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Suggestions for Change

by J. Mark Ogden

In 1964, race riots broke out in New York, Chicago, Philadelphia and other major U.S. cities; three civil rights workers were murdered in Mississippi; Martin Luther King Jr. received the Nobel Peace Prize; Lyndon Johnson defeated Barry Goldwater to become our 36th President; and Congress passed the Civil Rights Act of 1964.

Title VII of the Civil Rights Act generated 83 days of congressional debate, the longest in history, and politicians from both parties submitted more than 500 proposed amendments. During the next two decades, Congress gave the EEOC the power to enforce the Equal Protection Act of 1963, the Age Discrimination in Employment Act of 1967, the Americans with Disabilities Act of 1990 and the Civil Rights Act of 1991.

Today, the EEOC has more than 2,500 employees, including more than 900 investigators, spread throughout its headquarters in Washington, 23 district offices and 28 area offices. Its annual budget is in excess of $300 million. In many ways, the EEOC has become a bureaucratic monster, with numerous outdated practices and policies that do little to advance the agency's mission, but have a significantly detrimental impact on American employers.

Here are some suggestions for change:

Limit Investigation Periods

An employee must file a charge of discrimination at the EEOC, or related state agency, within 300 days from the date of the alleged discrimination or harassment. When the EEOC has concluded its investigation, the employee must file a lawsuit within 90 days after receipt of the EEOC's right-to-sue letter. There are no time limits, however, for the EEOC investigation period, i.e., the time between those events.

The EEOC regularly keeps the investigation open for months, sometimes years, even when it is not actively investigating the employee's claims. The longer the investigation period remains open, the more difficult it becomes for the employer to defend itself: memories fade, critical witnesses leave the employer, company documents -- including electronic evidence, such as e-mail and voicemail records -- are inadvertently misplaced or destroyed.

Many comparable state agencies have established strict deadlines for the length of the investigation period. For example, the Arizona Civil Rights Act requires the employee to file a lawsuit within 365 days from the time the employee filed the charge. The Civil Rights Division of the Arizona Attorney General's Office, for example, investigates for a maximum of nine months, then issues a right-to-sue letter, allowing the employee a 90-day period to file a lawsuit and meet the oneyear deadline.

Public Accountability

Following its investigation, the EEOC decides whether the employer has violated a federal employment statute and issues a "cause" or a "no cause" determination.

If the EEOC issues a "cause" determination, it invites the employer to conciliate and conveys a settlement demand on the employee's behalf, frequently at or near the statutory maximum of $300,000.

In many cases, the EEOC issues a "cause" determination with virtually no evidence, sometimes without even interviewing the alleged harasser or any member of man-

agement. The determination itself is usually composed of several "form" paragraphs at the beginning and the end, with perhaps a sentence or two of comments in between.

Considering that each district office reviews thousands of cases each year, a "cause" determination should be reserved for those cases where employer liability is clear and the damages are significant.

Nevertheless, since the EEOC's conciliation demand usually is unreasonably high, many employers choose to fight and the employee's case is litigated by a private lawyer or the EEOC's lawyers. A "cause" determination issued by a 40-year-old agency with thousands of employees and an enormous budget should ensure, at the very least, a victory for the employee on the issue of liability.

However, many employers are able to overcome the "cause" finding and prevail via a motion for summary judgment, resulting in the dismissal of the entire case. Some employers have elected to fight all the way through a jury trial and have been vindicated by federal juries.

In Arizona federal courts this occurs regularly and the EEOC is viewed like the shepherd in Aesop's fable, "The Boy Who Cried Wolf." The moral of the fable is this: even when liars tell the truth, they are never believed.

Clearly employment discrimination and harassment exists, however the EEOC has claimed that it exists -- where it does not exist -- on too many occasions and the organization's credibility has been severely compromised in the federal courts.

In some extreme cases, the courts have chastised the EEOC for litigating meritless claims. In EEOC v. Reeves and Associates, litigated in a Los Angeles federal court earlier this year, the court awarded more than $1 million in attorneys' fees to the employer because the EEOC filed a frivolous claim, conducted an incomplete and inadequate investigation, failed to engage in good-faith conciliation and engaged in distressing litigation tactics.

The EEOC should be more careful and selective in determining which cases merit a "cause" finding and even more discerning in deciding whether to file a lawsuit. If the EEOC would conduct thorough, impartial investigations, raise its threshold for issuing "cause" determinations and set minimum litigation standards, the agency might regain the respect it formerly deserved.

Eliminate Press Releases

When the EEOC issues a "cause" finding and the case settles during the conciliation process, Title VII requires the EEOC to maintain confidentiality regarding all aspects of the case. If, however, the conciliation fails, the EEOC routinely issues a press release at these points in the case: (1) following a written notice to the employer that the conciliation has failed; (2) when the case settles, at any time following an unsuccessful conciliation; (3) when the jury trial begins; and (4) following a jury trial, if the EEOC prevails.

Nothing causes more anxiety for employers than a press release issued by the EEOC. The media typically prints whatever it receives from the EEOC (usually a memorandum with quotation marks, falsely suggesting that the reporter actually interviewed someone at the EEOC), without interviewing the employer or its representatives.

Many employers suffer drastic business downturns following such articles, even though absolutely nothing has been proven when the EEOC issued the release. Many employers actually agree on all aspects of a settlement, including a payment to the complaining employee, but the agreements are scuttled solely because the EEOC refuses to forgo the press release.

Some employers prevail against the EEOC in the end, but frequently it is too late and the public relations damage has been done. Surprisingly, an article about an employer's successful defense of an employment claim is of little interest to the media.

The EEOC is well aware that its press releases can cause significant economic damage to business and it frequently threatens during the conciliation process that "this is the company's last chance to keep this quiet."

Nothing in Title VII or the EEOC regulations requires the EEOC to issue a press release and, in many cases, it appears to be nothing more than an extortion tactic to encourage settlement. Such behavior is reprehensible between private lawyers. For employees of a public agency, however, which should set a higher standard of civility in the litigation arena, it is unforgivable.

EEOC press releases serve no public benefit whatsoever, the statements are frequently misleading or plainly false, and many cases go forward into expensive and time-consuming litigation only because the EEOC refuses to compromise on this issue. For these reasons, the EEOC should adopt a new policy, excluding press releases all together, or setting stringent guidelines for their content.

Conclusion

The congressional intent that the EEOC should be a "neutral, fact-finding agency" has evaporated over the last four decades; instead, the EEOC has evolved into an aggressive, partisan advocate for people who consider themselves to be victims of discrimination and harassment.

To treat American employers with the respect and dignity they deserve, the EEOC should limit investigation periods to less than one year, eliminate its press releases and accept financial responsibility for the damage it has caused when an employer prevails in court.

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