

The U.S. Equal Employment Opportunity Commission

EEOC NOTICE
Number 915.002
Date 4/10/97

1. SUBJECT: Enforcement Guidance on non-waivable employee rights under Equal Employment Opportunity Commission (EEOC) enforced statutes.
2. PURPOSE: This enforcement guidance sets forth the EEOC's position that an employer may not interfere with the protected right of employees to file a charge or participate in any manner in an investigation, hearing, or proceeding under the laws enforced by EEOC.1
3. EFFECTIVE DATE: Upon issuance.
4. EXPIRATION DATE: As an exception to EEOC Order 205.001, Appendix B, Attachment 4, Section a(5), this Notice will remain in effect until rescinded or superseded.
5. ORIGINATOR: ADEA Division, Office of Legal Counsel.
6. INSTRUCTIONS: File after the last Enforcement Guidance in the 800 series of Volume II of the EEOC Compliance Manual.
7. SUBJECT MATTER:

I. General Statement

An employer may not interfere with the protected right of an employee to file a charge, testify, assist, or participate in any manner in an investigation, hearing, or proceeding under Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. § 2000e et seq., the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 et seq., the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 et seq., or the Equal Pay Act (EPA), 29 U.S.C. § 206(d). These employee rights are non-waivable under the federal civil rights laws.

This position is built on two cornerstones: (a) interference with these protected rights is contrary to public policy; and (b) the anti-retaliation provisions of the civil rights statutes prohibit such conduct.2

II. Background

Some employers attempt to limit an individual's right to file a charge or participate in an EEOC proceeding by requiring him or her to sign an agreement in which s/he relinquishes these statutory rights. Such language may appear in contracts requiring the use of alternative dispute resolution procedures (such as mediation or arbitration), waiver agreements,³ employee handbooks, employee benefits plans, and "non-compete" agreements. Notwithstanding the format or context of the agreement in which such language might appear, promises not to file a charge or participate in an EEOC proceeding are null and void as a matter of public policy. Agreements extracting such promises from employees may also amount to separate and discrete violations of the anti-retaliation provisions of the civil rights statutes.

III. Analysis

A. Public Policy. EEOC acts to vindicate the public interest in the eradication of employment discrimination. "[T]he EEOC is not merely a proxy for the victims of discrimination Although [it] can secure specific relief, such as hiring or reinstatement . . . , on behalf of discrimination victims, the agency is guided by 'the overriding public interest in equal employment opportunity . . . asserted through direct Federal enforcement.'" *General Telephone Co. v. EEOC*, 446 U.S. 318, 326 (1980) (quoting 118 Cong. Rec. 4941 (1972)). A strong public policy prohibits interference with governmental law enforcement activities. Agreements that prevent employees from cooperating with EEOC during enforcement proceedings interfere with enforcement activities because they deprive the Commission of important testimony and evidence needed to determine whether a violation has occurred. Furthermore, insofar as such agreements make it more difficult for the Commission to prosecute past violations, an atmosphere is created that tends to foster future violations of the law. See *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697, 710 (1945); *EEOC v. Astra USA, Inc.*, 94 F.3d, 738, 742 (1st Cir. 1996).

In *EEOC v. Astra USA, Inc.*, the employer obtained settlement agreements from a number of employees which, inter alia, prohibited them from assisting the Commission in investigating any sexual harassment charges against the employer. The district court granted the Commission's request for a preliminary injunction prohibiting Astra from entering into or enforcing the provisions of the settlement agreements barring employees from assisting the Commission during the investigation of any charges. 94 F.3d at 742.

The First Circuit affirmed the injunction. Invoking important public policy concerns, the court pointed out that Congress "entrusted the Commission with significant enforcement responsibilities in respect to Title VII." *EEOC v. Astra USA*, 94 F.3d at 744. It cited *EEOC v. Shell*

Oil Co., 466 U.S. 54, 69 (1984), for the bedrock principle that the Commission's ability to investigate charges of systemic discrimination must not be impaired. Turning to the agreements in controversy, the court concluded that "clearly, if victims of or witnesses to [employment discrimination] are unable to approach the EEOC or even to answer its questions, the investigatory powers that Congress conferred would be sharply curtailed and the efficacy of investigations would be severely hampered The EEOC acts not only on behalf of private parties but also 'to vindicate the public interest in preventing employment discrimination.'" Id., citing *General Telephone Co. v. EEOC*, 446 U.S. at 326. The First Circuit reasoned that "[p]ublic policy ... clearly favors the free flow of information between victims of [employment discrimination] and the agency entrusted with righting the wrongs inflicted upon them." 94 F.3d at 745. Thus, "any agreement that materially interferes with communication between an employee and the Commission sows the seeds of harm to the public interest." Id. at 744. See also *EEOC v. U.S. Steel Corp.*, 671 F. Supp. 351, 357-59 (W.D. Pa. 1987) (invalidating as contrary to public policy retirement plan provision that conditioned higher benefits on retiree's promise not to assist in EEOC investigations).

