U.S. Equal Employment Opportunity Commission

Meeting of March 20, 2013 - Development of a Quality Control Plan for Private Sector Investigations and Conciliations[1]

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Thank you for inviting me to participate in the EEOC's public meeting to discuss the development of a Quality Control Plan, which will revise the criteria to measure the quality of the EEOC's investigations and conciliations throughout the nation.

I am submitting this statement on my own behalf and it is based on my 20+ years of experience as an employment attorney, including as in-house counsel for a multi-national corporation where my responsibilities included supervision of the company's response to EEOC charges across the US. My statements are also informed by my conversations over the years with counsel on both sides of the bar as well as with various EEOC offices. Additionally, my comments are informed by my experience and current role as a workplace neutral conducting impartial internal workplace investigations of allegations of discrimination, harassment, and retaliation and serving as a neutral mediator in employment litigation.

I. The Conciliation Process

The EEOC is to be congratulated on what is widely viewed as a highly successful pre-investigation mediation program. It is worth remembering, however, that the current mediation program is a relatively recent creation beginning in 1991 as a pilot program in four field offices. In an April 28, 1995, press release, announcing the incorporation of alternative dispute resolution ("ADR") into its charge processing system, the EEOC recognized the importance of conserving limited agency funds and quoted Commissioner Miller who said that ADR will "facilitate early resolution where agreement is possible. That frees up our resources for use in identifying, investigating, and litigating more complex cases of employment discrimination."

Pursuant to the Code of Federal Regulations, where the EEOC determines based upon its investigation that reasonable cause exists to believe that one of the laws it is charged with enforcing has been violated it has a duty to "attempt to resolve the complaint by informal methods of conference, conciliation and persuasion." 29 CFR §1691.9.

[1] Source: http://www1.eeoc.gov//eeoc/meetings/3-20-13/schaefer.cfm?renderforprint=1

These informal methods at the conciliation stage are perceived by many as a missed opportunity to engage in meaningful efforts at dispute resolution as the EEOC has not, to date, interpreted "conference, conciliation and persuasion" to include formal ADR methods. Instead, the EEOC has been criticized as using "take it or leave it" tactics in the post-cause conciliation step.

In cases where the EEOC has decided not to file suit on behalf of the employee(s), the employee(s) is often left with the feeling of abandonment and confusion regarding why the EEOC has left the process and taken its notable leverage out of the dispute. The lack of meaningful conciliation efforts by the EEOC disserves the aggrieved Charging Party(ies) because on the one hand, the EEOC has validated the employee's allegations with its finding of reasonable cause. On the other hand, the EEOC issues the employee a "Right to Sue" letter and no further assistance from the very agency the employee had relied upon for enforcement efforts. This abandonment of the employee by the EEOC is not unlike the larger child sitting behind the smaller child and helping the smaller, younger child learn to teeter-totter with another child on the other side. Suddenly, without warning, the larger child jumps off the teeter-totter leaving the smaller child - who'd been benefiting from the tandem-situation - into a tenuous situation where leverage cannot be found.

While the EEOC's Right to Sue letter will generally explain to the employee his or her right to bring a legal action, it will generally not provide an explanation as to why the EEOC has decided it will not bring the lawsuit on the employee's behalf. Many employees in those circumstances do not understand why the EEOC has made this decision and, like the small child who is suddenly abandoned on the teeter-totter, feel abandoned by the EEOC. These feelings of abandonment, frustration and confusion by the employees seem to be especially present in those situations where an employee continues to work for the offending employer. In those cases, the employee feels extremely vulnerable to not only further discrimination and retaliation, but also may be left with little confidence that the EEOC's process worked or should be invoked again. Simply put, post-cause conciliation is a significant and often missed opportunity for the EEOC to make one final effort to assist the aggrieved employee (if not also the agency itself and its mission) in resolving a claim that the EEOC, by its own determination, has concluded more likely than not has legal merit. For those cases where the EEOC has decided not to bring the lawsuit on behalf of the employee, conciliation represents the one last chance for resolution before the employee is forced to decide whether (1) to retain private counsel; (2) try to represent him or herself pro se; or (3) to drop the case having lost faith in the system and/or the emotional and/or financial ability to continue the fight. Indeed, post-Charge litigation can easily add another year to the resolution process, assuming no appeals are made.

