

## **EEOC Acknowledges Limitations to its Enforcement Powers in Recent Opinion Letter**

**By Michael Brohman**

It is not often that the Equal Employment Opportunity Commission (EEOC) issues opinion letters. It is less often that the EEOC publicly acknowledges limitations to its enforcement powers. However, both of these events occurred through an opinion issued by the EEOC on September 3, 2020 (“Opinion Letter”).

A third party asked the EEOC to issue an opinion regarding the EEOC’s enforcement powers under section 707(a) of Title VII of the Civil Rights Act of 1964. Title VII is a federal law that protects employees against different forms of discrimination and harassment. Section 707(a) of the Act allows the EEOC to bring suit when an employer is engaged in a pattern or practice of resistance to an employee’s full exercise of rights “secured by this subchapter.”

The first issue addressed in the Opinion Letter was whether section 707(a) entitled the EEOC to exercise wide-ranging powers to bring suit against undefined practices that it believes facilitate unlawful “resistance” in some way, but may not in themselves constitute unlawful discrimination or harassment, or whether the EEOC’s powers were limited to address only the specifically identified unlawful acts set forth in sections 703 (unlawful discrimination) and 704 (unlawful retaliation) of the Act. In acknowledging that its powers were indeed limited and not wide-ranging, the EEOC began by stating that the it, like all agencies, is a “creature of statute” that only has the authority given to it by Congress.

The EEOC then focused on the language of Section 707(a) that referenced the rights “secured by this subchapter.” According to the EEOC, the “subchapter” referenced was Title VII itself, and the rights secured by Title VII were the rights “against prohibited conduct made unlawful by Sections 703 (discrimination) and 704 (retaliation).” Accordingly, the EEOC acknowledged that the powers granted it under Section 707(a) do not create an unlimited ability of the EEOC to file suit for undefined practices. Instead, “any suit that the Commission brings pursuant to section 707(a) must be based on an alleged pattern or practice of conduct that violates either section 703 or section 704.” As further support for its opinion, the EEOC cited to rulings in a 1977 United States Supreme Court case and a 2015 Seventh Circuit Court of Appeals case, which both acknowledged that section 707(a) does not create a broad power for the EEOC to pursue non-discriminatory practices that the EEOC simply dislikes.

The second issue addressed in the Opinion Letter was whether the EEOC could simply bring a suit for a violation of section 707(a), or whether EEOC had to follow the procedural guidelines set forth in section 706 of the Act before filing a suit. Before the EEOC can file a suit to address violations of sections 703 (discrimination) and 704 (harassment), section 706 requires the EEOC to first exhaust certain procedural requirements, such as filing a charge, making a reasonable cause finding after investigating the charge and attempting to conciliate the dispute. Through its Opinion Letter, the EEOC

considered whether it must exhaust those same procedural requirements before bringing a section 707(a) suit.

In acknowledging that it must comply with section 706 before suing under section 707(a), the EEOC again looked at the statutory language. Specifically, the EEOC cited to section 707(e), which provides that all actions on a charge of a pattern or practice of discrimination “shall be conducted in accordance with the procedures set forth in ... this title.” The EEOC then acknowledged that “to find that section 706 procedures do not apply to actions under section 707 would have the effect of reading section 707(e) ‘out of the statute.’”

The limitations that the EEOC acknowledged in its Opinion Letter are significant for employers who are faced with potential EEOC causes of action based on patterns and practices. First, employers can be comforted by the fact that the EEOC has acknowledged it only can use section 707(a) to pursue suits based on acts specifically violating sections 703 and 704, rather than on some undefined or unspecified acts. Second, since employers are active participants in the procedures outlined by section 706, employers can be assured that section 707(a) suits will not be filed without them first having the ability to address the issues raised.

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