A strong public policy interest also prohibits interference with the right to file a charge with EEOC. The primary purpose of a charge of discrimination filed with EEOC is to "place the EEOC on notice that someone ... believes that an employer has violated [one of the anti-discrimination statutes]." *EEOC v. Shell Oil Co.*, 466 U.S. at 68; see also *EEOC v. Cosmair, Inc.*, 821 F.2d 1085, 1089 (5th Cir. 1987) (primary purpose of a charge under ADEA "is not to seek recovery from the employer but rather to inform the EEOC of possible discrimination"). This notice to the EEOC serves to trigger law enforcement proceedings by the EEOC that include an investigation and, if there is a finding of discrimination, may include conciliation and litigation. Thus, every charge filed with the EEOC carries two potential claims for relief: the charging party's claim for individual relief, and the EEOC's claim "to vindicate the public interest in preventing employment discrimination." *General Telephone Co. v. EEOC*, 446 U.S. at 326.

Courts have consistently recognized that individuals possess a non-waivable right to file charges with the EEOC. See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991) (individual who signs an agreement to submit an employment discrimination claim to arbitration remains free to file a charge with EEOC); *EEOC v. Cosmair, Inc.*, 821 F.2d at 1090 (invalidating former employee's promise not to file a charge with EEOC because it "could impede EEOC enforcement of the civil rights laws" and is void as against public policy); *EEOC v. U.S. Steel Corp.*, 671 F. Supp. at 357-59 (invalidating as contrary to public policy retirement plan provision that conditioned higher benefits on retiree's promise not to file charges with EEOC).

Congress reaffirmed the public policy against interference with EEOC enforcement efforts, including the right to file a charge, by including the following explicit language in the waiver provisions of the Older Workers Benefit Protection Act of 1990 (OWBPA), amending the ADEA: "No waiver may be used to justify interfering with the protected right of an employee to file a charge or participate in an investigation or proceeding conducted by the Commission." 29 U.S.C. § 626(f)(4) (ADEA). The legislative history states that this statutory provision is intended "as a clear statement of support for the principle that the elimination of age discrimination in the workplace is a matter of public as well as private interest." Moreover, "[n]o waiver agreement may be permitted to interfere with the achievement of that goal. This position is consistent with the holding and reasoning of *EEOC v. Cosmair, Inc.*, 821 F.2d 1085 (5th Cir. 1987)." S. Rep. No. 263, 101st Cong., 2d Session 35; Legislative History of OWBPA, Part 1 p.354. See also *EEOC v. Johnson & Higgins, Inc.*, 91 F.3d 1529 (2d Cir. 1996) (In light of the strong public interest in eradicating age discrimination, EEOC authority to enforce the ADEA cannot be altered by a waiver of the rights of a private party). These principles apply equally to all of the statutes enforced by the EEOC.

B. Prohibitions Against Retaliation. Congress enacted provisions barring retaliation in each of the statutes enforced by the Commission in large part to ensure that employees remain free to report suspected violations to the government. See *Veprinsky v. Fluor Daniel, Inc.*, 87 F.3d 881, 889 (7th Cir. 1996) ("Given the instrumental role individual employees play in the statutory scheme, the protection of those individuals from retaliatory acts by the employer 'is essential to accomplish the purpose of Title VII.'") (quoting *EEOC v. Pacific Press Pub. Ass'n*, 676 F.2d 1272, 1281 (9th Cir. 1982)); *Garcia v. Lawn*, 805 F.2d 1400, 1405 (9th Cir. 1986) (retaliation "is likely to cause irreparable harm to the public interest in enforcing the law by deterring others from filing charges"). Cf. *NLRB v. Scrivener*, 405 U.S. 117, 121-22 (1972) ("Congress has made it clear that it wishes all persons with information about [unlawful practices] to be completely free from coercion against reporting them to the [government.]" ... This complete freedom is necessary ... 'to prevent the [government's] channels of information from being dried up by employer intimidation of prospective complainants and witnesses.'") (construing anti-retaliation provisions of the National Labor Relations Act).