In this time of the looming sequestration, it is perhaps even more urgent than it was in 1991 (when the EEOC began the mediation pilot program) that the EEOC recognize the need to conserve its limited economic resources while at the same time staying focused on continuing its mission to stop and remedy unlawful employment discrimination so

that the nation can achieve our ultimate vision of justice and equality in the workplace. Similar to the mediation pilot program it began in 1991, I urge the EEOC to:

- implement a pilot program incorporating a structured ADR process into the EEOC's post-cause conciliation process;
- consider promptly the use of ADR methodologies beyond mediation and arbitration, and to consider early case assessment, med-arb, and other hybrid processes prior to tendering a Right to Sue Notice; and
- set a time line within the Quality Control Plan for implementing a pilot program incorporating a structured ADR process into the post-cause conciliation process.

Here is a proposed model for the EEOC's consideration of what a structured ADR program might look like at the post-cause conciliation phase.

A. Creation of a National Panel of Post-Cause Mediators

Once the EEOC has made a determination that reasonable cause exists to believe that one of the laws it is charged with enforcing has been violated, it seems fair to say that the employer would no longer view the EEOC as neutral in its view of the dispute as between the employee and employer. To be effective, mediators must be perceived by the participants to be neutral and not be employees of the EEOC. As such, the EEOC is encouraged to develop or to designate a national panel of third-party mediators for use in post-cause conciliation mediations.

Because of the increasing complexity of employment laws and the unique challenges presented where the EEOC is advocating on behalf of an employee(s) following a reasonable cause finding, the EEOC is also urged to appoint only trained mediators with employment law subject matter expertise to its national panel of mediators. The following qualification criteria are provided for the EEOC's consideration:

1. Minimum of tens years of employment law experience;
2. A J.D. from an accredited law school; and
3. Formal mediation training.

If establishing and managing a panel is too cumbersome, the EEOC could consider accepting mediators on the mediation panels already in place at many U.S. Circuit Courts or explore FMCS's availability to the agency.

B. Process for Selecting the Mediator

I suggest the EEOC implement a selection process that provides for the random selection of five mediators from its panel of post-cause mediators. The panel cards for those mediators would then be submitted to the parties for their review and alternate striking of the names on the list as between the employer and the employee/EEOC, with the EEOC and employee acting as one party for such purposes. The employer would

have the right to decide whether to make the first or second strike as the EEOC was responsible for the creation of the post-cause panel of mediators.

I also suggest that the selection process allow for the parties to agree to the selection of a mediator not on the EEOC's panel of post-cause mediators if the employee, employer and EEOC all agree.

C. Participants at the Mediation

The participants at the mediation should include, at minimum, the employee, an EEOC attorney and a representative from the employer. Absent an agreement to the contrary, the employee, the employer and the EEOC must have participants attending the mediation with decision-making authority. In general, the parties are to be encouraged to bring to the mediation (in addition to the decision-makers) those persons with information that will be useful to the decision-makers and the mediator. For example, the EEOC might choose to have the investigator who investigated the charge attend the mediation and the employer may choose to have the manager whose conduct is being questioned to attend the meeting. If the employee is represented by private counsel, such private counsel should also be a participant in the mediation. Each party should be required to notify the mediator and the other parties, no later than two weeks before the mediation, regarding the participants on their mediation team.

