

EEOC Office of General Counsel

Litigation Services to the Public¹

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A. Federal District Court Litigation

1. Employment Discrimination Actions

When the EEOC has made a finding of reasonable cause to believe that one or more of the statutes it enforces has been violated, and any conditions precedent are satisfied, the Regional Attorney may review the matter for litigation.² Some statutory provisions require that the EEOC engage in conciliation prior to suit (*see e.g.* 42 U.S.C. § 2000e-5(b); 29 U.S.C. § 626(b)), but the EEOC has “expansive discretion ... to decide how to conduct conciliation efforts and when to end them.” *Mach Mining, LLC v. EEOC*, 575 U.S. 480, 487 (2015). Where the Regional Attorney decides the matter warrants litigation, the Regional Attorney must send a written recommendation to OGC-Headquarters. The General Counsel determines whether the recommendation will be submitted to the Commission for consideration, in accordance with any

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² The ADEA and EPA do not require that a charge be filed as a condition precedent for EEOC litigation, and the EPA does not require conciliation efforts. Under all statutes enforced by the EEOC, where a settlement is reached during the administrative process but then breached, the EEOC has the authority to file suit to enforce the agreement.

delegation of authority from the Commission. The General Counsel will ensure appropriate review and oversight of all cases prior to filing suit.

When a suit is approved for filing, the EEOC brings the suit “in its own name” and not in the name of any aggrieved individual. *Gen. Tel. Co. of the Northwest v. EEOC*, 446 U.S. 318, 324 (1980) (citing 42 U.S.C. § 2000e-5). The EEOC may choose to seek relief for the charging party(ies) and/or for “a group of aggrieved individuals,” and its authority to seek class-wide relief “is in no way dependent on Rule 23 [of the Federal Rules of Civil Procedure governing class actions].” *Id.* The Supreme Court has recognized that “the EEOC [is] the master of its own case and ... [has] the authority to evaluate the strength of the public interest at stake.” *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 291 (2002). “EEOC [has] exclusive authority over the choice of forum and the prayer for relief once a charge has been filed.” *Id.* at 298. Based on these authorities, the EEOC always retains prosecutorial discretion, including deciding whether to sue, defining the scope of the claims and any class, deciding how to litigate and prove its claims, and determining what relief to seek and for whom. Charging parties have a statutory right to intervene in an EEOC suit brought under Title VII, the ADA, the PWFA, or GINA (42 U.S.C. § 2000e-5(f)(1)) but have no suit rights under the ADEA or EPA once the EEOC files suit under those statutes (29 U.S.C. § 216(b)).

While the EEOC sues in its own name, the EEOC works closely with the charging party and other aggrieved individuals to litigate the matter effectively and vindicate the public interest, and it typically seeks victim-specific relief for them. *Cf. Gen. Tel.*, 446 U.S. at 326 (“EEOC is not merely a proxy for the victims of discrimination” and “[w]hen the EEOC acts, albeit at the behest of and for the benefit of specific individuals, it acts also to vindicate the public interest in preventing employment discrimination.”). The EEOC’s ability to plead and remedy through its lawsuits the violations suffered by charging parties and other aggrieved individuals is critical to the EEOC’s performance of its broader statutory mandate to vindicate the public interest in eradicating employment discrimination. As a result, while the agency is the plaintiff in EEOC’s actions and the client of EEOC attorneys, courts recognize the protected relationship between EEOC attorneys and persons for whom the EEOC seeks relief. Courts therefore shield as privileged the confidential communications between EEOC attorneys and charging parties and other aggrieved individuals and restrict an employer’s *ex parte* communications with such persons.

In addition to privileges available to all civil litigants, the EEOC often asserts the government deliberative process privilege in litigation. This evidentiary privilege, which is unique to the government, protects “communications received by the decisionmaker on the subject of the decision prior to the time the decision is made.” *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 151 (1975). The privilege “covers ‘documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.’” *Dep’t of Interior v. Klamath Water Users Protective Ass’n*, 532 U.S. 1, 8 (2001) (quoting *Sears*, 421 U.S. at 150). The privilege thus covers documents containing the analyses, opinions, advice, or recommendations of Commission staff, case-related communications between legal unit and investigator staff, and testimony from Commission staff that would disclose deliberative information.

