employees. *See, e.g., Frakes v. Crete Carrier Corp.*, 579 F.3d 426 (5th Cir. 2009) (holding that shop manager's communication to lead man of his reason for firing the plaintiff-mechanic was protected by a qualified privilege under Texas law, and that allegation that the employer's investigation was inadequate and potentially negligent was insufficient to support a finding of actual malice under a purposeful-avoidance theory, as was allegation that shop manager "doctored" the evidence against mechanic); *See Martin v. Southwestern Elec. Power Co.*, 860 S.W.2d 197, 199 (Tex. App.—Texarkana 1993, writ denied) (statements from

management to plaintiff's former coworkers regarding reason for his termination are covered by qualified privilege).

But, loose lips can still sometimes sink ships – there are numerous examples of employees who sued for defamation after their employer fired them, and then told other persons about the (allegedly false) basis for their termination. *See Shearson Lehman Hutton, Inc. v. Tucker*, 806 S.W.2d 914, 924 (Tex. App.–Corpus Christi 1991, writ dis'd w.o.j.) (affirming liability against employer because the plaintiff's supervisor recklessly told others that the plaintiff would lose his stockbroker's license); *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"); *Ramos v. Henry C. Beck Co.*, 711 S.W.3d 331 (Tex. App.–Dallas 1986, no writ) (finding a fact issue as to plaintiff's defamation claim against his employer based on his employer's statement that he had been caught stealing a power tool).

Therefore, it makes sense for employers to limit the extent of their communications regarding the reasons for an employee's termination. It also is prudent to ensure that, to the extent any such communications are made, they are accurate and truthful. When these basic rules are not followed, an employer can sometimes find itself in deep trouble with juries. For example, in early 2005, a jury in San Antonio, Texas, found for a former manager of Lowe's Home Improvement in a workers' compensation retaliation and defamation case. The jury awarded the plaintiff \$4.6 million. Here is the press release from the plaintiff's law firm's website that was taken from the Kerrville Daily Times:

Lowe's ordered to pay \$4.6M

By Gerard MacCrossan
The Daily Times
Published March 03, 2005

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 arthroscopic 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.”**

Pearson, who argued Smith’s case, said he believes Lowe’s fabricated a story for a loss prevention case against Smith, who still lives in the Kerrville area. He said an attempt to claim more than \$500 from Smith using a debt collection was abandoned by Lowe’s after the lawsuit was filed in November 2003.

Lowe’s spokeswoman Chris Ahearn said Wednesday she had no record of the alleged debt collection against Smith. She said prior to Smith’s dismissal, however, that Smith admitted violating company policy by using her employee discount to buy a ride-on lawnmower for her husband’s employer, and also violated policy by handling a return of the equipment after it was used.

“Violation of the policy can result in disciplinary action up to termination,” Ahearn said, adding that she couldn’t say if that was the sole reason given for Smith’s dismissal by former Kerrville Lowe’s manager Richard LeMoine.

Pearson said LeMoine wasn’t named personally in the suit, but that he did testify during last week’s trial. According to Ahearn, LeMoine now manages a Lowe’s store in Corpus Christi.

Connolly brushed off the alleged violation of the employee discount policy responding: “The jury’s verdict speaks volumes to Mrs. Smith’s reputation and personal integrity.”

According to Pearson, the claim filed against Lowe’s sought \$1.3 million for Smith.

“(The claim) was based on her lost wages – she was earning a substantial amount as a manager – and egregious statements about her conduct,” he said. “She had applied to a number of different retailers in the Kerrville area and could not get an interview.”

While Smith has since found employment, she is not earning at the salary level she was making at Lowe’s, Pearson said.

Ahearn said Lowe’s is disappointed at the verdict.

“Our attorneys are reviewing it and evaluating the company’s options at this time,” she said. “We will be making a decision in the near future as to the company’s future action.”

Pearson said the Lowe’s management engaged in a pattern and practice of “retaliation over workers’ compensation claims.” Three other former Kerrville employees – David Mata, Norman Morris and Bryan Morey – are being represented in wrongful dismissal claims against the home improvement warehouse chain.

“They had workers’ comp. claims and were either fired for bogus reasons or put in menial positions until they quit,” Pearson said.

All three cases are set for trial later this year.

Ahearn said Lowe’s plans to “vigorously” fight those claims.

II. FILING THE CHARGE

A. Exhaustion

1. What Is A “Charge”?

Employment discrimination plaintiffs must exhaust administrative remedies before pursuing claims in federal court. *Taylor v. Books A Million, Inc.*, 296 F.3d 376, 378 (5th Cir. 2002). Exhaustion occurs when the 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).

Usually, the employee will take one of several steps in order to preserve their rights before filing the Charge. The employee may contact the EEOC by phone, mail or online at www.eeoc.gov through the internet. Usually, if the employee makes first contact based on one of these methods, the employee will be asked to complete a Charge Intake Questionnaire form. This form contains a number of questions for the employee to provide the EEOC with information about their claims. The EEOC then uses this form to prepare a more formal Charge of Discrimination on a formal document called a Form 5. The Form 5 is then sent to the employee to review, make any corrections, sign and date. Of note, for the Charge to be jurisdictionally valid under state law, it must be notarized as well.

If the employee meets with the EEOC in person, usually a Form 5 Charge is prepared based on the information provided to the EEOC at the intake interview. The Charge is then signed and dated at the EEOC, and preferably notarized. Of course, the employee or their attorney may also prepare the Charge on a Form 5 to be filed with the EEOC as well.

The Charge must include the following pursuant to 29 C.F.R. § 1601.12:

- (a) Each charge should contain the following:

(1) The full name, address and telephone number of the person making the charge except as provided in § 1601.7;

(2) The full name and address of the person against whom the charge is made, if known (hereinafter referred to as the respondent);

(3) A clear and concise statement of the facts, including pertinent dates, constituting the alleged unlawful employment practices: *See* § 1601.15(b);

(4) If known, the approximate number of employees of the respondent employer or the approximate number of members of the respondent labor organization, as the case may be; and

(5) A statement disclosing whether proceedings involving the alleged unlawful employment practice have been commenced before a State or local agency charged with the enforcement of fair employment practice laws and, if so, the date of such commencement and the name of the agency.

(b) Notwithstanding the provisions of paragraph (a) of this section, a charge is sufficient when the Commission receives from the person making the charge a written statement sufficiently precise to identify the parties, and to describe generally the action or practices complained of. A charge may be amended to cure technical defects or omissions, including failure to verify the charge, or to clarify and amplify allegations made therein. Such amendments and amendments alleging additional acts which constitute unlawful employment practices related to or growing out of the subject matter of the original charge will relate back to the date the charge was first received. A charge that has been so amended shall not be required to be re-deferred.

Once the Charge is filed, the employee is referred to as the Charging Party, and the Employer is considered to be the Respondent. Oftentimes, the EEOC will offer the parties the opportunity to mediate, as discussed below. Should mediation be unsuccessful or the one of the parties chooses not to mediate, the Charge is then referred to the investigator to commence the investigation process. After the investigation process has concluded, the EEOC may find that a violation of the law has occurred or that it is unable to conclude that such violation has occurred. If the parties have not entered into a settlement before the Charge is dismissed, the EEOC can issue a “Right to Sue” letter. Once the Charging Party has the “Right to Sue” letter, the Charging Party has exhausted their administrative prerequisites and may then file suit in a court of competent jurisdiction, if in a timely manner.

One note under state law, exhaustion is also required in order to bring a claim under the TCHRA, but, the Texas Supreme Court held in 2010 that, as with federal law, the requirement is mandatory but not jurisdictional. *See In re United Servs. Automobile Assoc.*, 307 S.W.3d 299, 310 (Tex. 2010) (overruling prior decision to the contrary). The deadline to file a charge in Texas for state law purposes is 180 days, and for federal law purposes it is 300 days.

Sometimes, a person files an intake form, charge questionnaire, or other document with the EEOC within the requisite 180 or 300 day time period, but does not file a formal “charge” on

the standard EEOC form within the requisite period. The question then becomes: Can what the person filed nonetheless be considered a “charge” for purposes of complying with the limitations period? In *Federal Express Corp. v. Holowecki*, 128 S. Ct. 1147 (2008), the Supreme Court considered what qualifies as a “charge” under the ADEA. It explained that, in addition to the information required by relevant regulations (an allegation and the name of the charged party), “if a filing is to be deemed a charge it must be reasonably construed as a request for the agency to take remedial action to protect the employee’s rights or otherwise settle a dispute between the employer and the employee.” *Id.* at 1158. In other words, under *Holowecki*, a document may be a “charge” for purposes of limitations and administrative exhaustion at the EEOC level “even if it lacks an appropriate caption and charging language. A piece of paper that alleges discrimination and asks the agency to take remedial action suffices.” *E.E.O.C. v. Watkins Motor Lines, Inc.*, 553 F.3d 593, 597-98 (7th Cir. 2009).

While the *Holowecki* Court addressed the ADEA, it applies in the Title VII context too because “the filing provisions of the ADEA and Title VII are virtually in *haec verba*, the former having been patterned after the latter.” *E.E.O.C. v. Commercial Office Prods. Co.*, 486 U.S. 107, 123-24, 108 S. Ct. 1666, 100 L.Ed.2d 96 (1988). Indeed, the federal courts have consistently applied *Holowecki* in the Title VII context as well, reasoning that the exhaustion of remedies and charge requirements of Title VII parallel those of the ADEA. *See, e.g., Grice v. Baltimore County, Md.*, 2008 WL 4849322, *4 (D. Md. 2008); *Moore v. Angus Chemical Co.*, 2008 WL 4491592, *4 (W.D. La. 2008); *Taylor v. OCE Imagistics, Inc.*, 2008 WL 2148557, *2 (E.D. Va. 2008); *Evenson v. Sprint/United Mgmt. Co.*, 2008 WL 4107524, * 6 (N.D. Tex. 2008); *Grigsby v. Pratt & Whitney Amercon, Inc.*, 2008 WL 2156355, *5 (M.D. Pa. 2008); *Broxterman v. Falley’s Inc.*, 2008 WL 2038917, *2 (D. Kansas 2008); *Ellington v. Murray Energy Corp.*, 2008 WL 2019549, *2 (D. Utah 2008). Thus, in light of *Holowecki*, a plaintiff complies with the 180 day or 300 day limitations period under Title VII to file a charge so long as he or she files a piece of paper with the EEOC that has his or her name on it, and that alleges discrimination against a particular employer and asks the agency to take remedial action.

Holowecki, however, has some limits. A court has held that it does not apply to the Texas Labor Code, which has its own specific requirements, including that the charge must be sworn. *See Ojedis v. Jetblue Airways Corp.*, A-08-CA-127 LY, 2008 U.S. Dist. LEXIS 28970, at *5, 2008 WL 961884 (W.D. Tex. Apr. 9, 2008). Also, if a person files paperwork that is not a formal “charge” with the EEOC that alleges race discrimination, but then proceeds to file an actual formal charge and does not allege race discrimination, at least one court has held that *Holowecki* does not permit the person to then sue for race discrimination, the reasoning being that once the formal charge was filed it superseded the prior informal “charge.” *Morrow v. Metropolitan Transit Auth.*, No. 08-CV-6123 (DLC), 2009 WL 1286208, at *5-6 (S.D.N.Y. May 8, 2009).

Another limitation is that, even after *Holowecki*, some courts have found intake questionnaires insufficient to state a charge under Title VII because the questionnaires lacked clear requests for agency action. *See, e.g., Nadesan v. Tex. Oncology PA*, No. 2:10-CV-239-J, 2011 WL 147570, at *5 (N.D. Tex. Jan. 18, 2011) (“Unlike the filing in *Federal Express*, though, Nadesan’s supplement does not include any language requesting agency action.”); *Asongwe v. Wash. Mut. Card Servs. & Subsidiaries*, No. 3:09-CV-0668-G, 2009 WL 2337558, at *3 (N.D. Tex. July 29, 2009); *Equal Employment Opportunity Comm’n v. Freeman*, No. RWT

09cv2573, 2010 WL 1728847, *7 (D. Md. April 27, 2010); *King v. Lowe's Home Ctrs., Inc.*, No. AW-08-3393, 2009 WL 3681686, *4 (D. Md. Nov. 2, 2009); *Grice v. Baltimore County*, No. JFM 07-1701, 2008 WL 4849322, * 4 (D. Md. Nov. 5, 2008).

2. Defining The Scope of The Charge In Subsequent Litigation

Sometimes a person files a charge with various allegations, but then files a lawsuit that contains different, or broader, allegations. The question then becomes: Has that person exhausted their administrative remedies as to the different or broader allegations? On this issue, the Fifth Circuit has noted that, “[o]n one hand, the scope of an EEOC charge should be liberally construed for litigation purposes because Title VII “was designed to protect the many who are unlettered and unschooled in the nuances of literary draftsmanship.” *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455, 465 (5th Cir. 1970). 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.), *cert. denied*, 549 U.S. 888, 127 S. Ct. 299, 166 L.Ed.2d 154 (2006). To reconcile these policies, the Fifth Circuit construes an EEOC complaint broadly but in terms of the administrative EEOC investigation that “can reasonably be expected to grow out of the charge of discrimination.” *Sanchez*, 431 F.2d at 466. It uses a “fact-intensive analysis” of the administrative charge that looks beyond the four corners of the document to its substance. *Id.* In sum, a Title VII lawsuit may include allegations “like or related to allegation[s] contained in the [EEOC] charge and growing out of such allegations during the pendency of the case before the Commission.” *Id.*

Thus, it is well settled that district courts may only consider “specific allegations made in [an] EEOC complaint, as well as ‘any kind of discrimination like or related to the charge’s allegations, limited only by the scope of the EEOC investigation that could reasonably be expected to grow out of the initial charges of discrimination.’” *Thomas v. Atmos Energy Corp.*, 223 Fed. Appx. 369, 376 (5th Cir. 2007), *quoting Fine v. GAF Chem. Corp.*, 995 F.2d 576, 578 (5th Cir. 1993). Courts “engage in fact-intensive analysis of the statement given by the plaintiff in the administrative charge, and look slightly beyond its four corners, to its substance rather than its label To be clear, we do not require that a Title VII plaintiff check a certain box or recite a specific incantation to exhaust his or her administrative remedies before the proper agency.” *Pacheco*, 448 F.3d at 789. Instead, “the crucial element of a charge of discrimination is the factual statement contained therein.” *Manning v. Chevron Chem. Co., L.L.C.*, 332 F.3d 874, 879 (5th Cir. 2003), *quoting Sanchez*, 431 F.2d at 462.

A court may consider “supporting documentation” beyond the “four corners” of the Charge, including the Intake Questionnaire and attached statements, when determining whether administrative remedies have been exhausted. *Clark v. Kraft Foods, Inc.*, 18 F.3d 1278, 1280 (5th Cir. 1994); *see Federal Exp. Corp. v. Holowecki*, 552 U.S. 389, 128 S.Ct. 1147 (2008) (holding that in some circumstances “a wide range of documents might be classified as charges,” including Intake Questionnaires). 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 actual knowledge of the contents of the document during the course of the EEOC investigation.” *Kojin v. Barton Protective Services*, 339 F. Supp.

2d 923, 929 (S.D. Tex. 2004), *quoting Hayes v. MBNA Technology, Inc.*, 2004 WL 1283965 *6, (N.D. Tex. June 9, 2004).

In *Cooper v. Wal-Mart*, the court relied on handwritten notes attached to an EEOC charge to support a hostile work environment claim. *Cooper v. Wal-Mart Transp., LLC*, 662 F.Supp.2d 757, 773 (S.D. Tex. 2009). “Reading [the] Charge of Discrimination and [Plaintiff’s] notes together makes it apparent that his hostile work environment claim is like or related to the discrimination claim.” *Id.* at 774. Although the notes were not provided to the defendant, the court reasoned that “[b]ecause Wal-Mart was aware of many of the alleged incidents . . . described in the notes he attached to that Charge, the notes are appropriately considered in deciding whether the hostile work environment claim would reasonably fall within the scope of the EEOC’s investigation.” *Id.*

Among the Fifth Circuit’s numerous rulings on exhaustion of EEOC claims, there is the *Pacheco* opinion, which held that an employee failed to exhaust a disparate-impact claim because his EEOC charge alleged only disparate treatment and identified no neutral employment policy. 448 F.3d at 792. Although Pacheco’s administrative charge complained that he had not been promoted because of racial discrimination, his subsequent lawsuit alleged both disparate treatment and disparate impact. *Id.* at 786-87. The court affirmed the dismissal of the disparate-impact allegations because:

A disparate-impact investigation could not reasonably have been expected to grow out of Pacheco’s administrative charge because of the following matters taken together: (1) it facially alleged disparate treatment; (2) it identified no neutral employment policy; and (3) it complained of past incidents of disparate treatment only.