D. Confidential Mediation

One of the concerns identified by employers over the years is the view that the EEOC often fails in the post-cause conciliation process to provide the employer sufficient information to allow it to evaluate the EEOC's settlement demand. Over the past two years, several courts have also expressed this concern in opinions addressing the EEOC's obligation to engage in compulsory conciliation as a subject matter jurisdictional requirement. As such, if the EEOC adopts a pilot program requiring post-cause mediation, there will inevitably be a tension between the mediation norm of confidentiality and the prospect of a subsequent adjudication of a claim that the EEOC failed to attempt to conciliate in good faith. The offer in support of such a claim would likely be testimony about what happened or didn't happen at the mediation.

One procedural mechanism that the EEOC might consider to address this potential tension is to require as a part of its post-cause mediation process that the EEOC submit a confidential pre-mediation position paper to the mediator, employer and employee. The pre-mediation position paper would be required, at a minimum, to include: (1) the legal and factual issues in dispute, (2) the EEOC's position on those issues, and (3) the relief sought (including a particularized itemization of all elements of damage claimed). Given that the employer has already responded to the EEOC's information requests as a part of the EEOC's investigation process, the employer would have the option of submitting to the mediator, employee and EEOC a confidential pre-mediation position paper.

If the EEOC were to agree to this procedural step as a part of its post-cause mediation process this step would seem to go a long way to addressing the above-described concerns of employers and the courts. Moreover, by voluntarily providing this type of information to the mediator and the other parties prior to the mediation the potential success of the mediation is also increased.

II. The Investigation Process

In submitting this statement and suggestions regarding the EEOC's investigation process, I first note that I am not intimately familiar with the EEOC's current internal operations and investigatory processes other than those aspects that are made available publicly. As such, some or all of these suggestions may already be a part of those current processes. With that said, I submit this statement in good faith and in the earnest desire to assist the EEOC in its efforts and with the belief that even the best of processes can be improved. My statements and suggestions are also informed by the training I have had over the years in various quality methodologies, including Six Sigma, Lean, and Total Quality Management.

Generally speaking, all workplace investigations (regardless of whether the investigation is being done as a part of an organization's internal investigation process or by an external enforcement agency) can be broken down into the following three key process steps:

1. Collect the "right" information;
2. Evaluate the information and make factual findings; and
3. Determine whether the factual findings violate applicable law or company policy.

In the context of investigations conducted by EEOC investigators, it would seem that these three key steps of an investigation could also logically form the basis for establishing applicable criteria pursuant to which the quality of an investigation could be measured.

Before turning to a discussion of the three key steps in an investigation process, "cycle time" must be addressed to frame these suggestions. Cycle time refers to the duration of an organizational process and is often viewed as a key measurement of the quality of that process.

To measure cycle time in for the EEOC investigation process, one of the first steps would be to create a detailed process map, with input from across all team members involved in the process, e.g. intake, investigators, attorneys, managers, administrators, etc. With the input from the cross-functional, multi-level teams with responsibilities for the processes being reviewed often the simple mapping of the process uncovers and identifies non-value add activities in the process that were previously not recognized, but powerful. Examples of such non-value add activities in private sector business processes include: (1) files waiting to be read; (2) files waiting to be assigned an owner for the next process step; (3) transporting the files around the office or to other

buildings; (4) creating reports that no one reads; (5) waiting for approval signatures to move to the next process step; (6) waiting for hand off files to be returned; and (7) waiting for needed faxes or information from other sources.

In the context of an EEOC investigation, the term cycle time could refer to the time from which a charge is received by the EEOC through the time the EEOC makes a determination of whether there is reasonable cause to believe that discrimination has occurred. Based on a review of the statements submitted to the EEOC in response to its request for input into the development of the Strategic Plan for Fiscal Years 2012 - 2016, it seems safe to say that all stakeholders share the frustration with the current cycle times of many of the EEOC's investigations.