2. Subpoena Enforcement Actions

Congress has conferred on the Commission broad powers of access to records or testimony of those entities against whom charges have been filed under Title VII, the ADA, the PWFA, and GINA. 42 U.S.C. § 2000e-8(a) (incorporated into the ADA, GINA, and PWFA by 42 U.S.C. §§ 12117, 2000ff-6, 2000gg-2). Pursuant to 29 U.S.C. § 161(1) and 29 C.F.R. § 1601.16(b)(1), a recipient of an EEOC subpoena issued under these statutes who does not intend to comply can petition the Commission to revoke or modify the subpoena within five days of service of the subpoena. When an entity against which a charge has been filed fails to comply with an administrative subpoena, or with the Commission's final determination upholding all or part of the subpoena in response to a petition to revoke or modify it, the Commission may file a subpoena enforcement action in federal court under 29 U.S.C. § 161 (incorporated into Title VII by 42 U.S.C. § 2000e-9). The General Counsel is authorized to institute such enforcement proceedings. 29 C.F.R. § 1601.16(d).

The Commission also has broad investigative authority and subpoena power under the ADEA and EPA, through provisions of the Fair Labor Standards Act and the Federal Trade Commission Act. *See* 29 C.F.R. §§ 1621.30-31 (EPA) and §§ 1626.15-16 (ADEA). There is no provision for a petition to revoke or modify a subpoena under the ADEA or EPA. Subpoenas under the EPA must be issued by a member of the Commission. When an entity against which a charge has been filed fails to comply with an administrative subpoena issued under the ADEA or EPA, the Commission may file a subpoena enforcement action in federal court under 15 U.S.C. § 49 (incorporated into ADEA and EPA by 29 U.S.C. § 209).

3. Applications for Temporary Restraining Order or Preliminary Injunction

“Whenever a charge is filed with the Commission and the Commission concludes on the basis of a preliminary investigation that prompt judicial action is necessary to carry out the purposes of this Act, the Commission ... may bring an action for appropriate temporary or preliminary relief pending final disposition of such charge.” 42 U.S.C. § 2000e-5(f)(2) (applies to charges brought under Title VII, ADA, PWFA, and GINA). The General Counsel is authorized to institute an appropriate action for temporary or preliminary relief on behalf of the Commission where the respondent is not a government agency. 29 C.F.R. § 1601.23(a).

4. Intervention in Private Suits

The EEOC has a permissive right of intervention in a private suit brought under Title VII, the ADA, the PWFA, or GINA. *See* 42 U.S.C. § 2000e-5(f)(1). Intervention is contingent on the agency's certification that the case is of “general public importance.” 42 U.S.C. § 2000e-5(f)(1). The certification consists of a statement executed by the General Counsel. Certifications are not required for EEOC interventions in ADEA and EPA cases, but those cases should generally meet the same public importance standard.

B. Appellate Court Litigation

1. Appeals of EEOC District Court Litigation

If a legal unit receives a final judgment that is adverse in any material way, or if a Regional Attorney believes that an appeal is warranted from a partial judgment or an interlocutory order, the Regional Attorney submits a memorandum to the Associate General Counsel for Appellate Litigation Services (Appellate) noting whether the legal unit recommends an appeal. Appellate prepares its own recommendation for or against appeal, and the General Counsel decides whether to appeal. The Department of Justice, Office of the Solicitor General (OSG), represents the EEOC in all matters at the Supreme Court level. Appellate works closely with OSG in Supreme Court matters. The EEOC maintains a searchable [collection of its briefs](#) filed in the United States Courts of Appeals in cases in which the EEOC is a party.

2. Amicus Program

The EEOC will consider filing an amicus curiae brief in a private suit that raises novel or important issues of law affecting the statutes the EEOC enforces. The EEOC also sometimes files joint amicus briefs with other federal agencies, including the Departments of Justice and Labor. The EEOC's amicus program is focused on cases in the federal courts of appeals, but the EEOC will also consider filing an amicus brief in a federal district court or state court, for example, if the case presents a particularly important issue that falls within the EEOC's expertise. The EEOC does not generally participate in cases raising primarily factual issues. The EEOC will not file an amicus brief in a case involving a federal defendant. Although the EEOC cannot file its own amicus briefs in the Supreme Court, with Commission approval it may join amicus briefs that the OSG files. In general, the OSG will not file amicus briefs at the petition for certiorari stage unless the Supreme Court requests the government's views on the petition. The EEOC maintains a searchable collection of its amicus briefs.

The EEOC has a formal approval process for amicus participation, and it is critical that any suggestion for EEOC amicus participation be made as early as possible. Any amicus curiae suggestions should be submitted to amicus@eeoc.gov. Submissions should include the case name, docket number, court name, a brief description of the case and issue, and the status.