Id. at 792. *See also McClain v. Lufkin Industries, Inc.*, 519 F.3d 264 (5th Cir. 2008) (in class action brought by African-American employees to recover, on disparate impact and disparate treatment theories, for alleged racial discrimination in the workplace, the class failed to exhaust claims concerning employer’s alleged discriminatory assignment of newly hired black employees to company’s foundry division; neither named plaintiff, each with 20 or more years at the company, had worked in the foundry division, neither could or did complain to the EEOC about the foundry’s hiring practices, and the EEOC would not reasonably have investigated discriminatory assignment of new foundry division employees based on either plaintiff’s charge); *El Paso County v. Navarrete*, 194 S.W.3d 677 (Tex. App. – El Paso 2006, pet. denied) (plaintiff who alleged sex discrimination in her administrative charge of discrimination failed to exhaust administrative remedies as to her claim for retaliation); *Kretchmer v. Eveden, Inc.*, 374 Fed. Appx. 493, 495 (5th Cir. 2010) (plaintiff who checked off the boxes for “age” and “religion” as bases of discrimination on EEOC charge could not sue for sex discrimination in court); *Anderson v. City of Dallas*, 116 Fed. Appx. 19, 25 (5th Cir. 2004) (plaintiff who alleged retaliation and racial discrimination in her EEOC charge failed to exhaust administrative remedies as to her claims in court for age and sex discrimination).

Note that sometimes plaintiffs claim that the EEOC intake person who assisted them in preparing the charge failed to include all the bases of discrimination that the plaintiff told them about, and thus they should be able to assert those omitted bases of discrimination in court.

Those types of arguments have generally not been accepted. *See Novitsky v. American Consulting Engineers, L.L.C.*, 196 F.3d 699, 702 (7th Cir. 1999) (holding that the failure of an EEOC staffer to include all claims on an Intake Questionnaire in the Charge does not allow a complainant to broaden the scope of her claim).

3. Exceptions To The Charge Filing Requirement

a. Post-Charge Retaliation

There is a limited exception to exhaustion for certain types of retaliation claims. Specifically, a Charging Party need not file an amendment to her Charge of Discrimination every time that retaliation occurs. For example, if a Charge of Discrimination is filed, and the Charging Party employee is later terminated while the Charge is being investigated or even after a lawsuit has been filed, the Charging Party is not required to file an amendment to the Charge or filing another Charge. Rather, such retaliation is subsumed within the first Charge, so that the employee can bring such claim in their lawsuit. A case that demonstrates this is *Gupta v. East Texas State Univ.*, 654 F.2d 411 (5th Cir. 1981). There, the Court held that “it is unnecessary for a plaintiff to exhaust administrative remedies prior to urging a retaliation claim growing out of an earlier charge; the district court has ancillary jurisdiction to hear such a claim when it grows out of an administrative charge that is properly before the court.” *Id.* at 414. The Court reasoned that having required Gupta to file another charge for retaliation would have done nothing but create additional procedural technicalities when a single filing would comply with the intent of Title VII. *Id.* Eliminating this needless procedural barrier will deter employers from attempting to discourage employees from exercising their rights under Title VII. *Id.*

Gupta does not apply, however, if the alleged retaliation occurred before the Charging Party ever filed any EEOC charge. *See McCray v. DPC Industries, Inc.*, 942 F. Supp. 288, 295 (E.D. Tex. 1996) (the situation in *Gupta* is distinguishable from this case because McCray’s retaliation claim does not grow out of a previously filed EEOC charge. The alleged retaliation about which McCray complains occurred before McCray ever went to the EEOC. Thus, the *Gupta* rule does not apply.”)

b. The Single Filing Rule

In certain circumstances the Fifth Circuit has allowed a Title VII plaintiff to “piggyback” on the allegations contained in another Title VII plaintiff’s EEOC charge. *See Price v. Choctaw Glove & Safety Co.*, 459 F.3d 595, 598 (5th Cir. 2006). This “carefully limited exception” to the Title VII exhaustion requirement enables plaintiffs who have not filed EEOC charges to “join or intervene in a lawsuit in which the original, similarly situated plaintiff had fully exhausted the administrative requirements.” *Id.* This exception only applies, however, 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 (citing *Bettcher v. Brown Schs., Inc.*, 262 F.3d 492, 494 (5th Cir. 2001)). The doctrine does not apply where the respective plaintiffs filed separate EEOC charges and separate lawsuits. *See id.* (“A non-charging party cannot bring her own independent lawsuit based upon another party’s charge.”); *Tolliver v. Xerox Corp.*, 918

F.2d 1052, 1057 (2d Cir. 1990) (“[U]nder Title VII, the single filing rule has been used only to permit joining a preexisting suit in which at least one plaintiff had filed a timely charge.”).

B. Mediation

The EEOC offers mediation to the parties as to most filed Charges. A mediation election form is provided to the Charging Party upon filing or soon after filing. The Respondent employer is sent the mediation election form at the time of the Notice of Charge of Discrimination is sent to it. If both parties agree to mediate, then the EEOC in-house mediator assigned to the Charge will schedule the mediation. If one party does not agree to mediation, then no mediation is scheduled, and the Charge is then transferred to the investigation unit. The EEOC advises the parties that it maintains a wall of separation between the mediation and investigation units in order to preserve the integrity of the mediation process.

The EEOC’s mediation program is voluntary and confidential. If mediation is successful, there is no investigation. If the charge filed against the employer is eligible for mediation, the employer will be invited to take part in the mediation process. If mediation is unsuccessful, the charge is referred for investigation.

According to the EEOC, some advantages of mediation include: (1) EEOC’s mediation program is free; (2) mediation is efficient – the process is initiated before an investigation begins and most mediations are completed in one session, which usually lasts for one to five hours; (3) the average processing time for mediation is 84 days; (4) the mediation program is completely voluntary; (5) successful mediation results in the closure of the charge filed with EEOC – if mediation is unsuccessful, the charge is referred for investigation; (6) mediators are neutral third parties who have no interest in the outcome of the mediation; (7) mediation is a confidential process: the sessions are not tape-recorded or transcribed; mediator notes taken during the mediation are discarded; information learned during the mediation cannot be used during an EEOC investigation if the mediation is unsuccessful; (8) mediation is an informal process: the goal of mediation is not fact finding; instead, the purpose is to discuss the charge and reach an agreement that is satisfactory to all parties; (9) settlement agreements secured during mediation are not admissions by the employer of any violation of laws enforced by the EEOC; (10) mediation avoids lengthy, expensive, and unnecessary litigation; (11) settlement agreements secured during mediation are enforceable; (12) the overwhelming majority of employers and charging parties participating in EEOC mediation program are satisfied with the process and would use it again; (13) mediation can help the parties understand why the employment relationship broke down; (14) mediation can help the parties identify ways to repair an ongoing relationship.

C. Timeliness

1. General Rule

A plaintiff may bring a claim for discrimination under Title VII only if she has filed a claim with the EEOC within 180 days of the alleged unlawful act, or within 300 days if the plaintiff first filed a complaint with a state or local agency. 42 U.S.C. § 2000e-5(e)(1). In *Del. State College v. Ricks*, 449 U.S. 250, 262, 101 S. Ct. 498, 66 L. Ed. 2d 431 (1980), the U.S.

Supreme Court held that the 300 days runs from the date the employer unequivocally communicates the adverse action to the employee, even if the actual action does not occur until a later date. *Id.* at 257-58, 101 S. Ct. 498.

2. Exceptions To General Rule

a. Continuing Violation Theory

The 300-day filing period is not jurisdictional, but rather operates as a statute of limitations and is subject to equitable doctrines such as tolling or estoppel. *See Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393, 102 S. Ct. 1127, 1132, 71 L.Ed.2d 234 (1982). However, the Supreme Court has held that such doctrines must be applied sparingly. *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 113-14, 122 S. Ct. 2061, 153 L.Ed.2d 106 (2002).

For example, when plaintiffs assert a hostile work environment claim that is based on facts that extend over time (rather than a discrete act that occurs at a specific time, such as termination, failure to promote, demotion, etc.), a court may consider the past allegations (*i.e.*, the ones outside of the 180 or 300 day limitation) under a continuing violation theory. *See Morgan*, 536 U.S. at 117 (“Provided that an act contributing to the [hostile work environment] claim occurs within the filing period, the entire time period of the hostile environment may be considered by a court for the purposes of determining liability.”). At least one of the acts forming the hostile environment must be within the 180 day or 300 day period before the charge was filed; otherwise, the claim remains untimely. *See, e.g., Abrams v. American Airlines Inc.*, 302 Fed. Appx. 242 (5th Cir., Nov 6, 2008) (finding hostile environment claim time-barred in these procedural circumstances).

Under the state law case of *Bartosh v. Sam Houston State Univ.*, 259 S.W.3d 317 (Tex. App–Texarkana, 2008 pet. denied), a plaintiff may have claims dismissed if the untimely acts in the Charge are not pled with the timely acts. Further, it is always a wise choice to ensure that the “continuing violation” box is checked off on the face of the Charge of Discrimination.

In *Stewart v. Mississippi Transp. Com'n*, 586 F.3d 321, 328 (5th Cir. 2009), the Fifth Circuit observed that the “continuing violations” theory does not apply, if: (i) the “separate acts” forming the supposed “continuing violation” are unrelated; or (ii) the employer takes intervening corrective action. In *Stewart*, the employer had taken intervening corrective action, which barred the plaintiff from using the harassment outside of the 300-day period (before the intervening action was taken) as part of the evidence to support her sexual harassment claim. The court found that without that evidence, the remaining timely proof of sexual harassment was insufficient to support her claim. *Id.* at 330-31.

In *Noack v. YMCA of Greater Houston Area*, 418 Fed. Appx. 347, 351 (5th Cir. 2011), the Fifth Circuit rejected the plaintiff’s “continuing violations” theory because the “separate acts” forming the supposed “continuing violation” were unrelated, in that they were based on different types of alleged harassment that were perpetrated by different alleged harassers. *See also Lopez v. Kempthorne*, 684 F. Supp. 2d 827, 884 (S.D. Tex. 2010) (Harmon, J.) (rejecting application of “continuing violations” doctrine where alleged harassment was based on separate and unrelated acts of different alleged harassers); *Equal Employment Opportunity Comm'n v.*

CRST Van Expedited, Inc., 615 F. Supp. 2d 867, 881-82 (N.D. Iowa 2009) (harassment by different persons at different times was not part of a continuing violation).

b. Equitable tolling or equitable estoppel

Second, in very rare cases, the 180 or 300-day limitations period may be extended based on equitable tolling or equitable estoppel. Equitable tolling or estoppel is a remedy that should be used “sparingly.” *Irwin v. Dep’t of Veterans Affairs*, 498 U.S. 89, 96, 111 S. Ct. 453, 112 L. Ed. 2d 435 (1990). 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) (quoting *Rashidi v. Am. President Lines*, 96 F.3d 124, 128 (5th Cir. 1996)). More specifically, the court has recognized three possible and non-exclusive bases for tolling the time period for filing a charge: (1) the pendency of a suit between the same parties in the wrong forum; (2) plaintiff’s unawareness of the facts giving rise to the claim because of the defendant’s intentional concealment of them; and (3) the EEOC’s misleading the plaintiff about the nature of her rights. *Wilson v. Sec’y, Dep’t of Veterans Affairs*, 65 F.3d 402, 404 (5th Cir. 1995). The party who invokes equitable tolling bears the burden of demonstrating that it applies in his case. *Conaway v. Control Data Corp.*, 955 F.2d 358, 362 (5th Cir. 1992). Equitable tolling is not warranted when an attorney merely commits error or neglect. *Cousin v. Lensing*, 310 F.3d 843, 849 (5th Cir. 2002).

In *Tyler v. Union Oil Co. of Cal.*, 304 F.3d 379, 385, 391 (5th Cir. 2002), the Fifth Circuit applied equitable estoppel. There, the plaintiffs filed EEOC charges outside of the 300-day limitations period. But, they did so because the employer had given them releases, which they signed, that caused them to believe they had waived any ADEA claim. In fact, they had not waived any ADEA claim, because the releases failed to comply with the requirements of the Older Workers Benefits Protection Act. Once the plaintiffs realized that, they then filed their EEOC charges. The Fifth Circuit held that the employer was equitably estopped from relying on the 300 day limitations period to dismiss the case because its own affirmative conduct – the releases it gave the plaintiffs – misled the plaintiffs regarding the nature of their rights such that they did not file charges within the 300-day period.

On the other hand, in *Phillips v. Leggett & Platt, Inc.*, 658 F.3d 452 (5th Cir. 2011), the Fifth Circuit rejected the employee’s equitable tolling argument. Leggett & Platt consolidated its two Mississippi facilities. In June 2007 Leggett informed Phillips, an accounts-payable clerk, that she would be laid off due to the closing of one of the facilities. After terminating her employment, Leggett hired Phillips in August on a temporary basis to assist with the consolidation; her temporary employment was terminated on January 2, 2008. 63 days later, she filed an age-discrimination claim with the EEOC, received a right-to-sue letter from the EEOC, and filed suit in the United States District Court for the Northern District of Mississippi, where a jury found Leggett liable for discriminatory termination under the ADEA. Leggett filed a motion for judgment as a matter of law, contending that Phillips’ suit was time-barred. In an opinion by Judge Southwick, the Fifth Circuit agreed, reversing the district court and finding that temporary indefinite employment does not toll the limitations period when the plaintiff has all the facts necessary to file her claim.

The Fifth Circuit reviewed the limitations period de novo. Under the ADEA, in a non-deferral state, the plaintiff is required to file a charge with the EEOC “within 180 days after the alleged unlawful practice occurred.” The panel cited Fifth Circuit precedent to state that the 180-day limitations period begins on “the date of notice of termination, rather than the final date of employment”; the period begins when an employee is unambiguously informed of termination. The 180-day limitations period for Phillips suit started in June 2007, when she was unambiguously told she would be terminated. Phillips’ temporary rehiring did not alter the finality of her termination from permanent employment.

The court also reviewed the district court’s application of equitable tolling for abuse of discretion. The panel said that of the three bases for equitable tolling, the only relevant possibility was whether Phillips was unaware of, or misled about, the facts necessary to support her claim. The limitations period started when Phillips had all the facts needed to bring suit—namely that she was discharged, qualified for the position, in a protected class, and replaced by a younger person. These facts were available to Phillips in June 2007. The panel acknowledged that Phillips was in the sensitive position of having to file allegations of discrimination against her employer or forfeit them while she still hoped that she might regain permanent employment. Ultimately, the panel held that because the finality of the termination was never in doubt, the district court abused its discretion in equitably tolling Phillips’ wrongful termination claim. Judge Higginbotham dissented, arguing that the panel overstepped because the standard of review for equitable tolling is the deferential abuse of discretion. Judge Higginbotham found adequate facts to support the trial judge’s determination that equitable tolling should apply.