If the EEOC has not done so, I would encourage it to form a cross-functional, multi-level team to develop a detailed process map of the EEOC's current investigation process. Query whether in the current internal investigation process at the EEOC there is any non-value add activity that adds to the overall cycle time of an investigation. Query whether the investigation processes are different by field office and whether there are lessons to be learned from sharing of the process mapping results and whether this is an opportunity for evaluating increased standardization of process.

1. Collecting the "Right" Information

Based on my experience as well as on my conversations over the years with counsel who regularly represent employers, there appears to be a wide variation in the nature and scope of the initial Request for Information ("ROI") that are generally served on employers with the EEOC's notification to the employer with the notification of the charge of discrimination that may reflect different processes being used in different offices or perhaps just different processes among investigators. Similarly, there appears to be a wide variation in the level of factual detail contained in the charge that again may reflect the differences in the intake process as between offices and perhaps even among office employees. In situations where a charge contains only minimal factual allegations, it seems easy to understand how an employer could become frustrated by what would appear to be an overly broad and unduly burdensome ROI. Anecdotally, some employers are frustrated when charges contain minimal factual allegations, yet the employer is expected to provide enormous amounts of information in response. The result often involves further delay for an EEOC action or response.

The EEOC is also apparently frustrated with "undue delays" from what it perceives to be the failure of employers to comply with its ROI's. "Our experience shows that undue delay in responding to requests for information extends the time it takes to complete an investigation." Source: http://www.eeoc.gov/employers/process.cfm

If the EEOC's baseline performance analysis bears out the stakeholders' frustrations with the perceived undue length of time associated with the gathering of information step in the investigation process, I submit the following two suggestions to both reduce

the cycle time associated with obtaining the information the EEOC needs to evaluate the charge and to improve the quality of the information gathered.

The first opportunity to reduce the cycle time would seem to be at the initial intake of the charge or shortly after receiving a charge by implementing the necessary changes to obtain a more detailed set of factual allegations by the charging party. By working to obtain a more detailed set of factual allegations, the EEOC will then be better positioned to prepare a more strategically focused initial ROI to serve on the employer. One way to approach this goal would be to look to the guidance that has been developed in the private sector for employers faced with the need to conduct internal investigations into allegations of discrimination or harassment. The EEOC is encouraged to consider revising existing in-take questionnaires and procedures to incorporate some of the best practices that have been developed in the private sector.

Similarly, in gathering information from the employer, I urge the EEOC to review and consider revising the initial requests for information that are sent to employers. Again, it would seem that one potential resource to use for developing or revising such checklists would be the guidance that has been developed in the private sector for employers faced with the need to conduct internal investigations into allegations of harassment or discrimination.

The collection of information step in an investigation is not limited to the collection of documents. In most investigations into discrimination and harassment, the investigator will also need to collect information by interviewing witnesses. In fact, depending on the allegation(s) being investigated, witness interviews may be the primary source of information being collected. Each witness interview should be tailored to the particular facts and allegation(s), even though the EEOC has the authority to go beyond the scope of the Charge itself. With that said, in the interest of efficiency of process and overall quality, it is also helpful for investigators to have access to examples of the types of questions that may be appropriate to ask the complaining party as well as witnesses.

2. Evaluating the Information and Making Factual Findings

Once the "right" information has been gathered, the next key step of an investigation is to evaluate the information that has been collected. Essentially, the EEOC investigator is being asked at this step of the investigation to decide what more likely than not happened. This is often the most difficult step in an investigation as there are generally conflicting versions of the relevant facts and the investigator will often need to make a credibility assessment of witnesses in addition to weighing the documentary information collected. There is no rote formula for the EEOC investigator to use in evaluating the information collected in his or her investigation, but the strongest evaluations rely on a variety of factors and explain the methodology the investigator used to reach his her factual findings.

