



The GSH 60-Second Memo

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Can the EEOC Really Ask for All That? Scope of an EEOC Investigation

By: Warren E. Buliox, Esq.

One of your former employees - Bill - filed a Charge of Discrimination with the Equal Employment Opportunity Commission ("EEOC" or the "Commission"), alleging sex discrimination and retaliation in violation of Title VII. Since that time, you have put together a fairly thorough response position statement outlining every reason, factually and legally, you believe the Charge of Discrimination should be dismissed. As far as you are concerned, this is a relatively open and shut case, as Bill was discharged for falsifying company documents.

For the EEOC, however, the case is far from straightforward, and your response is merely the tip of the iceberg. From talking to Bill, the Commission believes there may be much more to the case than initially disclosed, and it now seeks additional information. Specifically, the Commission requests disciplinary records for all employees in Bill's department, which consists of more than 100 employees. The Commission also wants the name, sex, race and age of each and every employee who worked for the company from 2007 to the present.

In reviewing the Commission's request, several legitimate

questions come to mind. First, how are disciplinary records on all employees in Bill's department relevant to Bill's Charge of Discrimination? Further, what does information on race and age have to do with Bill's allegations of sex discrimination and retaliation? And finally, are you required to tender all this information, irrespective of its relevancy or the burden placed on your business?

The EEOC has broad investigatory powers and the right to request and obtain "any evidence of any person being investigated or proceeded against that relates to unlawful employment practices . . . and is relevant to the charge under investigation." 42 U.S.C. 2000e-8(a). While the EEOC has broad investigatory power, its ability to gather information during an investigation is not unbridled. Notably, the information the EEOC seeks must be reasonably relevant to the matter and not too indefinite or unreasonably broad or burdensome.

The "requirement of relevance, like the charge itself, is designed to cabin the EEOC's authority and prevent 'fishing expeditions.'" EEOC v. United Airlines, Inc., 287 F.3d 643, 653 (7th Cir. 2002); also see EEOC v. City of Milwaukee, 919 F.Supp 1247, 1259 (E.D.Wis. 1996) (holding that the EEOC's request for medical records of third parties was not reasonably relevant and could not be enforced with an order compelling production of such documents); EEOC v. K-Mart Corp., 694 F.2d 1055, 1063 (6th Cir. 1982) ("[t]he EEOC is entitled to have access only to evidence that is relevant and material to the charge of discrimination.").

As many employers find out the hard way, the notion of relevancy in the context of an EEOC investigation is a broad one. EEOC v. Elrod, 674 F.2d 601, 613 (7th Cir. 1982). In fact, courts have often given the EEOC access to information which "*might* cast light on the allegations against the employer." EEOC v. Shell Oil, 466 U.S. 54, 68-69 (1984) (emphasis added). Under this standard, much -- but not all -- information the EEOC seeks is considered to be relevant for the purposes of the investigation.

In Bill's case, because Title VII analysis often requires a look at whether similarly situated employees were treated less favorably than the charging party, information on other employees in Bill's department "might" cast light on whether discrimination occurred as alleged and is therefore likely relevant (for the purposes of the investigation) and should be disclosed. This dynamic may change, however, if the Commission is seeking records on all employees, regardless of position or department, in all five of your locations.

That being noted, what about the Commission's request for information on the race and age of other employees? This information cannot possibly be relevant to Bill's allegations of sex discrimination and retaliation, right? Well . . . technically it may not be, but the EEOC, by Congressional mandate, is required to work to "prevent any person from engaging in any unlawful employment practice." 42 U.S.C. 2000e-5(a). Accordingly, the EEOC Compliance Manual advises its investigators to be on the lookout for

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possible unrelated violations of the law which can be considered later as a basis for new charges. This does not mean that the requirement of relevancy is out the window, as an employer can present information to demonstrate to the EEOC that the information sought has no bearing on the circumstances and facts surrounding a particular charging party's claim. However, Congress' mandate to the EEOC does mean that employers should be on the lookout for possible additional violations and should take steps to ensure that they are in compliance with anti-discrimination laws across the board.

As to the question of relevance specifically, the Commission does, on occasion, look beyond the four corners of the charge to determine whether a violation of the law exists. To do so, however, the claim(s) not explicitly stated in the Charge of Discrimination must be reasonably related to the claims in the charge and must have been expected to grow out of an investigation of the same. Harper v. Godfrey Co., 45 F.3d 143, 148 (7th Cir. 1995). In Bill's case, whether information on the age and race of other employees is reasonably related to his Charge of Discrimination depends on the actual circumstances of the case, which will require a very fact-specific analysis. From what we have given you alone, however, it would appear that the information sought is likely not relevant to Bill's charge.

Let's assume, for the sake of discussion, that all the material the EEOC is seeking in Bill's case is relevant to the investigation. Can you object to the request on the basis that it may be too indefinite or unreasonably broad or burdensome because it calls for the production of disciplinary records for over 100 employees? While you certainly can try, there is no guarantee you will be successful.

"The presumption is that compliance should be enforced to further the agency's legitimate inquiry into matters of public interest." EEOC v. United Airlines, Inc., 287 F.3d 643, 653 (7th Cir. 2002). To show that a request by the EEOC is too indefinite, unreasonably broad or burdensome, an employer must prove that the request would threaten its business operations. Unfortunately, as courts have put it, employers face a "difficult burden" in proving that compliance with an EEOC request would threaten its business operations. Typically, the more relevant the information, the less likely it is that any burden placed on the employer will outweigh the public's interest in having the information produced.

Given the range of latitude courts afford the EEOC in determining the scope of their investigations, employers are advised to use caution when considering making objections and/or refusing to comply with requests for information. Employers should make good faith efforts to fully cooperate throughout an EEOC investigation and should only object and/or refuse to provide requested material if there is a strong legal basis for doing so. Knowing when to pick your battle, so to speak, will help save you from unnecessary headache and expense.

Wisconsin

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