In *Henderson, et al. v. AT & T Corporation*, 933 F. Supp. 1326, 1334-35 (S.D. Tex. 1996), the plaintiff learned of the adverse action (that she was being replaced by another worker) she complained of, but still did not file a charge of discrimination with the EEOC within 300 days. Judge Kent forgave her presumptively late filing based on the equitable tolling doctrine. Specifically, the record showed that the plaintiff did not realize she was being replaced by a younger man until some time after she was initially told she was being replaced. Judge Kent held that her 300 days to file thus did not begin to run until she received this later information, upon which her claim was based. In doing so, Judge Kent stated:

Generally, a discrimination cause of action accrues, and the 300-day period begins running, when the employee learns of the adverse action taken by the employer. *Delaware State College v. Ricks*, 449 U.S. 250, 258-59, 101 S. Ct. 498, 504-05, 66 L. Ed. 2d 431 (1980); *Amburgey v. Corhart Refractories Corp.*, 936 F.2d 805, 810 (5th Cir. 1991). However, if, at the time of the adverse employment action, the employee did not have enough information to support filing a discrimination claim, the 300 day limitations period may be equitably tolled until the time the facts supporting a cause of action are or should be apparent to the employee. See *Blumberg v. HCA Management Co.*, 848 F.2d 642, 644-45 (5th Cir. 1988) (“a plaintiff who is aware that she is being replaced in a position she believes she is able to handle by a person outside the protected age group knows enough to support filing a claim.”), *cert. denied*, 488 U.S. 1007, 109 S. Ct. 789, 102 L.Ed.2d 781 (1989); *accord Conaway v. Control Data Corp.*, 955 F.2d 358, 362 (5th Cir. 1992), *cert. denied*, 506 U.S. 864, 113 S. Ct. 186, 121 L.Ed.2d 131 (1992); *Rhodes v. Guiberson Oil Tools Div.*, 927 F.2d 876 (5th Cir.

1991), *cert. denied*, 502 U.S. 868, 112 S. Ct. 198, 116 L.Ed.2d 158 (1991); *Pruet Production Co. v. Ayles*, 784 F.2d 1275, 1279 (5th Cir. 1986).

c. Relation Back Theory

Third, the legal “relation back theory” is also used in the EEOC context. Usually the Form 5 filing date is the date by which parties look to determine whether the Charge is timely filed. However, should the Charging Party file the Form 5 in an untimely manner, then it still may be possible to pursue the claim. If the Charging Party filed a completed Intake Questionnaire form, such information is sufficient to constitute an “Administrative Charge.” Therefore, the amended Form 5 Charge can be considered to be filed on the date of the Intake Questionnaire form pursuant to the “relation back” theory, as often used in amended pleadings in a lawsuit. *Price v. Southwestern Bell Telephone Co.*, 687 F.2d 74 (5th Cir. 1982) (Title VII); 29 C.F.R. §1601.12; *Brammer v. Martinaire, Inc.*, 838 S.W.2d 844 (Tex. App.—Amarillo 1992, no writ) (Texas Commission on Human Rights Act).

In addition, the question sometimes arises: suppose a charge is amended outside of the 180 or 300 day limitations period – does the amendment “relate back” to the original filing date, so as to make it timely? Generally, amendments that raise a new legal theory do not “relate back” to an original charge of discrimination. *See, e.g., EEOC v. Miss. Coll.*, 626 F.2d 477, 483-84 (5th Cir. 1980) (observing that “[b]ecause [the claimant’s] allegations of racial discrimination do not relate to or grow out of the allegations of sex discrimination advanced in the original charge, that aspect of the amended charge does not relate back to the time of filing of [the] original charge”); *Simms v. Oklahoma ex rel. Dep’t of Mental Health & Substance Abuse Servs.*, 165 F.3d 1321, 1327 (10th Cir. 1999) (holding that the plaintiff’s amended charge did not relate back under § 1601.12(b), because the original charge alleged only race discrimination, while the amended charge included “a new theory of recovery” – retaliation); *Fairchild v. Forma Scientific, Inc.*, 147 F.3d 567, 575 (7th Cir. 1998) (“[A]n untimely amendment that alleges an entirely new theory of recovery does not relate back to a timely filed original charge.”); *id.* at 576 (concluding that an amendment containing a claim of disability discrimination did not relate back to the original charge, which alleged age discrimination); *Evans v. Tech. Applications & Serv. Co.*, 80 F.3d 954, 963-64 (4th Cir. 1996) (holding that the plaintiff’s age discrimination claim did not relate back to the originally filed charge of sex discrimination).

There is one very narrow exception to this general rule. An amendment, even one that alleges a new theory of recovery, can relate back to the date of the original charge when the facts supporting both the amendment and the original charge are essentially the same. *See Hornsby v. Conoco, Inc.*, 777 F.2d 243, 247 (5th Cir. 1985) (concluding that the plaintiff’s amendment, which alleged gender discrimination, related back to the age and retaliation claims in her original charge, because the factual allegations in the original charge included a reference to gender discrimination); *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455, 462-64 (5th Cir. 1970) (concluding that the plaintiff could add a national origin discrimination claim to the gender discrimination claim in her original charge); *but see Manning v. Chevron Chem. Co., LLC*, 332 F.3d 874, 879 (5th Cir. 2003) (“In this case, Manning failed to allege sufficient facts in his original charge to provide Chevron with the requisite notice. Therefore, we hold that Manning’s amended charge, alleging disability discrimination, does not relate back to his original charge, which raised different theories of recovery.”).

In *Wolf v. East Texas Med. Ctr.*, 515 F. Supp. 2d 682 (E.D. Tex. 2007) the plaintiff alleged discrimination due to age and gender. The defendant filed a motion for summary judgment based on the fact that the plaintiff's Charge was filed more than 300 days after the date of the underlying discriminatory acts. However, plaintiff had filed her verified layoff questionnaire form along with an unverified pre-charge intake form within the 300-day period. The Court held that the layoff questionnaire was considered to be a timely filed Charge, as it included language that it could be considered to be a charge as opposed to the pre-charge intake form which stated that it was plaintiff's responsibility to file a formal Charge. However, the Court also held that the claims that were not included in the layoff questionnaire and were first brought up in the EEOC formal filing were not timely and were dismissed. The reasoning being that federal regulations pertaining to a charge of discrimination provide an avenue for amendments to charges that will relate back to the original filing date of the charge. 29 C.F.R. §§ 1601.12 & 29 C.F.R. 1626.8. Essentially, the Plaintiff is limited to the factual allegations asserted in the Layoff Questionnaire, which is her initial charge of discrimination, and factual allegations asserted in the amended charge – the charge filed in March 2006 – that are related to or grow out of the subject matter included in her Layoff Questionnaire.

d. Lily Ledbetter Fair Pay Act

Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 127 S. Ct. 2162, 167 L. Ed. 2d 982 (2007), involved a woman who allegedly had been paid unequally for equal work for several years based on a discriminatory pay decision made twenty years earlier. The U.S. Supreme Court interpreted Title VII to mean that the unlawful employment practice occurred twenty years earlier when the initial pay decision was made and, thus, that Ledbetter's Title VII claim was time barred. It reached this ruling even though Ledbetter's compensation was still affected by the decision within 180 days before she filed her EEOC charge.

Congress disagreed and enacted the Fair Pay Act ("FPA") to clarify that a discriminatory compensation decision or other practice that is unlawful under: (1) Title VII of the Civil Rights Act of 1964; (2) the Age Discrimination in Employment Act of 1967; (3) the Americans with Disabilities Act of 1990; or (4) the Rehabilitation Act of 1973, occurs each time compensation is paid pursuant to the discriminatory compensation decision or other practice. President Barack Obama signed into law the Lily Ledbetter Fair Pay Act of 2009, Pub.L. No. 111-2, amending 42 U.S.C. § 2000e-5(e) and 29 U.S.C. § 626 (Jan. 29, 2009), which overturned the Supreme Court's decision in *Ledbetter*. As mentioned, the FPA amended both Title VII and the ADEA to read, in pertinent part:

[A]n unlawful employment practice occurs, with respect to discrimination in compensation in violation of this title, when a discriminatory compensation decision or other practice is adopted, when an individual becomes subject to a discriminatory compensation decision or other practice, or when an individual is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice.

The FPA was enacted on January 29, 2009 and applies to "all claims of discrimination . . . that are pending on or after May 28, 2007" and extends liability "for up to two years preceding

the filing of the charge, where the unlawful employment practices that have occurred during the charge filing period are similar or related to unlawful practices with regard to discrimination in compensation that occurred outside the time for filing a charge.”

Thus, under *Ledbetter*, even if the discriminatory pay decision occurred outside of the 180 day or 300 day limitations period, a charge is still timely, so long as it is made within 180 days or 300 days of when the Charging Party was affected by it. In other words, under the FPA, Ms. Ledbetter’s claim would have been timely even though it was based on a decision made twenty years before she filed her EEOC charge.

Whether other claims that affect compensation, but are not in and of themselves compensation-setting decisions, are covered by the FPA is the subject of debate in the courts. The vast majority of courts have taken the position that “[t]he rule set out in *Ledbetter* and prior cases—that ‘current effects alone cannot breathe new life into prior uncharged discrimination’ – is still binding law for Title VII disparate treatment cases involving discrete acts other than pay.” *Leach v. Baylor College of Medicine*, Civil Action No. H-07-0921, 2009 WL 385450, at *17 (S.D. Tex. Feb. 17, 2009); *Vuong v. New York Life Insurance Company*, No. 03-cv-1074, 2009 WL 306391, at *7-9 (S.D.N.Y. 2009) (holding that, while the plaintiffs Title VII compensation claims were resurrected by the FPA, his failure to promote claims were not); *Grant v. Pathmark Stores, Inc.*, No. 06-Civ-5755, 2009 WL 2263759, at *7-9 (S.D.N.Y. July 29, 2009) (same); *Rowland v. Certainteed Corporation, et al.*, No. 08-3671, 2009 WL 1444413, at *6 (E.D. Penn. May 21, 2009) (holding that, since the plaintiff’s failure to promote claims were not ultimately related to compensation issues, their timeliness was unaffected by the FPA); *see also Richards v. Johnson & Johnson*, No. 05-cv-3663, 2009 WL 1562952, at *9 (D. N.J. June 2, 2009). In *Rowland*, the district court held that the FPA “does not help Plaintiff here because she pressed no discriminatory compensation claim with respect to her failure to promote claim.” 2009 WL 1444413 at *6. The plaintiff argued that she was subject to “ongoing discriminatory denial of the promotion to the [p]osition”; however, the district court held that this claim was not related to discriminatory compensation. *Id.* Judge Keith Ellison has also taken this position. *See Harris v. Auxilium Pharm., Inc.*, 664 F. Supp. 2d 711, 746-47 (S.D. Tex. 2009). (refusing to apply *Ledbetter* to failure to promote claims).

The Fifth Circuit has also found that the Lilly Ledbetter Fair Pay Act of 2009 “does not apply to discrete acts such as the ones at hand.” *Tillman v. Southern Wood Preserving of Hattiesburg, Inc.*, 377 Fed. Appx. 346, 350 (5th Cir. 2010) (citing *Harris v. Auxilium Pharm., Inc.*, 664 F.Supp.2d 711, 746-47 (S.D. Tex. 2009)).

Other courts of appeals have also agreed that that approach. For example, in *Noel v. The Boeing Co.*, 622 F.3d 266 (3rd Cir. 2010), the Third Circuit Court of Appeals upheld summary judgment for an employer, and specifically held that a black Haitian mechanic could not use the FPA to support his failure-to-promote claim under Title VII. In this case, an employee unsuccessfully argued that the 300-day statute of limitations began each time he received a lower paycheck than he would have received had he been promoted three years prior to his claim of discrimination.

Emmanuel Noel, a black Haitian national, began working for Boeing in 1990 as an hourly sheet metal assembler. Boeing periodically offered the opportunities to work at offsite locations.

Those opportunities included greater pay, per diems, and additional training, and often resulted in promotion to a higher labor grade, if warranted by the skill and ability of the worker. In 2002, Noel and two white employees participated in an offsite assignment that resulted in their labor grades rising from 7 to 8. After seven months, the labor grade of the two white employees rose from 8 to 11, while Noel's remained the same.

In September 2003, Noel complained about that situation to a union representative and a company labor representative, but no action was taken. On March 25, 2005, Noel filed a charge of discrimination with the EEOC, followed by a Title VII complaint in federal court on June 30, 2006. The complaint included an allegation that Noel was not promoted in 2003, when his white co-workers were.

The district court found that Noel's claims were time barred because he did not file his EEOC charge within the required 300-day period that began when Boeing failed to promote him in 2003. Noel appealed the dismissal of his claims, arguing that under the FPA, his 2005 charge was timely, because the 300-day statute of limitation period restarted every time he got a paycheck that reflected the company's failure to promote him to a higher paying job.

The Third Circuit upheld the lower court's decision, stating that the FPA applies only to cases that involve "discrimination in compensation." Discrimination in compensation means "paying different wages or providing different benefits to similarly situated employees, not promoting one employee but not another to a more remunerative position." According to the Court, the FPA only comes into play if the employee's complaint is based on a pay disparity – and a pay disparity claim is made only when an individual demonstrates that he or she was paid differently for equal work done under substantially similar conditions. Therefore, Noel could not use the FPA to excuse his non-compliance with the applicable 300-day statute of limitations.

In *Almond v. Unified School Dist. No. 501*, __F.3d __, No. 10–3315, 2011 WL 5925312, at *9 (10th Cir. Nov. 29, 2011), the Tenth Circuit Court of Appeals reached the same result, stating:

In light of all this, we hold that § 626(d)(3) of the Ledbetter Act governs the accrual only of discrimination in compensation (unequal pay for equal work) claims in violation of § 623(a)(1)—nothing more, nothing less. The language does not affect the accrual of other cases alleging discrimination in hiring, firing, demotions, transfers, or the like. And having reached that conclusion, it follows ineluctably that the Act can't save the plaintiffs' claims in this case. That's because there's no pay discrimination claim here. True, the plaintiffs were transferred to lower paying positions. True, this had the knock on effect of lowering their compensation. True, we must assume that the transfer decision was discriminatory at this stage of the litigation. But none of this brings the plaintiffs' claim within the ambit of the Ledbetter Act because they don't contend they were ever paid less than others doing the same work. In fact, and though it is inessential to our decision, the plaintiffs acknowledge they were paid more for the first two years than their similarly situated co-workers, until their salaries were brought in line with everyone else in their pay grade. Put differently, the plaintiffs may have been discriminated against in the transfer decision but they

were not discriminated against in compensation. Accordingly, the general *Ricks* accrual rule, not the Ledbetter Act's discrimination in compensation rule, governs this case and the plaintiffs' claims remain untimely.

III. DEFENDANT'S NOTICE OF CHARGE AND RESPONSE

A. Document Hold

Once a charge is filed with the EEOC, the employer has a duty to preserve hard and electronic documents and records relating to the employee's claims. An employer must preserve "all personnel records relevant to the charge" until final disposition of the charge or any lawsuit that may thereafter be filed. 29 C.F.R. § 1602.14. When an EEOC charge has been filed against a company, the company should retain personnel or employment records relating to the issues under investigation as a result of the charge, including those related to the charging party or other persons alleged to be aggrieved and to all other employees holding or seeking positions similar to that held or sought by the affected individual(s). Such records will be necessary to use in the preparation of the employer's defense as well as responding to the EEOC's Request for Information ("RFI").

A "litigation hold" should be sent to key employees advising of the types of documents which must be preserved until the final disposition of the matter as the inadvertent destruction of records (even if done pursuant to an existing records retention policy) can have grave consequences to an employer's defense. When a charge is not resolved after investigation, and the charging party has received a notice of right to sue, "final disposition" arguably means the date of expiration of the 90-day statutory period within which the aggrieved person may bring suit or, where suit is brought by the charging party or the EEOC, the date on which the litigation is terminated, including any appeals. However, given that an employee may bring certain types of claims even after the time to sue based on a right-to-sue letter has expired, it is prudent to preserve relevant documents obtained pursuant to the litigation hold until all potential limitations periods have expired.

