

EEOC: A “Pattern and Practice” is Not a Standalone Basis to Sue

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The U.S. Equal Employment Opportunity Commission (EEOC) recently issued an [opinion letter](#) clarifying its authority to bring “pattern and practice” lawsuits under § 707(a) of Title VII of the Civil Rights Act of 1964. The Commission’s detailed guidance, issued September 3, 2020, announces a more restrained approach by the agency in bringing such claims.

The Commissioners voted to approve the guidance on August 27, 2020. In the letter, the EEOC states as a matter of policy that an alleged “pattern or practice of resistance” is not an independent reason for the agency to sue an employer, absent an underlying allegation of discrimination or retaliation. The EEOC has used Section 707’s “resistance” provision of late—independent of any actual violations of Sections 703 or 704—to challenge employer practices that it contends interfere with the right of employees to pursue Title VII claims.

Historical Background. Section 707 dates from the original passage of Title VII when the Justice Department and not the EEOC litigated violations of Title VII. Section 707 permitted the Attorney General to file a lawsuit against “any person or group of persons engaged in a pattern or practice of resistance” to the rights protected by Title VII. Before the EEOC was given litigation authority in 1972, the Attorney General did occasionally file 707 lawsuits without underlying charges and against individuals.

Questions Answered. The EEOC addressed two questions: (1) “[D]oes a pattern or practice claim under section 707(a) require allegations of violations of section 703 or section 704?” and (2) “[D]oes a claim under section 707 require the pre-suit requirements of section 706 be satisfied before the EEOC can file suit?” The opinion letter states: “The best reading of the relevant statutory text is that the answer to both questions is yes.”

Changing Course. This latest stance is in contrast with the EEOC’s earlier position on both

questions. In the past, the Commission has filed suit challenging employer policies or practices even where no underlying violations of Sections 703 or 704 of the statute were alleged. The U.S. Court of Appeals for the Seventh Circuit, the only appeals court to have considered the issue, rejected such an expansive take on the Commission's authority in [EEOC v. CVS Pharmacy, Inc.](#), a 2015 decision rebuffing the EEOC's independent challenge to severance agreements that included language which, in the EEOC's view, deterred employees from pursuing EEOC charges, or participating in EEOC proceedings. "Section 707(a) does not create a broad enforcement power for the EEOC to pursue non-discriminatory employment practices that it dislikes," the court wrote.

Falling in line with the Seventh Circuit, the EEOC now says that "the better reading of the statutory text is that it does not support such a reading of section 707." A Section 707 claim must be "tethered" to an underlying allegation of discrimination or retaliation, it now concludes. "Rather than giving the Commission wide-ranging power to bring suit against undefined practices that it believes facilitate unlawful 'resistance' in some way, but may not be themselves unlawful discrimination, section 707 gives the Commission the important power of acting against acts of discrimination in violation of sections 703 or 704."

Pre-suit Procedures Required. The opinion letter also states that the EEOC must engage in pre-suit procedures, including a formal charge, reasonable cause finding, and conciliation efforts, before it may bring a Section 707 pattern and practice claim, holding itself to the same procedures it must follow when pursuing allegations on behalf of individual claimants under Section 706.

Justice Department Authority. Although the EEOC now has the authority to sue private employers, the Justice Department has litigation authority relating to sue state and local governments for Title VII violations. The opinion letter notes that the EEOC is not opining on the Justice Department's authority to file suits without a charge, and notes that the Justice Department does have the authority under Section 707 to sue individuals.

Takeaway. The EEOC seldom issues formal opinion letters, and this rare guidance is welcome news for employers. It represents a significant step back from the EEOC's expansive view of its own authority to challenge employer practices without citing a specific alleged violation of discrimination—and its authority to do so without first attempting to resolve the matter informally. As a formal guidance, employers can cite it favorably when defending company policies against any such freestanding actions by the EEOC.

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