One measure of quality the EEOC might consider including in its Quality Control Plan is whether or not the investigator has explained the methodology he or she used in

evaluating the information collected and making the findings of facts. To help make this step of the investigation process more easily repeated and audited, the EEOC might consider creating best practice templates for investigators to use in this step of the investigation. Here is one example of such a template that could be used to evaluate the credibility of witnesses or other information where there are conflicting witness statements or otherwise conflicting information. The "factor considered" referenced in this chart refers to the five factors (inherent plausibility, demeanor, motive to falsify, corroboration, past record) the EEOC suggested in its 1999 Enforcement Guidance that employers consider when faced with conflicting versions of relevant events in an internal investigation into alleged harassment.

Example of Methodology Template

Information Considered	Factor Considered	Effect on Credibility	Corroboration/Conflict With …

3. Making a Determination of Reasonable Cause

Once the information has been evaluated and the findings of fact made, the final step in the investigation process requires the EEOC to then determine whether what is believed to have happened supports a determination by the EEOC that reasonable cause exists to believe that one of the laws the EEOC is charged with enforcing has been violated. Analytically and procedurally, this should be a separate step from the analysis discussed in step two above. Too often, in my experience, when this issue is not considered in a separate step analytically and procedurally the result is a failure to distinguish between what may be rude or disrespectful behavior but not the type of behavior that would constitute a violation of the federal laws the EEOC enforces.

III. Training of EEOC Investigators

In addition to my private practice as a workplace neutral with Workplace Investigations Group and One Mediation, I am also a charter member of the Association of Workplace Investigators, Inc. ("AWI") and a member of the faculty of its national training institute. The AWI is a nonprofit headquartered in Sacramento, California with a stated mission "to promote and support workplace investigations as a distinct area of expertise and to enhance the quality of workplace investigations." The AWI was originally incorporated as a nonprofit in 2009 as the California Association of Workplace Investigators, Inc. and its focus was only on California. In 2011, the organization expanded its purpose beyond California and membership in the organization is now available worldwide. AWI is the only multi-disciplinary professional association exclusively for workplace investigators. Although AWI is a relatively new organization, it has grown quickly and has over 350 members.

One of the ways in which the AWI accomplishes its mission of enhancing the quality of workplace investigations is by providing training and continuing education. To date, it has delivered 16 in-person basic seminars, 17 webinars, three annual conferences with over 150 attendees at each conference, and two week long national training institutes with over 60 attendees at each.

Student feedback from the AWI's second intensive five-day national training program was excellent. The program featured 23.25 hours of classroom instruction and discussions, a full day mock investigation program, and optional individual video-recorded interview sessions. All participates in the program were given a 700 page binder containing original articles written by faculty especially for the institutes, reprints of classics in the field of workplace investigations and presentations used by the faculty at the training program. "The modules and materials are so comprehensive, and practical. The practice tools provided at the lectures are extremely valuable and the binder will be like an investigator's 'encyclopedia" going forward," remarked one student. Another student said, the "[m]aterials will be an excellent future reference." The AWI has also issued "Guiding Principles for Investigators Conducting Impartial Workplace Investigations." These Guiding Principles were developed over a two and half-year period with input from the members of the AWI. Issued in 2012, they provide a general framework and guidance for conducting internal investigations into allegations of workplace misconduct such as harassment, discrimination and retaliation. While not legal or professional "standards," the Guiding Principles are a part of the developing norms in the area of internal workplace investigations. A copy of AWI's Guiding Principles can be obtained on its website at http://www.aowi.org/assets/documents/guiding%20principles.pdf.

As the old adage says, an organization is only as goods as its people. As such, my final recommendation is to encourage the EEOC to reinvigorate its training program for investigators as a part of its Quality Control Plan. As the only multi-disciplinary professional association exclusively for workplace investigators, the AWI would seem to be uniquely positioned to partner with the EEOC in this effort.

IV. Conclusion

In closing, I want to again say thank you to the EEOC for not only inviting me to participate in this public meeting, but also for your efforts to continue to increase the transparency of government as well as the engagement of citizens in the development of the EEOC's Strategic Enforcement Plan and Quality Control Plan.