An employer's non-compliance with its duty to preserve relevant information may have serious consequences once litigation commences. *See, e.g., Rimkus Consulting Group, Inc. v. Cammarata*, 688 F. Supp. 2d 598 (S.D. Tex. 2010) (decision from Judge Lee Rosenthal explaining adverse inference instruction jury may be given when a litigant fails to properly preserve evidence); *see, e.g., Ashton v. Knight Transp. Inc.*, 772 F. Supp. 2d 772, 806 (N.D. Tex. 2011) (following *Rimkus* and striking defendant's pleadings and defenses as a sanction); *Green v. Blitz U.S.A. Inc.*, No. 2:07-CV-372 (TJW), 2011 WL 806011, at *1 (E.D. Tex. March 1, 2011) (citing *Rimkus* and sanctioning defendant \$250,000 for its failure to preserve relevant evidence); *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 220 (S.D.N.Y. 2003) (sanctions issued against employer for its failure to preserve backup tapes containing potentially relevant e-mail correspondence of key employees); *Byrnie v. Town of Cromwell, Bd. of Ed.*, 243 F.3d 93, 107 (2d Cir. 2001) (defendant's failure to retain notes could justify the giving of a spoliation instruction allowing for the presumption of discrimination in age and gender discrimination action, since at the time the relevant notes were destroyed, the school system had notice of the prospect of potential litigation, the notes formed the basis for the system's answer to disappointed candidate's complaint to state agency, and in any event, federal regulations

implementing Title VII and the ADEA required employers to retain all records pertaining to employment decisions for a period of two years).

B. Investigation

1. Privilege Issues In The Investigation Itself

It is wise for the employer to have its legal counsel conduct or direct the investigation of an EEOC charge. One of the reasons this is so is because typically, when an in-house or outside lawyer conducts an investigation of an EEOC charge for an employer, that lawyer's work product and communications are privileged from discovery under the work product and attorney-client privileges. See *Robinson v. Time Warner, Inc.*, 187 F.R.D. 144 (S.D.N.Y. 1999) (attorney-client privilege and work-product doctrine protected information learned by employer's counsel during his investigation into employee's allegations of racial discrimination, along with notes generated by counsel during investigation and counsel's final investigative report, where investigation was conducted for legal purpose and in anticipation of litigation); *Miller v. Federal Express Corp.*, 186 F.R.D. 376 (W.D. Tenn. 1999) (“[o]n the other hand, once plaintiff announced her intention to move forward under federal discrimination laws by filing a racial discrimination charge with the EEOC on August 7, 1996, the investigatory work carried on by defendant's employees was done in anticipation of litigation” and is thus privileged).

The privileges are subject to waiver, however, however. Such waiver may be by asserting an affirmative defense. For example, the *Faragher/Ellerth* affirmative defense protects employers from liability for otherwise unlawful harassment when no tangible employment action is taken against an employee. See *Faragher v. City of Boca Raton*, 524 U.S. 775, 807, 118 S. Ct. 2275, 141 L. Ed. 2d 662 (1998); accord *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765, 118 S. Ct. 2257, 141 L. Ed. 2d 633 (1998). “The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any [discriminatory or] sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.” *Faragher*, 524 U.S. at 807, 118 S. Ct. 2275; *Ellerth*, 524 U.S. at 765, 118 S. Ct. 2257.

Some courts have interpreted an assertion of the *Faragher/Ellerth* affirmative defense as waiving the protection of the work product doctrine and attorney-client privilege in relation to investigations and remedial efforts in response to employee complaints of discrimination because doing so brings the employer's investigations into issue. See, e.g., *E.E.O.C. v. Outback Steakhouse of FL, Inc.*, 251 F.R.D. 603 (D. Colo. 2008) (The Court agrees that to the extent that Defendants have asserted the *Faragher/Ellerth* affirmative defense, they have waived the protections of the attorney-client privilege and work product doctrine regarding investigations into complaints made by female employees.); *Walker v. County of Contra Costa*, 227 F.R.D. 529, 535 (N.D. Cal. 2005) (“If [an employer] assert[s] as an affirmative defense the adequacy of [its] pre-litigation investigation into [an employee's] claims of discrimination, then [it] waive[s] the attorney-client privilege and work product doctrine with respect to documents reflecting that investigation.”); *Jones v. Rabanco, Ltd.*, No. C03-3195P, 2006 WL 2401270, at *4 (W.D. Wash. Aug. 18, 2006) (unpublished decision) (raising the *Faragher/Ellerth* defense causes “any investigation and remedial efforts into the discrimination alleged ..., in which [an employer]

engaged and in which [its] attorneys were involved, to become discoverable, despite any ... privilege that may have normally attached to such communications”); *Austin v. City & County of Denver ex rel. Bd. of Water Com’rs*, No. 05-CV-01313, 2006 WL 1409543, at *7 (D. Colo. May 19, 2006) (unpublished decision) (“Where a party puts the adequacy of its pre-litigation investigation into issue by asserting the investigation as a defense, the party must turn over documents related to that investigation, even if they would ordinarily be privilege[d].”).

Therefore, when investigating a harassment claim, be aware that your investigation may not be privileged, even if conducted by a lawyer. In that case, it may be prudent to work through a “proxy” investigator – perhaps a competent HR manager of the company whom the lawyer may coach through the investigation. This way, the lawyer will be far less likely to become an operative fact witness.

2. Conducting A Robust Investigation

The investigator should gather copies of all relevant documents, including personnel files, policies, e-mails, comparator information, demographic information, and information regarding the decision-makers or the accused “bad actors.” The investigator should conduct interviews – preferably under privilege (*see above*) – to gather and confirm the facts. It may be prudent to have key witnesses review the draft position statement before it is submitted to the EEOC, to be sure it is 100% accurate and they are comfortable with the way the facts are presented. Remember, one day they may be cross-examined about the position statement. So, it makes sense to get them on board with it before it is filed with the EEOC.

Employees who are interviewed should be told their interview is attorney-client privileged (and what that means), not to disclose the contents of their communications to others, and also be advised of the Company’s anti-retaliation policies. On some occasions, it may be prudent to put the anti-retaliation language in a memo to be given to the employee(s) being interviewed. This is especially important now, given that the U.S. Supreme Court has ruled that an employee who is merely interviewed as part of an internal investigation may sue for retaliation under Title VII. *Crawford v. Metro. Gov’t of Nashville and Davidson County, Tenn.*, 129 S. Ct. 846, 172 L. Ed. 2d 650 (2009).

When dealing with a current employee, there are a number of issues to resolve. But, two are of most importance. First, any managers who know of the charge must be clearly informed of the company’s anti-retaliation policies, preferably in writing. Second, it is typically prudent to reach out to the employee in some fashion to interview them. Because that interview will not be privileged, however, the investigating attorney should not conduct the interview. He or she may select a proxy and prepare that person. That way, if litigation ensues, it will be that person, and not the lawyer, who will be the witness should there be a dispute over what was said in the interview.

Where a termination decision is at issue, some questions to ask in an effort to determine how strong (or weak) of a case the employee has, the investigator should ask themselves:

- ✓ Was the rule or standard that was violated published?

- ✓ Did the employee ever receive a personal, written copy of the rule violated (*i.e.*, employee handbook)?
- ✓ If other employees have violated this rule or order, did they receive the same disciplinary action as this employee? This is especially critical if the employees worked for the same supervisors, and violated the work rule in the same fashion.
- ✓ Is the employer consistent and unbiased in applying rules and standards?
- ✓ Does the employer have factual records on all its employees covering all violations of this rule or order?
- ✓ Does this employee have the worst record of all employees who violated this rule or order?
- ✓ Has this employee been warned previously for violation of this rule or order?
- ✓ Has the employee ever received a previous written warning of the violation of this rule or order?
- ✓ Has the employee ever received a final warning for the violation of this or any other published rule or order?
- ✓ What is the employee's warning record during the last twelve months?
- ✓ Would a failure to terminate have raised questions of consistency of application of the employer's policies?
- ✓ How long has the employee been employed; positions held?
- ✓ If performance is an issue, has there been any counseling? If not, why?
- ✓ What do prior written performance reviews look like?
- ✓ Was the incident that triggered the final warning or discharge carefully investigated prior to taking serious or final disciplinary action?
- ✓ Does your evidence include names of witnesses, dates, time, places, and other pertinent factors on all past violations, including the last one?
- ✓ Did the employer seek out and hear the employee's version of events before terminating their employment?
- ✓ Was the degree of discipline imposed on this employee related to: the seriousness of the proven offense; the employee's past record; the employee's length of service?

C. Privilege Issues In Deciding What To Provide To The EEOC

When reviewing the EEOC's RFI, an employer should take care in analyzing the information to be provided to determine if a response can be made without producing otherwise confidential or proprietary information. Because of the substantial possibility documents produced to the EEOC will be disclosed to others, an employer may ultimately need to make certain difficult decisions about when to oppose production of responsive but confidential or privileged documents. The EEOC will disclose nearly all information in a charging party's file – including information obtained via RFI – to the Charging Party. *See* EEOC Compliance Manual §§ 83.5 – 83.7. Furthermore, the EEOC will disclose information in a Charging Party's file, including information obtained via RFI, reflecting “statistics and other information about an employer's general practices” to other charging parties with claims against the same employer. *Id.* at § 83.7. And, the EEOC has been criticized for being inconsistent in applying its own rules regarding disclosure of documents containing sensitive matters such as trade secrets and attorney-client communications. *See, e.g., Venetian Casino Resort, L.L.C. v. E.E.O.C.*, 530 F.3d 925 (D.C. Cir. 2008).

Employers, therefore, must give due consideration to producing confidential or privileged documents voluntarily in response to an RFI. There are several strategies that employers should be aware of to challenge and/or limit the type of information sought by such requests. Specifically, an employer should not hesitate to contact the investigator directly if it believes there is a risk that documents to be produced might reveal confidential or proprietary information. An employer should seek the investigator's agreement that disclosure of trade secret and confidential information will not be made. In the absence of an agreement or the appropriate assurances from the EEOC's investigator, the employer may have no choice but to refuse to cooperate with the RFI and seek judicial relief prior to disclosure – either in the form of an injunction or a motion to quash any subpoenas issued by the agency on the grounds of confidentiality. Finally, if such documents must be produced, clearly label them “confidential.”

Some courts have adopted the concept of “selective waiver” – permitting parties to produce otherwise privileged documents to a federal agency without waiving the privilege. *See, e.g., Diversified Indus. v. Meredith*, 572 F.2d 596, 611 (8th Cir. 1977). But many courts have rejected the doctrine in the context of attorney-client privilege and the attorney work product doctrine. The Tenth Circuit, for example, found that a company waived its privileges raised in connection with the production of over 200,000 documents to the SEC and the Department of Justice. The production was made as a result of a negotiated confidentiality agreement, but in a separate shareholder action, the company was ordered to produce those same documents to the plaintiffs. *Qwest Communs. Int'l, Inc. v. New England Health Care Employees Pension Fund*, 450 F.3d 1179 (10th Cir. 2006). In short, the court declined to enforce the confidentiality agreement and found that Qwest had waived its privileges by producing the documents.

On the other hand, in *McDonnell Douglas Corp. v. United States E.E.O.C.*, 922 F. Supp. 235, 242 (E.D. Mo. 1996), the employer conducted an adverse impact analysis of two reductions in force under the attorney-client privilege. Several of the employees terminated in the reductions in force filed EEOC charges. The employer delivered the “adverse impact analyses” to the EEOC as part of the EEOC's investigation of possible pattern and practice discrimination arising out of the reductions in force. When a FOIA request for the documents was filed by an

attorney for an individual discrimination plaintiff, the EEOC advised the employer that it would disclose the adverse impact analyses to the FOIA requestor. The employer brought suit to stop the EEOC from making disclosure, and it prevailed. The court found that the employer's limited production of the privileged report did not waive the privilege because "MDC's disclosure of the documents to the EEOC constituted only a limited waiver and did not destroy the privilege." *Id.* at 243.

As described by one court, "the case law addressing the issue of limited waiver is in a state of hopeless confusion." *In re Columbia/HCA Healthcare Corp. Billing Prac. Litig.*, 293 F.3d 289, 294-95 (6th Cir. 2002). Whether and when disclosure to the EEOC constitutes a waiver of privilege will depend on the jurisdiction of any litigation, the types of documents produced, and the specific facts under which those documents were produced. Given the existing status of the law on limited or selected waiver, in the near term, employers must exercise caution in determining whether to produce otherwise privileged documents.

D. Response

As part of its investigation, the EEOC often will ask an employer to prepare a written response to the allegations in the charge. The form letter the EEOC sends to notify employers of charges filed against them contains, as one option, a preprinted request for a position statement. The employer may be instructed to submit position statements in as little as 14 days from the date it received notice of the charge. However, employers can and should request additional time, which the EEOC typically grants if the requested extension is reasonable. Furthermore, settlement discussions and mediation may postpone the time in which an employer must otherwise provide its position statement.

Generally, the position statement should respond fully to each major allegation in a charge. Since the position statement is the employer's first – and, sometimes, only – opportunity to explain its side of the dispute in writing before the EEOC, the employer should usually take the opportunity to do more than merely affirm or deny the allegations in a charge. Instead, the employer should provide as many details as it can that support its case. Finally, the employer should assert that its position statement is the product of its current understanding of the matters raised in the charge, and may be subject to change.

The employer must be sure that what it says in the position statement is accurate. The position statement will probably be shown to the Charging Party – and his or her lawyer. In some circumstances, if the position statement contains statistics or information about the employer's general practices, it may be disclosed to other parties who assert similar charges against the same employer. Furthermore, the statements made by an employer in its position statement might later be used against the employer in any trial of the allegations in the charge. Inaccurate factual representations in a position statement provided to the EEOC are not necessarily fatal for an employer. *See, e.g., Clair v. Agusta Aerospace Corp.*, 592 F. Supp. 2d 812, 822 (E.D. Pa. 2009) (employer's admitted factual misstatement in position statement to EEOC as to e-mail being factor in employee's termination did not demonstrate pretext). But, such mistakes often do have adverse consequences for the employer. *See McInnis v. Alamo Comm. College Dist.*, 207 F.3d 276, 283 (5th Cir. 2000) (reversing summary judgment that had been entered for the employer in a discrimination case partially because the employer's report to the EEOC

“contained false statements”); *Olitsky. v. Spencer Gills, Inc.*, 964 F.2d 1471, 1476-77 (5th Cir. 1992); see also *Maschka v. Genuine Parts Co.*, 122 F.3d 566 (8th Cir. 1997) (employer’s position statement was admissible to show that employer had asserted contradictory positions); *Brooks v. Grandma’s House Day Care Ctrs., Inc.*, 227 F. Supp. 2d 1041, 1044-465 (E.D. Wis. 2002) (same). As one court explained:

Although EEOC investigations are not binding in the sense that they do not adjudicate liability or result in appealable determinations, the proceedings do have consequences for the parties in subsequent lawsuits. For example, materials such as Position Statements may be admissible as evidence of party admissions or for purposes of witness impeachment. See, e.g., *Gage v. Metro. Water Reclamation District of Greater Chicago*, 365 F. Supp. 2d 919, 936-37 (N.D. Ill. 2005) (“[a]n employer’s position statement in an EEOC proceeding may be admissible to the extent it constitutes an admission, or to show the employer has given inconsistent statements in justifying its challenged decision, which may tend to prove that its stated reasons are pretexts”) (quoting *Frazier v. Ind. Dep’t of Labor*, 2003 WL 21254424, at *5, 2003 U.S. Dist. LEXIS 9073 at *5 (S.D. Ind. Mar. 17, 2003)). The EEOC’s reasonable cause determinations are also potentially admissible as evidence. See *Wade v. Washington Metro. Area Transit Auth.*, Civ. A. No. 01-0334, 2006 WL 890679, at *4, 2006 U.S. Dist. LEXIS 16447 at *12 (D.D.C. Apr. 5, 2006) (“[t]he Supreme Court has explained that ‘prior administrative findings made with respect to an employment discrimination claim,’ e.g., EEOC determinations, are admissible under [the Federal Rules of Evidence]”) (quoting *Chandler v. Roudebush*, 425 U.S. 840, 863 n. 39, 96 S. Ct. 1949, 48 L. Ed. 2d 416 (1976)).

American Center for Intern. Labor Solidarity v. Federal Ins. Co., 518 F. Supp. 2d 163, 168-69 (D.D.C. 2007).

Given the possibility that a judge or jury may one day closely scrutinize the position statement, it must be more than just accurate. It must present the sort of image the employer wants to present – one of a reasonable, kind, compassionate, and caring company that really wants the best for all its workers and works hard every day to make that a reality. The position statement should never suggest anger towards the EEOC, or disrespect for the Charging Party (no matter how groundless the charge may be). It should also be sure to emphasize the good things the employer did for the charging party, and that it does for the community.

E. Mediation

Note that if you go to an EEOC mediation, you should bring your own settlement agreement with you. This is because the EEOC’s agreement will only resolve the claims brought in the EEOC charge. Employers want a broader, all-inclusive, general release. Therefore, employers should bring with them a supplemental settlement agreement that covers all claims that were or could have been brought up until the time the settlement agreement is executed.

IV. PLAINTIFF'S REBUTTAL

A. Obtaining the Employer's Position Statement

After filing the Charge and the Respondent employer has prepared and filed its position statement, the EEOC usually reviews both before making decisions as to whether to continue its investigation and follow-up with requests of the employer described in the next section. Usually, the EEOC investigator will follow up with the Charging Party to discuss the position statement with him and request a response that may verbal or in writing. However, there are occasions where that may not happen. For example, the investigator may feel that the evidence is such that it does not warrant further investigation at which time the EEOC may choose to dismiss the Charge. However, just because the EEOC dismisses the Charge does not necessarily mean that the Charging Party does not have a viable claim. Many times, the EEOC's limited resources do not allow for the full investigation of every Charge.

As counsel for the Charging Party, it is, therefore, advisable to obtain a copy of the position statement or review it so as to be able to prepare a proper rebuttal to submit to the EEOC. You will need to know the policies and procedures for the EEOC District office in which the Charge is pending because they may vary from District to District. For example, the Houston District office allows the Charging Party or her attorney to obtain a copy of the position statement. The person obtaining such position statement must sign a non-disclosure agreement whereby she agrees not to disclose it to anyone else, other than to the Charging Party, of course, if obtained by counsel. The Houston District Office will usually not send any exhibits, as those will need to be reviewed in person. The Charging Party or counsel will need to determine whether such review is necessary in preparing the rebuttal. By way of comparison, other District offices, such as the Dallas District Office, will not send Charging Party or counsel a copy of the position statement. Those offices may generally discuss the employer's position statement with the Charging Party or counsel upon request.

Arguments have been made by counsel for the Charging Party that it is necessary to obtain the position statement so that the Charging Party can have the opportunity to brief out all the issues in response to the employer's statement, as the employer had with the Charge. It would also enable the Charging Party to be able to present her facts and evidence in a meaningful way so that the investigator can have an opportunity to engage in a more thorough review of the facts relating to the claims asserted in the Charge. Ultimately, the Charging Party is interested in having the EEOC thoroughly review the facts supporting the Charge and, if needed, perhaps having the EEOC continue its investigate the claims in the hope of receiving a Letter of Determination which is issued by the EEOC when it has found that a violation of the law for which it is responsible to investigate has occurred.

B. Preparing a Rebuttal

Now that you have obtained the position statement, it is time to roll up your sleeves and prepare the rebuttal. There is no science to the rebuttal other than evaluating what is needed to be able to respond in the manner that you feel is appropriate to respond and persuade the EEOC that the Charge deserves a Cause finding. From the Charging Party's perspective, the position statements that are submitted range, for example, from a few words of denial, and perhaps some

choice words from the owner of the employer to an elaborate response that details facts, legal authority, and statements from witnesses.

It is helpful in most rebuttals to present an overview of the facts and describe the Charging Party's positive role in the company. When addressing the facts, it is also sound to describe the scenario within which the Charging Party found herself that gives rise to the claim asserted. For example, if the Charging Party has been sexually harassed, it may be necessary to discuss facts that support the hostile work environment theory, *quid pro quo* theory or both. When doing so, be clear as to the specific factual allegations are being used to support such claims. The more information the better for the EEOC in terms of the identity of the person or persons engaging in the unlawful acts, the time periods of such acts, the effect of such acts on the Charging Party as well as the impact on the Charging Party's ability to perform her job effectively. It may also be a good strategy to identify individuals who can support such claims. At or by this time, it is a good idea to have spoken with such potential witnesses to provide their information to the EEOC as corroboration for the Charge. Perhaps, you may decide to obtain verified Declarations or Affidavits to also produce to the EEOC. Of course, strategic considerations may dictate how you proceed on that front. Indeed, after the Charge has been dismissed and litigation ensues, the defendant employer will have an opportunity to obtain a copy of the Charge file, which will include the rebuttal and any exhibits or other documents or witness statements filed with the EEOC. In other words, if you want the EEOC to have it, the employer will most likely get it later.

At some point during or after a recitation of the facts, some discussion of legal authority may be necessary. The EEOC investigators are trained in the elements required to establish a claim, the defenses to such claims, the burdens of proof and major updated case law. However, that does not mean that legal authority on such issues is not warranted. It really depends on the type of case and the arguments made in the position statement. So, the first consideration is whether you feel it is necessary to identify the elements of the claims asserted. From that point, it is prudent to address any legal authority or nuances in the law that may support the claims asserted in the Charge. If a *prima facie* element is being challenged or pretext is asserted as not having been established, it may be necessary to reference legal authority supporting the contention that such element has been met under the law or that the evidence asserted is sufficient to establish pretext. It may also be necessary to go into the interpretation of the law as applied to the factual scenario presented in the Charge. As there is legal authority that touches on many employment law issues, some of which going in opposite directions, matching the law to the facts in the particular Charge may be helpful not only in persuading the investigator, but their supervisor and the EEOC's legal counsel assigned to review the Charge and the investigator's recommendations. Ultimately, any recommendation for a cause finding must be reviewed by EEOC legal counsel to determine whether there has been a violation of law.

V. HANDLING THE EEOC'S FOLLOW-UP INVESTIGATION EFFORTS

A. RFI/RFP

There are few limits on the EEOC's investigatory powers. For example, it is not limited to investigating only the claims explicitly asserted in a charge. Instead, the EEOC has the authority 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.A. § 2000e-8(a). Furthermore, EEOC investigators are instructed to consider during their investigation whether the Commission should investigate additional locations, if a charge applies only to a single employer location. EEOC Compliance Manual § 22.3(c). Investigators also are instructed to be mindful of additional, unrelated violations of employment laws discovered during the course of an investigation and are instructed to report these violations so the Commission can consider filing separate charges for these violations. *See, e.g., id.* at §§ 22.3(a), 25.7. Thus, employers should ensure their strict compliance with all fair labor laws before they are subject to a probing EEOC investigation.

The EEOC has broad authority and considerable tools to investigate charges of discrimination. Employers should be mindful that some commentators believe the agency is capable of using these tools and authority in ways that may impose a substantial burden on the employer that go beyond the individual merits of a given charge. To avoid such risks and promote a favorable outcome, it is important for both sides to build credibility with the investigator and to avoid any potentially disruptive behaviors, such as failing to treat the investigator or EEOC staff with civility and respect, which may cause a current or future investigation to become far more intrusive, extensive, or public than necessary. The first-line investigator, whom many regard as unimportant in the EEOC’s decision-making process, may be the very person who will have the greatest impact on the scope and direction of the investigation and whose recommendation will be given the greatest deference by the EEOC’s district director or regional attorney.

When the EEOC investigator receives a new charge, he or she will typically make an initial recommendation as to the scope of the investigation to be performed in connection with that charge. EEOC Compliance Manual at § 2.7(g). Thereafter, the EEOC often prepares a written investigative plan to guide the Commission’s investigation of the charge. *Id.* at § 22.2. The investigation plan will almost always involve a Request for Information (“RFI”), will often involve an employer position statement, and may involve witness interviews, on-site investigations, or other investigative tools. If necessary, the EEOC will employ the use of subpoenas to obtain documents or testimony needed to aid in its investigation. *Id.* at § 24.

The investigation plan will typically involve issuance of an RFI to the respondent employer as a first step in the investigation. *Id.* at § 22.2. According to the Compliance Manual, the EEOC investigator should draft the RFI to be “specific and tailored to the scope of the investigation as defined in the” investigation plan. *Id.* at § 22.2(b). The EEOC investigator may call an employer before serving it with an RFI expected to require extensive production of documents. *Id.* at § 26.3(a)(1). The purpose of such a call is to learn what documents may exist and how the employer keeps those documents, so as to make a request that “lessen[s], wherever possible, the burden placed upon the respondent to compile and/or produce the necessary evidence” *Id.* It is therefore in the employer’s interest to cooperate with the investigator making such a call.

The EEOC generally follows the guidelines set in the Compliance Manual, and reasonably tailors its RFIs. However, because the EEOC may demand production within a relatively short period of time, some employers, on whom the burden to produce ultimately falls,

may find a request overbroad or overly burdensome even when it is objectively reasonable in scope.

If necessary to object to the RFI on the grounds of undue burden, employers should address whether the same or similar information is available in an alternative form. The employer should talk to the EEOC investigator and explain what business records are available and how the information sought could be provided in a manner closely resembling the manner requested before submitting information in a format different from that requested or refusing to comply altogether. Offering to work with the EEOC investigator to resolve any such objections benefits the employer in the long run by avoiding costly and drawn out disputes. A simple phone call to the EEOC investigator may be beneficial in narrowing discovery requests and avoiding any misunderstandings related to the type or form of information sought by the agency. Most of these situations can be worked out so that EEOC gets the information it needs without the employer feeling unduly burdened.

Often, the EEOC will not object to an employer providing responses to the RFI in “batches,” particularly where the EEOC has requested a significant amount of information to be produced in a short amount of time. The first batch of responses should be submitted timely under the EEOC deadline if at all possible, with additional time requested to supply the rest. By the second submission to the EEOC, the employer should endeavor to include as much of the requested materials as possible so as to demonstrate a good faith effort at compliance as well as to give the EEOC sufficient information to reconsider whether additional information is even necessary. The employer is in a much better position to discuss the difficulties in collecting and assembling information or the breadth of the requests (and negotiate a reduction) if some data has already been produced which demonstrates the true breadth and unreasonableness of the original request. At times, the combination of the seemingly overbroad array of claims asserted in the charge and the burdensome nature of the RFI may result in an employer – especially one unfamiliar with the EEOC – assuming an unproductively hostile posture at an early stage of the investigation. Remember, the EEOC can and often will give an employer additional time in which to respond to an RFI, and may also engage in a give and take resulting in a reduction of the RFI’s burden to a cooperative employer. In most cases, there is little to be gained from rendering the relationship with the investigator adversarial at this stage.

Finally, be sure to provide a “context cover letter” with any additional information you produce. Otherwise, the EEOC investigator may not understand the information the same way you do, or may infer something from it that you believe is not appropriate.

B. Interviews and On-site Investigations

Interviews and on-site investigations may play a role in the EEOC’s investigation of a charge. Typically, the EEOC will schedule an on-site investigation in advance. *See, e.g.*, EEOC Compliance Manual § 25.2(a). The Commission, however, need not necessarily give an employer notice of an on-site investigation, and may choose instead to show up at the employer’s place of business unannounced. This may be the Commission’s preferred approach if it is anticipating a lack of cooperation from the employer. *Id.* at § 25.2(b)(1). Employers faced with such “drop-in” visits by EEOC investigators will need to decide whether to allow the investigator access to the site, or whether to require the investigator to compel an inspection by subpoena.

Interviews may be conducted at the worksite unless the witness requests anonymity. *Id.* at § 23.6. The EEOC Compliance Manual instructs investigators to schedule interviews at a time when they would result in minimal interference with the employer's business. *Id.* Interviews planned for the workplace should be scheduled with the employer's prior knowledge and consent. The EEOC, however, may begin interviewing key witnesses identified by the charging party before the employer has provided, a position statement or its response to any RFI. *Id.* at § 23.4. Finally, while the employer's attorney may be present for interviews of the employer itself, or its management personnel, neither the employer nor its attorney may be present for the interviews of other employees. *Id.* at § 23.6(c).

The potential for surprise is significant in the context of site visits and interviews. Much may be taking place during the course of an investigation without the employer's full or partial knowledge. An employer is well advised to begin ensuring that it is in compliance with all employment laws well before such an investigation is threatened and certainly no later than immediately upon receipt of a charge it thinks may lead to a site visit. Similarly, the employer should in the majority of cases, immediately upon learning of a charge, begin interviewing potential witnesses, with the caveat that such interviews must be taken with care. Implicit threats or suggested retaliation could raise substantial problems for the employer.

C. Subpoenas

Generally, the EEOC's subpoena power is as broad as its investigatory scope, and the EEOC is likely to gain access to virtually all non-privileged materials within its investigative plan. The EEOC may subpoena "any person who has custody or control of relevant evidence." *Id.* at § 24.1. Those subpoenas generally are enforced so long as the subpoena is sufficiently clear to allow for a response, and the information sought is relevant. As the Supreme Court acknowledged, "[s]ince the enactment of Title VII, courts have generously construed the term 'relevant' and have afforded the Commission access to virtually any material that might cast light on the allegations against the employer." *EEOC v. Shell Oil Co.*, 466 U.S. 54, 68-69 (1984).

The relevance requirement is not particularly onerous. Courts have given broad construction to the term "relevant" and have traditionally allowed the EEOC access to any material that "might cast light on the allegations against the employer." *Shell Oil Co.*, 466 U.S. at 68-69; see also *EEOC v. Dillon Cos., Inc.*, 310 F.3d 1271, 1274 (10th Cir. 2002) ("The Supreme Court has explained that the 'relevancy' limitation on the EEOC's investigatory authority is 'not especially constraining.' " (quoting *Shell Oil*, 466 U.S. at 68, 104 S.Ct. 1621)); *EEOC v. Ford Motor Credit Co.*, 26 F.3d 44, 47 (6th Cir. 1994) (noting that "Congress intended [the EEOC] to have broad access to information relevant to inquiries it is mandated to conduct"); *EEOC v. Franklin & Marshall Coll.*, 775 F.2d 110, 116 (3d Cir. 1985) ("The concept of relevancy is construed broadly when a charge is in the investigatory stage."). Nonetheless, the EEOC's power of investigation is anchored to the charge of discrimination, and courts must be careful not to construe the charge and relevance requirements so broadly as to confer "unconstrained investigative authority" upon the EEOC. *Shell Oil*, 466 U.S. at 64-65, 104 S.Ct. 1621; see also *EEOC v. United Air Lines, Inc.*, 287 F.3d 643, 653 (7th Cir. 2002). The relevance requirement "is designed to cabin the EEOC's authority and prevent fishing expeditions." *United Air Lines*,

287 F.3d at 653 (quotation marks omitted). The EEOC bears the burden of demonstrating relevance. *See EEOC v. S. Farm Bureau Cas. Ins. Co.*, 271 F.3d 209, 211 (5th Cir. 2001).

Once the EEOC begins an investigation, it is not required to ignore facts that support additional claims of discrimination if it uncovers such evidence during the course of a reasonable investigation of the charge. *See, e.g., Gen. Tel. Co. of the N.W., Inc. v. EEOC*, 446 U.S. 318, 331, 100 S.Ct. 1698, 64 L.Ed.2d 319 (1980) (“Any violations that the EEOC ascertains in the course of a reasonable investigation of the charging party's complaint are actionable.”); *EEOC v. Cambridge Tile Mfg. Co.*, 590 F.2d 205, 206 (6th Cir. 1979) (per curiam) (enforcing EEOC subpoena seeking information related to sex discrimination in job classification after EEOC uncovered evidence of such discrimination during investigation of allegations of sex and race discrimination in termination); *EEOC v. Gen. Elec. Co.*, 532 F.2d 359, 364-65 (4th Cir. 1976) (“[T]he original charge is sufficient to support action by the EEOC . . . for any discrimination stated in the charge itself or developed in the course of a reasonable investigation of that charge....”). Rather, the EEOC has the power to investigate a “a broader picture of discrimination which unfolds in the course of a reasonable investigation of a specific charge.” *Cambridge Tile*, 590 F.2d at 206.

There are limits, however. For example, in *EEOC v. Southern Farm Bureau Casualty Insurance Co.*, 271 F.3d 209 (5th Cir. 2001), an employee filed a charge with the EEOC alleging that Southern Farm had discriminated against him based on race. During the EEOC's investigation, Southern Farm provided the EEOC with a list of employees by name, position, and race. Based on this list, the EEOC suspected potential sex discrimination, and issued a subpoena requesting certain information related to possible unlawful employment practices based on sex. *Id.* at 211. The Fifth Circuit affirmed the district court's refusal to enforce the EEOC subpoena for information relating to potential sex discrimination. In affirming the district court's decision, the *Southern Farm* court noted that when the EEOC discovered what it considered to be evidence of sex discrimination, it could have exercised its authority under 42 U.S.C. §§ 2000e-5(b) and 2000e-6(e) to file a commissioner's charge alleging sex discrimination. At that point, the EEOC would have been free to request information relevant to Southern Farm's employment of women. *Id.*

Though the subpoena powers are broad, the EEOC instructs its investigators to use subpoenas in most circumstances “only after other investigative methods have been attempted.” EEOC Compliance Manual § 24.1. It also requires the investigator to take into consideration several relevant factors including the respondent's ability to produce the requested information. *Id.* at § 24.4.

Recently, in *E.E.O.C. v. Alliance Residential Co.*, __ F. Supp. 2d __, Case No. 5:11-MC-638-FB, 2011 WL 5865246, at *6-7 (W.D. Tex. Nov. 18, 2011), the employer objected to the EEOC's subpoena on the basis the request for former employees' social security numbers and health information was private information not available to the general public. In rejecting the employer's objection, the court explained:

The Supreme Court and lower courts have rejected confidentiality arguments as a defense to an administrative subpoena. *EEOC v. Associated Dry Goods Corp.*, 449 U.S. 590, 604, 101 S.Ct. 817, 66 L.Ed.2d 762 (1981) (holding defendant did

not have “a categorical right to refuse to comply with the EEOC subpoena unless the Commission assured it that the information supplied would be held in absolute secrecy,” but noting each charging party could only see information in his or her own file); *Univ. of Pa. v. EEOC*, 493 U.S. 182, 192, 110 S.Ct. 577, 107 L.Ed.2d 571 (1990) (concluding confidentiality of academic peer review materials did not justify noncompliance with administrative subpoena); *EEOC v. Bay Shipbuilding Corp.*, 668 F.2d 304, 312 (7th Cir. 1981) (“confidentiality is no excuse for noncompliance”); *EEOC v. Univ. of N.M.*, 504 F.2d 1299, 1303 (10th Cir. 1974) (requiring compliance even where personnel files and records were “both confidential and extremely sensitive”).

The EEOC contends any legitimate concerns Alliance has regarding confidentiality are already appropriately addressed under the law governing EEOC investigations. It argues 42 U.S.C. § 2000e–5(b) prohibits the EEOC from making public charges of discrimination and imposes fines and imprisonment for anyone violating this rule of confidentiality. In addition, Section 2000e–8(e) prohibits the disclosure of any information obtained pursuant to the EEOC’s investigatory powers.

The Supreme Court has explained the relationship between these statutory safeguards and confidentiality concerns:

Congress apparently considered the issue of confidentiality, and it provided a modicum of protection [Section 2000e–8(e)]. Petitioner urges us to go further than Congress thought necessary to safeguard that value, that is, to strike the balance differently from the one Congress adopted. Petitioner, however, does not offer any persuasive justification for that suggestion.

Univ. of Pa., 493 U.S. at 192.

The Court acknowledges the sensitivity of some of the information requested by the EEOC, specifically the medical information and social security numbers of former employees. To that end, the court notes the charging party, Ms. Laurel, is entitled to “see information in no file other than ... her own.” *Associated Dry Goods Corp.*, 449 U.S. at 604. Other than this protection, the Court concludes the statutory safeguards already in place are sufficient to protect the medical and social security information requested by the EEOC.

D. Additional Briefing

If it appears the EEOC is leaning towards finding probable cause, it may be prudent for the employer to provide the EEOC additional briefing. Whether additional briefing is necessary can usually be determined through discussions with the EEOC investigator.

Providing additional briefing may pay other dividends too. For example, in *E.E.O.C. v. Agro Distribution, LLC*, 555 F.3d 462 (5th Cir. 2009), the EEOC brought suit against Agro for violating the Americans with Disabilities Act (“ADA”) by allegedly failing to provide a

reasonable accommodation to an ex-employee and by terminating his employment on the basis of his disability. The district court dismissed the suit and awarded Agro approximately \$225,000.00 for its attorneys' fees and costs. The Fifth Circuit affirmed the district court's ruling. The Fifth Circuit emphasized that the day after an EEOC investigator performed an on-site investigation, Agro's attorney mailed a letter to the EEOC expressing concern about the investigator's investigation. Agro's attorney reported in his letter that she made insulting remarks during interviews; indicated disgust for the statements of management witnesses; raised her voice; rephrased witnesses' statements to favor the charge; and selectively recorded portions of the statements. The EEOC never responded to this letter and left the investigator in charge of the investigation. *Id.* at 466.

VI. DISMISSAL AND TIMELY FILING OF SUIT

A. Initiated by the EEOC

1. Title VII

After the EEOC has conducted its investigation, the investigator will make a decision as to whether to recommend dismissal or finding cause. Usually, any such recommendation is in writing, which is exempt from disclosure when the Charge file is produced. The practice seems to be that the investigator discusses his proposed recommendation with his supervisor. If it is a recommendation for dismissal without a finding of cause, the EEOC will issue a "Right to Sue" letter that states that the Commission is unable to conclude that a violation of law has occurred. The letter is then mailed to the Charging Party, the Respondent, and their respective attorneys.

Generally, for Title VII claims, the Charge should be on file for at least 180 days before a right to sue can be given under Title VII at 42 U.S.C. §2000e-5(f). *See EEOC v. Hearst Corp.*, 103 F.3d 462 (5th Cir. 1997). Otherwise, a Court may not have jurisdiction over the Charge until the expiration of 180 days and remand it back to the EEOC while the litigation is stayed or dismissed. Recognizing a more recent practical approach, The District Court in *Emmanuel v. Cognizant Technology Solutions*, 2008 WL 4826022 (N.D. Tex 2008) held that "[b]y issuing the right-to-sue letter before the 180 day period, the EEOC waives its exclusive jurisdiction and, therefore, the claimant is not barred from proceeding with its claim in federal court." It appears that the court did not want to issue a stay because it would encourage the EEOC just to hold onto cases. It opined that by "[i]mposing a stay on cases where an 'early' right-to-sue letter is issued by the EEOC simply 'encourages the EEOC to hold charges in limbo' and does not acknowledge the fact that 'the EEOC is overburdened with pending cases and lacks the resources to investigate all of those cases within the 180 day period.'"

The receipt of the "Right to Sue" letter triggers a filing deadline under Title VII that must be observed. In order for the plaintiff employee to file suit on the claims asserted in the Charge, she must file suit in a court of competent jurisdiction as to such federal claims within 90 days of the date of her *receipt* of such letter. *Montgomery v. Bridgeway Healthcare, Inc.*, 2007 WL 2827998 (N.D. Tex. 2007). "When the date on which the right to sue letter was actually received is either unknown or disputed, courts have presumed various receipt dates ranging from three to seven days after the letter was mailed." *Taylor v. Books A Million, Inc.*, 296 F.3d 376, 379 (5th

Cir. 2002) (citations omitted) (Title VII cases presuming receipt within seven days when the actual date of receipt was unknown).

2. ADEA

Outside of the Title VII context, there are some different rules. For example, with regard to ADEA claims, no right-to-sue letter is required. *See Julian v. City of Houston*, 314 F.3d 721, 725 (5th Cir. 2002). 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.” *Id.* at 726. Under 29 U.S.C. § 626(d), “the claimant’s independent right to sue arises automatically upon the expiration of sixty days after filing of the charge with the EEOC.” *Id.* (footnote omitted); *see also* 29 U.S.C.A. § 626(d) (setting out the administrative remedies that must be exhausted prior to filing suit under the ADEA). As the Fifth Circuit explained in *Julian*:

But there are preconditions to bringing suit under the ADEA. Title 29 U.S.C. § 626(d) provides: “No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Equal Employment Opportunity Commission.” Thus, a person seeking relief under the ADEA must first file an administrative charge with the EEOC. And § 626(d) establishes time limits for filing the EEOC charge. For cases arising in Texas, a complainant must file within 300 days of the last act of discrimination. After timely filing the EEOC charge, the complainant must then wait sixty days before filing a civil action. Under the plain language of § 626(d), “the claimant’s independent right to sue arises automatically upon the expiration of sixty days after filing of the charge with the EEOC.” Accordingly, a complainant who timely files the EEOC charge and then observes the sixty-day waiting period has satisfied the statutory preconditions to filing suit.

Id. at 725-26 (footnotes omitted).

3. Chapter 21 Of The Texas Labor Code

Under Texas state law, the time frame within which an action for employment discrimination must be brought is set forth in Section 21.256 of the Texas Labor Code. Tex. Labor Code Ann. § 21.256 (Vernon 2006). That section provides that “[a] civil action may not be brought under this subchapter later than the second anniversary of the date the complaint relating to the action is filed.” Tex. Labor Code Ann. § 21.256. Thus, in order to comply with the exhaustion requirement under the Texas Labor Code, an employee must: (1) file a complaint with the Texas Workforce Commission – Civil Rights Division within 180 days of the alleged discriminatory act; (2) allow the Commission to dismiss the complaint or resolve the complaint within 180 days before filing suit; and (3) file suit no later than two years after the complaint is filed. *Rice v. Russell-Stanley, L.P.*, 131 S.W.3d 510, 513 (Tex. App. – Waco 2004, pet. denied); *see* Tex. Lab. Code Ann. §§ 21.201-202, 21.208 (Vernon 2006); *Gallegos v. Johnson*, No. 13-07-00603-CV, 2010 Tex.App. LEXIS 1330, 2010 WL 672934 at *37-38 (Tex. App. – Corpus Christi Feb. 25, 2010, no pet. h.) (mem. op.).

Fulfilling elements one and two noted above entitle a complainant to a right-to-sue letter. A plaintiff's entitlement to a right-to-sue letter signals that she has satisfied the exhaustion requirement. *See Rice*, 131 S.W.3d at 512 (holding that "it is the entitlement to the right-to-sue letter that exhausts the complainant's administrative remedies," not its possession); *City of Houston v. Fletcher*, 63 S.W.3d 920, 923 (Tex. App. – Houston [14th Dist.] 2002, no pet.) (explaining that "[t]he statute certainly supports an interpretation that the right-to-sue letter is notice of exhaustion, not actually part of exhaustion"); *see also Gallegos*, 2010 Tex.App. LEXIS 1330, 2010 WL 672934 at *38. Thus, a plaintiff need not actually obtain a right-to-sue letter in order to exhaust her administrative remedies; she need only be entitled to one. "Texas courts hold that it is the entitlement to a right-to-sue letter rather than the receipt of the letter that exhausts the complainant's administrative remedies." *Wooten v. Fed. Exp. Corp.*, No. 3:04-CV-1196-D, 2007 WL 63609, at *8 n. 14 (N.D. Tex. Jan. 9, 2007) (Fitzwater, C.J.) (citing *Rice*, 131 S.W.3d at 513), *aff'd*, 325 Fed.Appx. 297 (5th Cir. 2009). "[T]he right-to-sue letter is not part of the exhaustion requirement, only notice of exhaustion [is required]." *Rice*, 131 S.W.3d at 513.

However, Texas state law further provides that "within 60 days after the date a notice of the right to file a civil action is received, the complainant may bring a civil action against the respondent." Tex. Lab. Code § 21.254. Thus, courts have held that if a plaintiff does in fact receive a right-to-sue letter from the Texas Workforce Commission – Civil Rights Division, she must bring suit within sixty-days of receiving the letter, or else her claim is time-barred. *Hansen v. Aon Risk Services of Texas*, 473 F. Supp. 2d 743 (S.D. Tex. 2007) ("... the court concludes that plaintiff's TCHRA claim is time-barred because it was filed more than 60 days after plaintiff received the TCHR's notice of right to sue."); *Lottinger v. Shell Oil Co.*, 143 F. Supp. 2d 743, 753 (S.D. Tex. 2001) ("Although the sixty-day period is not considered jurisdictional under Texas law, actions filed in federal court after the expiration of sixty days are routinely dismissed as untimely.") (citing *Dean v. Xerox Corp.*, No. Civ. A. 3:96-CV-2409-D, 1997 WL 756574, at *2 (N.D. Tex. Nov. 25, 1997); *Battee v. Eckerd Drugs, Inc.*, No. 396CV1551-R, 1997 WL 340941, at *10 (N.D. Tex. June 13, 1997); *Zevator v. Methodist Hosp.*, No. H-94-859, 1995 WL 500637, at *2 (S.D. Tex. Mar. 30, 1995)).

B. Initiated by the Charging Party

The Charging Party may request a "Right to Sue" letter as well so that he may be able to proceed to litigation without waiting for the EEOC to conclude its investigation. Of course, certain strategic considerations are at play as to which path to take. When the Charging Party requests the "Right to Sue" letter, it usually states that it is issued upon request or some other neutral language. Procedures for requesting a "Right to Sue" letter may vary between District offices. For example, a District office may not allow a Charging Party to have the "Right to Sue" letter be issued upon request, if substantial investigation has occurred, without some language that the EEOC investigated and was unable to conclude that a violation occurred. Also, be wary of the 180 day time issue, as discussed above when requesting the "Right to Sue" letter.

C. Employer's Considerations

Even after a right-to-sue letter is issued, an employer could be held liable if it retaliates against the employee for having filed an EEOC charge in the first place. Indeed, if any employer took some adverse action against an ex-employee it could potentially be liable for retaliation.

See Robinson v. Shell Oil Co., 519 U.S. 337, 346, 117 S. Ct. 843, 136 L. Ed. 2d 808 (1997) (term “employees,” as used in anti-retaliation provision of Title VII, includes former employees.).

Employers should be not assume that just because a charging party does not file suit based on an EEOC right-to-sue letter, that they will not sue the employer at all. They may later obtain a right-to-sue letter later on from the Texas Workforce Commission – Civil Rights Division (formerly the Texas Commission on Human Rights) and sue based on that letter. They could do that because an EEOC Right-To-Sue letter is not interchangeable with a right to sue letter from the Texas Workforce Commission – Civil Rights Division, and a letter from one agency does not trigger the time frame to sue under the other. *See Jones v. Grinnell Corp.*, 235 F.3d 972, 975 (5th Cir. 2001) (“Furthermore, the EEOC’s right to sue letter cannot substitute for a TCHR right to sue letter.”); *Vielma v. Eureka Co.*, 218 F.3d 458, 461-62 (5th Cir. 2000) (same); *Williams v. Vought*, 68 S.W.3d 102, 109 (Tex. App.–Dallas 2001, no pet.) (time period proscribed in the TCHRA for filing suit runs from the Texas Workforce Commission – Civil Rights Division’s notice of right to sue, not the EEOC’s notice).

In addition, there are some anti-discrimination laws an employee may base a lawsuit on that have no administrative exhaustion requirement at all. For example, under 42 U.S.C. § 1981 and employee may sue an employer based on intentional race discrimination and even retaliation without going through the EEOC or any administrative agency first. *See, e.g., CBOCS West, Inc. v. Humphries*, 128 S. Ct. 1951, 1961, 170 L. Ed. 2d 864 (2008) (finding that “ 42 U.S.C. § 1981 encompasses claims of retaliation.”).

Section 1981 provides: “All persons ... shall have the same right ... to make and enforce contracts ... as is enjoyed by white citizens.” 42 U.S.C. § 1981. The substantive analysis of disparate treatments claims is identical under Title VII and 42 U.S.C. § 1981. *See Jenkins*, 478 F.3d at 260 (“Section 1981 claims are analyzed under the same framework as Title VII claims.”) (citing *Roberson v. Alltel Info. Servs.*, 373 F.3d 647, 651 (5th Cir. 2004)); *Wallace v. Texas Tech Univ.*, 80 F.3d 1042, 1047 (5th Cir. 1996) (Title VII and Section 1981 claims analyzed the same way); *Anderson v. Douglas & Lomason Co., Inc.*, 26 F.3d 1277, 1284 n. 7 (5th Cir. 1994) (same).

Suits under Section 1981 are governed by either four or two year statute of limitations, depending on the type of claim asserted. Specifically, under Section 1981, claims based on harassment, termination, or other actions not relating to contract formation, are subject to a four year statute of limitations under the “catch all” limitations period for federal claims, 28 U.S.C. § 1658. *See Johnson v. Crown Enterprises, Inc.*, 398 F.3d 339, 341 (5th Cir. 2005); *Price v. M & H Valve Co.*, 177 Fed.Appx. 1, No. 05-15205, 2006 WL 897231, at * 10 (11th Cir., Apr. 07, 2006). In contrast, claims relating to contract formation – including claims for failure to promote – are subject to the relevant state personal injury limitations period, which, in Texas, is two years. *See Price*, 2006 WL 897231, at * 10 (holding failure to promote claim under Section 1981 was barred by Alabama’s two-year limitations period); *Pegram v. Honeywell, Inc.*, 361 F.3d 272, 278 (5th Cir. 2004) (“Under Texas law, one must file a discrimination claim under section 1981 within two years of the adverse employment action.”) (footnote and citations omitted).

VII. CAUSE FINDINGS

A. Preliminary Determination Letters

The EEOC will often issue a preliminary determination letter. For example, the EEOC may issue a letter to the Charging Party advising him or her that they intend to find no probable cause for certain reasons, and will dismiss the charge on that basis, unless the charging party provides additional evidence within a certain time frame. The EEOC may send a similar type of preliminary determination letter to the employer.

The EEOC may also choose to conduct a pre-determination interview with the Respondent if it is leaning towards a finding that a violation of law occurred. In which case, the EEOC will most likely contact the Respondent in an attempt to ascertain if the Respondent has any additional evidence to produce, generally or on specific grounds identified by the EEOC.

B. Letters of Determination

If the EEOC ultimately concludes that the evidence establishes that discrimination has occurred, after its legal counsel has approved same, the employer and the charging party will be informed of this in a letter of determination that explains the finding. This letter usually provides the factual basis for the finding that a violation has occurred. It then sets forth the violations; such as finding that a hostile work environment exists or that a Charging Party was subjected to retaliatory discharge. If there are particular claims asserted in the Charge upon which the EEOC is unable to reach a cause finding, then it may note that it is not finding that a violation exists as to any other claims that are not addressed in such letter. Once the EEOC has issued the letter of determination and sent it to all parties, it will then attempt conciliation with the employer to develop a remedy for the alleged discrimination.

C. Conciliation

1. Legal Pointers

The EEOC has a statutory obligation to attempt conciliation with employers: “[T]he Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion.” 42 U.S.C. § 2000e-5(b). The Commission may bring a civil action only if “the Commission has been unable to secure from the respondent a conciliation agreement.” *Id.* at § 2000e-5(f)(1).

Conciliation is “the preferred means of achieving the objectives of Title VII,” *EEOC v. Pierce Packing Co.*, 669 F.2d 605, 609 (9th Cir. 1982), and is one of the “most essential functions” of the EEOC. *EEOC v. Pet, Inc., Funsten Nut Div.*, 612 F.2d 1001, 1002 (5th Cir. 1980).

A good-faith attempt at conciliation requires that the EEOC: (1) outline to the employer the reasonable cause for its belief that Title VII 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. Klingler Elec. Corp.*, 636 F.2d 104, 107 (5th Cir. 1981).

In *Agro Distribution, LLC*, 555 F.3d at 468, a case decided in January 2009, the Fifth Circuit found that the district court correctly concluded that in dealing with Agro, the EEOC did not attempt conciliation in good faith. The court held that by repeatedly failing to communicate with Agro, the EEOC failed to respond in a reasonable and flexible manner to the reasonable attitudes of the employer. The EEOC abandoned its role as a neutral investigator and compounded its arbitrary assessment that Agro violated the ADA with an insupportable demand for compensatory damages as a weapon to force settlement.

Agro Distribution, LLC court concluded, however, that the EEOC's conciliation requirement is a precondition to suit but not a jurisdictional prerequisite. *Id.* at 468-69. It based that conclusion on the U.S. Supreme Court's holding in *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 503, 126 S. Ct. 1235, 1238, 163 L. Ed. 2d 1097 (2006).

The court in *Agro Distribution, LLC* stated that, notwithstanding its non-jurisdictional nature, "Courts remain free to impose a stay for the EEOC to continue prematurely terminated negotiations, and where the EEOC fails to act in good faith, dismissal remains an appropriate sanction." *Id.* at 469.

Agro Distribution, LLC is an extreme case. In situations where the EEOC has made a greater conciliation effort, attempts to rely on *Agro Distribution, LLC* to obtain dismissal or other sanctions are not likely to be successful. *See, e.g., E.E.O.C. v. Columbia Sussex Corp.*, 632 F. Supp. 2d 576 (M.D. La. 2009) ("Further, it appears that the EEOC's efforts in this case do not sink to the level found in *Agro*. While it appears that the EEOC issued a "Notice of Conciliation Failure" one day after Columbia Sussex requested a meeting to discuss the factual basis of the EEOC's determination and its request for damages, it also appears that an impasse had arisen as to the threshold question of whether a violation had occurred. Given that Columbia Sussex and the EEOC do seem to have reached an impasse regarding the threshold issue of whether a Title VII violation occurred, this Court agrees with the EEOC that conciliation efforts at this point would be futile. This Court finds that the EEOC fulfilled its duty to conciliate with defendant."). *See also E.E.O.C. v. O'Reilly Automotive Inc.*, NO. CIV.A. H-08-2429, 2010 WL 5391183, *7 (S.D. Tex. Dec 14, 2010) (rejecting motion to dismiss based on EEOC's alleged failure to conciliate in good faith, stating "[t]he court does not endorse the EEOC's conciliation efforts but cannot say that the EEOC failed to act in good faith.").

In addition, absent compelling proof of bad faith by the EEOC, the most likely relief for the EEOC's failure to conciliate would be a stay, not dismissal. As one Texas federal district court explained:

Even had Smith complied with Rule 9(c) and pleaded with particularity that the EEOC failed to conciliate, and had the court concluded that the EEOC did not satisfy its obligation to adequately conciliate, this would almost inevitably result in staying this case, not dismissing it. *See Agro Distribution*, 555 F.3d at 469 (holding that dismissal is only appropriate where EEOC acts in bad faith); *EEOC v. Serv. Master Co.*, 2007 WL 1828035, at *3 (N.D. Tex. June 26, 2007) (Lynn, J.) (issuing stay where EEOC failed to conciliate with defendant). "[T]he sanction of dismissal" is available only when the question of conciliation is properly raised by a defendant and the court finds that the EEOC acted in bad faith, thus

warranting severe sanctions. *See EEOC v. Asplundh Tree Expert Co.*, 340 F.3d 1256, 1261 (11th Cir. 2003). Dismissal is an available sanction for bad faith behavior by the EEOC, *see Agro Distribution*, 555 F.3d at 469, but failure to conciliate does not act as a substantive defense to the merits of an EEOC discrimination claim. Nor is conciliation an element of the EEOC's cause of action. "[A] lack of reasonable conciliation is not an affirmative defense to liability but a condition precedent to prosecuting the action-the remedy for a violation is a stay of the case until conciliation efforts are completed, not dismissal of the case." *EEOC v. Burlington N.*, 2008 WL 4845308, at *2 n. 6 (W.D. Okla. June 23, 2008).

E.E.O.C. v. Service Temps, Inc., NO. 3:08-CV-1552-D, 2010 WL 2381499, at *3 (N.D. Tex. Jun 11, 2010).

Finally, in that same case, *Service Temps, Inc.*, the court also found that the question of conciliation does not present an issue for the trier of fact, but "[r]ather, this is a preliminary question for the court." *Id.*

2. Practice Pointers and Practical Considerations

a. In General

Oftentimes, conciliation is handled by the investigator, who has conducted the investigation, when the investigator entertains a settlement demand from the Charging Party. Usually, the demand comes in the form of monetary relief, but may also include non-monetary requests; such as the request to expunge the Charging Party's personnel file or a letter of recommendation, etc. The EEOC will also usually request other non-monetary relief in connection with a proposed conciliation; such as, training, posting and other requirements. The EEOC also usually requires some type of reporting or enforcement period within which to monitor the settlement and agreed upon non-monetary terms by the Respondent. The conciliation demand is presented to the Respondent employer to determine whether the Respondent is interested in conciliating the claims. If the Respondent conciliates and there is a settlement, then the EEOC will prepare a consent decree for the parties to sign along with the EEOC. If the conciliation fails, the EEOC determines whether it will proceed with litigation or notify the Charging Party of her "Right to Sue."

Employers should be aware that, if they do not resolve the charge in conciliation, and the EEOC decides to bring suit itself, rather than just issue a "Right to Sue" letter to the Charging Party, then: (1) the EEOC will likely issue a press release announcing its lawsuit, that it will post on its website and that may be picked up by media outlets; and (2) any post-suit settlement with the EEOC will require that the case be resolved through a consent decree, which must be approved by the court, and is also a publically available document. In addition, the EEOC normally issues another press release announcing settlements of its suits, which again may be picked up and publicized by various media outlets. Thus, if the employer is concerned about negative publicity, its should factor that considerations into its analysis during conciliation.

In addition, the requirement that EEOC suits be settled through a consent decree can sometimes be a burdensome one, at least from many employers' perspectives. Such consent decrees often require the employer to implement training programs, post additional notices in the workplace regarding equal employment, implement new EEOC-approved policies, or modify existing policies, and report to the EEOC regarding compliance and any additional employee-complaints on a regular basis for a period of years. In some larger cases, employers may also have to hire or pay for a consent decree monitor, and make significant changes to their hiring, pay, or promotional practices and policies. Accordingly, if the employer is concerned about having to comply with a potentially burdensome consent decree, it should factor that possibility into its analysis during conciliation.

An example of a recent significant EEOC case resolved by a consent decree is the EEOC's settlement with Verizon of a nationwide class action lawsuit alleging that Verizon violated the ADA by refusing to make exceptions to its "no fault" attendance plans to accommodate employees with disabilities. According to the EEOC's press release, Verizon violated the ADA by failing to provide reasonable accommodations for people with disabilities, such as making an exception to its attendance plans for individuals whose "chargeable absences" were caused by their disabilities. Instead, the EEOC said, the company disciplined or terminated employees who needed such accommodations. In addition to requiring the payment of \$20 million in monetary relief to affected employees, the Consent Decree filed with the federal district court in Maryland last year requires the company to revise its attendance plans, policies and ADA policy to include reasonable accommodations for persons with disabilities, including excusing certain absences. The Consent Decree provides a step by step analysis that the EEOC expects Verizon to go through before considering an employee's absence to be a "chargeable absence" subject to discipline under the company's attendance policy.

b. Can There Be An Oral Settlement In Conciliation?

Sometimes, the parties agree to a resolution in conciliation, but it breaks down for some reason before it is finalized in writing. In *EEOC v. Philip Services Corp.*, 635 F.3d 164 (5th Cir. 2011), the EEOC sought to enforce an oral agreement to settle reached during the EEOC's conciliation process. The Court of Appeals, agreeing with the court below, held that enforcement of an oral settlement agreement reached during the conciliation process is not possible because it would require an inquiry into what was said or done during the conciliation process, which is prohibited by Title VII and would undermine the reason for the prohibition. As the Court of Appeals stated, "Should this court permit actions seeking to establish an oral conciliation agreement, we would certainly see an increase in such actions and would risk a decrease in the open communication necessary to reach voluntary settlements during the conciliation process." *Id.* at 169.

VIII. LITIGATION

A. By EEOC

When Title VII was enacted in 1964, it authorized private actions by individual employees and public actions by the Attorney General in cases involving a "pattern or practice" of discrimination. 42 U.S.C. § 2000e-6(a) (1994 ed.). The EEOC, however, merely had the

authority to investigate and, if possible, to conciliate charges of discrimination. *See General Telephone Co. of Northwest v. EEOC*, 446 U.S. 318, 325, 100 S. Ct. 1698, 64 L. Ed. 2d 319 (1980). In 1972, Congress amended Title VII to authorize the EEOC to bring its own enforcement actions; indeed, the 1972 amendments created a system in which the EEOC was intended “to bear the primary burden of litigation,” *id.*, at 326, 100 S. Ct. 1698. Those amendments authorize the courts to enjoin employers from engaging in unlawful employment practices, and to order appropriate affirmative action, which may include reinstatement, with or without back-pay. Where the EEOC brings suit, the individual charging party is then 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); 42 U.S.C. § 2000e-5.

Thus, since the 1972 amendments, the EEOC has been able to bring suit on a charging party’s behalf. *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002), the U.S. Supreme Court held that even if the Charging Party was bound by an enforceable arbitration agreement, the EEOC could still seek victim-specific relief in addition to injunctive relief for discrimination claims brought under Title VII and the ADA. The Court held that the EEOC was not a party to any agreements to arbitrate between the employer and employee and that an employee’s agreement to arbitrate did not limit the remedies available to the EEOC. In February 2012, the Eighth Circuit Court of Appeals applied *Waffle House* to conclude that an employee’s failure to disclose his/her discrimination claim in his/her personal bankruptcy—which would judicially estop them from pursuing a claim—did not judicially estop the EEOC from bringing a claim on their behalf. *E.E.O.C. v. CRST Van Expedited, Inc.*, ___ F.3d ___, ___, Nos. 09–3764, 09–3765, 10–1682; 2012 WL 555510, at *16-17 (8th Cir., Feb. 22, 2012) (reversing district court’s contrary conclusion).

In *Occidental Life Insurance Co. v. EEOC*, 432 U.S. 355, 358-73, 97 S. Ct. 2447, 53 L. Ed. 2d 402 (1977) the Supreme Court held that EEOC enforcement actions are not subject to state statutes of limitation, but rather that the federal enforcement structure itself provides the time limitations for EEOC actions. 432 U.S. at 372, 97 S. Ct. 2447. The Court held it was inappropriate to apply state statutes of limitations to the EEOC’s actions, stating that “absorption of state limitations would be inconsistent with the congressional intent underlying the enactment of the 1972 amendments.” *Id.* at 369, 97 S. Ct. 2447. The Court instead held that the procedural framework itself provides a statute of limitations, with the “benchmark” measured not by some end date but rather by “the commencement of the proceeding before the administrative body.” *Id.* at 372, 97 S. Ct. 2447.

In *General Telephone Co. of Northwest v. EEOC*, 446 U.S. 318, 100 S. Ct. 1698, 64 L. Ed. 2d 319 (1980) the EEOC sought to bring a discrimination claim on behalf of all female employees at General Telephone’s facilities in four States, without being certified as the class representative under Federal Rule of Civil Procedure 23. *Id.* at 321-322. Relying on the plain language of Title VII and the legislative intent behind the 1972 amendments, the U.S. Supreme Court held that the EEOC was not required to comply with Rule 23 because it “need look no further than § 706 for its authority to bring suit in its own name for the purpose, among others, of securing relief for a group of aggrieved individuals.” *Id.*, at 324, 100 S. Ct. 1698. In light of the provisions granting the EEOC exclusive jurisdiction over the claim for 180 days after the employee files a charge, the court concluded that “the EEOC is not merely a proxy for the

victims of discrimination and that [its] enforcement suits should not be considered representative actions subject to Rule 23.” *Id.* at 326, 100 S. Ct. 1698.

Because of the EEOC’s role in enforcing anti-discrimination laws in court, a governmental task force report in 2006 noted that the EEOC is “uniquely positioned to litigate systemic cases. First, unlike private litigants, EEOC need not meet the stringent requirements of Rule 23 of the Federal Rules of Civil Procedure in order to maintain a class suit in federal court. Second, as a practical matter, EEOC may be able to bring certain systemic cases that the private bar is not likely to handle, for example, where the monetary relief might be limited, the focus is on injunctive relief, or the victims are in underserved communities. EEOC also can file ADEA suits against state entities and obtain monetary relief, whereas private litigants are limited by sovereign immunity to obtaining only injunctive relief in such cases. Finally, the task force believes that EEOC’s nationwide presence permits it to act as a large yet highly specialized law firm with a unique role in civil rights enforcement.”

While the EEOC has broad power to bring litigation, there are some limits. For example, courts have held that if the EEOC investigation only focuses on a local or regional area of the employer’s workforce, it cannot thereafter file suit against the employer based on nationwide allegations of discrimination. In *EEOC v. Outback Steak House of Florida, Inc.*, 520 F. Supp. 2d 1250 (D. Col. 2007), the EEOC brought a civil public enforcement action alleging that Outback Steak House engaged in a pattern or practice of discrimination against women. The initial EEOC charges of discrimination concerned the conduct of a male manager who oversaw operations in Colorado, Wyoming, and Montana. After filing suit, the EEOC sought nationwide data from Outback, explaining that such data was necessary to determine the scope of the class. Defendants objected, claiming that during the EEOC investigation and conciliation process, they were led to believe that any class claims against them were limited to the three-state region at issue in the charges. The Court found that the EEOC failed adequately to notify Defendants of the potential national scope of the charges, and thus, the EEOC was limited to seeking legal redress on a regional basis. Other cases that have limited or dismissed EEOC lawsuits on the same theory include: (1) *E.E.O.C. v. CRST Van Expedited, Inc.*, NO. 07-CV-95-LRR, 2009 WL 2524402, at *16-18 (N.D. Iowa, Aug 13, 2009), *aff’d in part and reverse in part on other grounds*, ___ F.3d ___, ___, Nos. 09–3764, 09–3765, 10–1682; 2012 WL 555510, at *8-12 (8th Cir., Feb. 22, 2012); (2) *EEOC v. Target Corp.*, No. 02-C-146, 2007 WL 1461298 (E.D. Wis., May 16, 2007); and (3) *EEOC v. Jillian’s of Indianapolis, Inc.*, 279 F. Supp. 2d 974, 982-83 (S.D. Ind. 2003).

Another issue is the appropriate statute of limitations to apply to Title VII claims brought by the EEOC that are purportedly asserted on behalf of a class of workers who have suffered a pattern or practice of discrimination. The question arises of whether the EEOC can use its power to obtain relief on behalf of individuals whose own claims would be barred by the applicable statute of limitations if they were suing on their own behalf. The Supreme Court has not directly addressed whether Title VII’s statute of limitations binds the EEOC when it sues, and the circuit courts of appeals are silent. Matters are messy at the district court level. Other district courts have “blurred the line between class-wide claims brought pursuant to § [2000e-5] and pattern-or-practice claims brought pursuant to § [2000e-6].” *EEOC v. Scolari Warehouse Mkts., Inc.*, 488 F. Supp. 2d 1117, 1143 (D. Nev. 2007). As a consequence, such district courts offer widely divergent analyses that are impossible to reconcile or even tidily summarize. All that may be

said is that, whereas some – or even most – district courts appear to indicate the EEOC may be subject to a statute of limitations, *see, e.g., EEOC v. Burlington Med. Supplies, Inc.*, 536 F. Supp. 2d 647, 659-60 (E.D. Va. 2008); *EEOC v. Wyndham Worldwide Corp.*, No. C07-1531RSM, 2008 WL 4527974, *6-8 (W.D. Wash. Oct. 3, 2008); *EEOC v. KCD Constr., Inc.*, No. 05-2122 (DSD/SRN), 2007 WL 1129220, *4, 2007 U.S. Dist. LEXIS 28061, *10 (D. Minn. Apr. 16, 2007); *EEOC v. GLC Rests., Inc.*, No. CV-05-0618-PCT-DGC, 2006 WL 3052224, *2-3 (D. Ariz. Oct. 26, 2006); *EEOC v. Custom Cos.*, Nos. 02-C-3768 & 03-C-2293, 2004 WL 765891, *2-11 (N.D.Ill. Apr. 7, 2004); *EEOC v. Optical Cable Corp.*, 169 F. Supp. 2d 539, 544-50 (W.D. Va. 2001); *EEOC v. Harvey L. Walner & Assocs.*, No. 95-1355, 1995 WL 470233, *3-6 (N.D. Ill. Aug. 7, 1995), *aff'd on other grounds*, 91 F.3d 963 (7th Cir. 1996); *EEOC v. Sears, Roebuck & Co.*, 490 F. Supp. 1245, 1258-62 (M.D. Ala. 1980), some other district courts appear to grant the EEOC the power to resurrect stale claims, *see, e.g., EEOC v. Ceisel Masonry, Inc.*, 594 F. Supp. 2d 1018, 1022 (N.D. Ill. 2009); *EEOC v. Worthington, Moore & Jacobs, Inc.*, 582 F. Supp. 2d 731, 737-38 (D. Md. 2008); *EEOC v. Scolari Warehouse Markets, Inc.*, 488 F. Supp. 2d 1117, 1136 (D. Nev. 2007); *EEOC v. L.A. Weight Loss*, 509 F. Supp. 2d 527, 534-36 (D. Md. 2007); *EEOC v. Dial Corp.*, 156 F. Supp. 2d 926, 966-69 (N.D. Ill. 2001); *EEOC v. Mitsubishi Motor Mfg. of Am., Inc.*, 990 F. Supp. 1059, 1083-88 (C.D. Ill. 1998).

In 2009, in the case of *Equal Employment Opportunity Com'n v. CRST Van Expedited, Inc.*, 615 F. Supp. 2d 867 (N.D. Iowa 2009), the district court surveyed the case law in this area and held that:

After surveying these district court cases, the court finds the better reasoned authority holds that Title VII generally does not grant the EEOC the power to resurrect otherwise stale claims of unlawful employment discrimination. The plain language of § 2000e-5 contemplates that the “charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred[.]” 42 U.S.C. § 2000e-5(e)(1) (emphasis added). Section 2000e-5 makes no exception for the EEOC, even though it clearly contemplates EEOC enforcement actions. Any ambiguity in the statute is the consequence of early judicial decisions, which granted the EEOC the ability to use an individual charge of discrimination as “a jurisdictional springboard” but failed to discuss the statute of limitations problems that might arise if courts were to allow the EEOC to recover for non-charging parties with stale claims.

* * *

To adopt the EEOC’s construction of Title VII would permit the EEOC to destroy all principles of repose and force employers to defend against zombie-like claims from the distant past.

Id. at 877-78.

On April 27, 2010, the court in *Equal Employment Opportunity Comm’n v. Freeman*, No. RWT 09cv2573, 2010 WL 1728847 (D. Md. April 27, 2010), reached the same conclusion. There, the EEOC sued a company named Freeman, alleging its use of credit history as a hiring criteria had a disparate impact upon black job applicants and that its use of criminal history had a

disparate impact upon black, Hispanic and male applicants. The EEOC became interested in these alleged practices when an applicant filed a charge of discrimination with the agency. This is undisputed: The EEOC, in its role as vindicator of the public good, can sue on behalf of a class of individuals harmed by discriminatory practices, even if all individuals affected did not file a charge of discrimination themselves. Here is what is unclear: Is the EEOC limited to seeking relief for individuals who allegedly were subjected to the unlawful practices during the 300 days before someone filed the original charge? Or can the EEOC go beyond the 300-day window? While an aggrieved person (Person A) can piggyback on another person's charge, the question is whether the EEOC can recover money for Person A if his claims are stale. The U.S. District Court in Maryland granted partial summary judgment to Freeman, holding that the EEOC cannot seek relief for anyone affected beyond the 300-day window. In short, the court held that Title VII limits the class of individuals for whom the EEOC can seek relief to those allegedly subjected to the unlawful practice during the 300 days before the charge was filed. Beyond that, the aggrieved person is out of luck; as the court reasoned, nothing in the law "suggests that the EEOC can recover for individuals whose claims are otherwise time-barred." In reaching this conclusion, the court rejected a number of district court cases to the contrary.

Likewise, in an apparent emerging trend, in *E.E.O.C. v. Carolls Corp.*, No. 5:98-CV-1772 (FJS/GHL), 2011 WL 817516, at *4 (N.D.N.Y. Mar. 2, 2011), the district court followed *CRST Van Expedited, Inc.*, holding that "when the EEOC brings a suit in its own name under § 706 on behalf of a group of aggrieved persons, Title VII's statute of limitations, 42 U.S.C. § 2000e-5(e)(1) applies." See also *E.E.O.C. v. Kaplan Higher Educ. Corp.* 790 F. Supp. 2d 619, 623-24 (N.D. Ohio 2011) (concluding that EEOC suits were bound by 300 day limitations period); *E.E.O.C. v. Bloomberg*, No. 07 Civ. 8383(LAP), 2010 WL 4237077 *15 (S.D.N.Y. Oct. 25, 2010) (EEOC may not seek relief for individuals for discrete unlawful acts outside the 300 days preceding the filing of the triggering charge.)

On the other hand, in *E.E.O.C. v. Sterling Jewelers, Inc.*, NO. 08-CV-706, 2010 WL 86376, *5 (W.D.N.Y. Jan 6, 2010), the district court rejected *CRST Van Expedited, Inc.*, and the apparent majority of recent decisions on this point, stating:

. . . the sole limitation on the EEOC's ability to proceed with an enforcement action is that a charge be filed with the EEOC within 300 days of a violation, and it is undisputed that one or more charges were filed within that time period by the affected employees. Once those charges were filed, the EEOC was authorized to investigate and commence an enforcement action which-unlike an action by an individual plaintiff - is not confined to the scope of the EEOC charge. *General Telephone, supra*. Therefore, since at least one administrative charge was filed with the EEOC within the 300-day period, EEOC's complaint need not be limited in scope to violations occurring within that period. (footnote omitted).

B. By Private Party

1. Generally

When the Charging Party receives her "Right to Sue" letter from the EEOC and the deadline runs on such claims, she must file suit in a court of competent jurisdiction within the 90

day period, as discussed above. Of course, considerations at this stage include an assessment as to which claims are ripe or viable for litigation within the scope of the Charge, which venue or forum is appropriate, and whether the option exists for state law claims to be brought along with or instead of the federal claims, assuming all are timely.

2. Admissibility Of EEOC Cause Determinations

If the EEOC found cause, the plaintiff will want to introduce that finding as evidence at trial. “As a general rule, ‘EEOC determinations and 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) (citing *McClure v. Mexia Indep. Sch. Dist.*, 750 F.2d 396, 400 (5th Cir.1985)); *Palasota v. Hagggar Clothing Co.*, 342 F.3d 569, 577 n.13 (5th Cir. 2003) (“[A]n EEOC determination prepared by professional investigators on behalf of an impartial agency, [is] highly probative.”) (quoting *Plummer v. Western Int’l Hotels Co.*, 656 F.2d 502, 505 (9th Cir. 1981) (citing *Peters v. Jefferson Chem. Co.*, 516 F.2d 447, 450-51 (5th Cir. 1975)).

That said, if evidence shows that the EEOC’s findings are unreliable, or merely contain legal conclusions, then they are likely to be deemed inadmissible under Federal Rule of Evidence 403. For example, in *Weathersby v. One Source Mfg. Technology, L.L.C.*, 378 Fed. Appx. 463 (5th Cir. 2010), the Fifth Circuit affirmed the district court’s exclusion of the EEOC’s letter of determination, stating:

Weathersby sought to introduce into evidence a Letter of Determination by the Equal Employment Opportunity Commission (“EEOC”). In the letter, the EEOC concluded that One Source had violated Title VII when it did not hire Weathersby. The district court excluded the Letter of Determination pursuant to Federal Rule of Evidence 403 because it concluded that its prejudicial nature substantially outweighed any probative value. As the district court explained in its ruling on Weathersby’s motion for a new trial, the letter had very little probative value as it “merely lists the Plaintiff’s allegations and the Defendant’s responses ... without making any factual findings, repeats hearsay ... without bothering to identify the source of the statements and whether they were made under oath or subject to perjury, and reaches the legal conclusion that the Defendant violated Title VII...” *Weathersby v. One Source Mfg. Tech., L.L.C.*, No. A-08-CA-087-SS, at *6 (W.D. Tex. Apr.2, 2009) (brackets and quotation marks omitted) (citing *Cortes v. Maxus Exploration Co.*, 977 F.2d 195, 201-202 (5th Cir. 1992); *EEOC v. Manville Sales Corp.*, 27 F.3d 1089, 1095 (5th Cir. 1994); *Price v. Fed. Express Corp.*, 283 F.3d 715, 725 (5th Cir. 2002); *Haines v. Tex. Workers Comp. Comm’n*, No. 04-50309, 2005 U.S.App. LEXIS 5, at *3 (5th Cir. Jan. 3, 2005) (unpublished)). The district court further noted that this court’s precedents recognize the high likelihood of unfair prejudice of an EEOC letter containing a legal conclusion, potentially leading the jury to give the EEOC’s decision improper weight “rather than make an independent decision based on all the evidence presented at trial.” *Id.* at *7. Additionally, the district court observed that with the exception of the letter’s highly prejudicial legal conclusion, the

information provided therein “would have merely been cumulative of the live testimony presented to the jury over the course of the trial.” *Id.*

Id. at 465.

As the Fifth Circuit further explained in another case:

While this court has recognized that EEOC reasonable cause determinations are “highly probative of discrimination,” we have also admonished that such a statement “should not ‘be read as leaving district courts without discretion under Rule 403 to exclude such reports if their probative value is substantially outweighed by prejudicial effect or other considerations enumerated in the rule.’” *Manville Sales Corp.*, 27 F.3d at 1095 (internal quotation marks and brackets in first quotation omitted) (quoting *Cortes v. Maxus Exploration Co.*, 977 F.2d 195, 201-02 (5th Cir. 1992)); *see also Eason v. Fleming Cos.*, No. 92-1390, 1993 WL 13015208, at *3 (5th Cir. Aug. 24, 1993) (“[D]espite their probative value, EEOC determinations may be excluded from evidence ... pursuant to Rule 403 of the Federal Rules of Evidence, where the court determines that their probative value is substantially outweighed by their prejudicial effect.”).

Harris v. Mississippi Transp. Com’n, 329 Fed.Appx. 550, 554-55 (5th Cir. 2009).

C. Intervention Issues

If the EEOC issues a letter of determination, conciliation fails, and then it determines that it will press forward in litigation against the employer, the EEOC will be doing so on behalf of the public interest and the Commission is the party plaintiff. Should the plaintiff choose to be an individual party in the action, his attorney must decide if that action is ripe for intervention based on the claims pled. It is well settled that “Title VII grants the aggrieved party the option to intervene as a matter of right in a civil enforcement action brought by the EEOC.” *EEOC v. Coastal Transp. Svcs.*, 2007 WL 2126609 at *2 (S.D. Tex. 2007) (*EEOC v. Wackenhut Corp.*, 939 F.2d 241, 244 (5th Cir. 1991); *EEOC v. Odyssey Healthcare*, 2009 WL 5170210 at *1 (W.D. Tex. 2009)).

The ADEA is different, however. The Fifth Circuit discussed this issue in *Vines v. University of Louisiana at Monroe*, 398 F.3d 700 (5th Cir. 2005). “The distinctive enforcement scheme of the ADEA terminates the right of an individual to pursue an action once the EEOC commences an action to enforce the employee’s rights under the statute, whereas the enforcement scheme of Title VII does not terminate the rights of the employee once the EEOC brings a suit. 29 U.S.C. 626(c)(1) (“the right of any person to bring such action shall terminate upon the commencement of an action by the [EEOC] to enforce the right of such employee under [the ADEA]”). More succinctly, a Charging Party may intervene in a Title VII action brought by the EEOC, but not an ADEA action.

D. FOIA Request For The File

Parties should obtain the EEOC file through a FOIA request. Often, the EEOC will hold some information back, based on an alleged exception from disclosure under FOIA. In that

case, the party may appeal the non-disclosure through a simple process that is not costly or time consuming. Often times, the appeal will cause the EEOC to release additional documents, which may be helpful in prosecuting or defending the case.