Agreements that attempt to bar individuals from filing a charge or assisting in a Commission investigation run afoul of the anti-retaliation provisions because they impose a penalty upon those who are entitled to engage in protected activity under one or more of the statutes enforced by the Commission. By their very existence, such agreements have a chilling effect on the willingness and ability of individuals to come forward with

information that may be of critical import to the Commission as it seeks to advance the public interest in the elimination of unlawful employment discrimination. See, e.g., *EEOC v. Board of Governors*, 957 F.2d 424 (7th Cir.), cert. denied, 506 U.S. 906 (1992) (unlawful retaliation for a collective bargaining agreement to allow the termination of an administrative grievance proceeding upon the filing of a charge with EEOC); *EEOC v. Cosmair, Inc.*, 821 F.2d at 1089 (impermissible retaliation arises when payments to which one is otherwise entitled are stopped merely because a charge is filed with EEOC); *EEOC v. U.S. Steel Corp.*, 671 F.Supp. at 358 (retaliation under §4 (d) of the ADEA results when an employer revokes enhanced pension benefits for persons who file charges or otherwise participate in EEOC proceedings)⁵. Cf. *Connecticut Light & Power v. Secretary of Labor*, 85 F.3d 89 (2d Cir. 1996) (construing the anti-retaliation provisions of the Energy Reorganization Act of 1974 and finding a violation where an agreement sought to prevent an individual from reporting unlawful conduct to the government).

C. The Commission's Position is Consistent with the Public Interest in the Voluntary Settlement of Employment Discrimination Disputes. The Commission supports efforts by employers and employees to resolve employment discrimination disputes voluntarily. In particular, on April 25, 1995, the Commission announced that it "supports efforts by employers to develop voluntary internal ADR programs to address workplace discrimination disputes, because the interests of employers and employees will be served by the development of fair, credible, internal ADR programs that resolve discrimination disputes satisfactorily."⁶ Nothing in this enforcement guidance diminishes Commission support for post-dispute agreements entered into knowingly and voluntarily to settle claims of discrimination or utilize alternative dispute resolution mechanisms. Nor does the guidance create any A substantial disincentive to settlement. See *EEOC v. Astra USA*, 94 F.3d at 744.

In this regard, the Commission notes that even though an individual who has signed a waiver agreement or otherwise settled a claim subsequently files a charge with the Commission based on the same claim, the employer will be shielded against any further recovery by the charging party provided the waiver agreement or settlement is valid under applicable law. This is true whether the EEOC or the private individual brings a subsequent action. See *EEOC v. Astra USA, Inc.*, 94 F.3d at 744 (injunction prohibiting covenants preventing employees from assisting EEOC does nothing at all to promote further litigation between Astra and the settling employees or to disturb the finality of the negotiated settlement); *EEOC v. Cosmair, Inc.*, 821 F.2d at 1091 (although an employee cannot waive the right to file a charge with EEOC, he can waive the right to recover in his own lawsuit as well as the right to recover in a lawsuit brought by the EEOC on his behalf); *EEOC v. U.S. Steel Corp.*, 671 F. Supp. at 358 (where provision in a waiver agreement preventing employees from assisting EEOC is enjoined, employer may still assert the waiver as a bar to recovery on a claim of age discrimination brought by or on behalf of an individual who signed a valid waiver involving that claim).

However, while a private agreement can eliminate an individual's right to personal recovery, it cannot interfere with EEOC's right to enforce Title VII, the EPA, the ADA, or the ADEA by seeking relief that will benefit the public and any victims of an employer's unlawful practices who have not validly waived their claims. See *EEOC v. Harris Chernin, Inc.*, 10 F.3d 1286, 1291-92 (7th Cir. 1993); *EEOC v. United Parcel Serv.*, 860 F.2d 372, 374 (10th Cir. 1988); *EEOC v. Goodyear Aerospace Corp.*, 813 F.2d 1539, 1542-43 (9th Cir. 1987); *New Orleans S.S. Ass'n v. EEOC*, 680 F.2d 23, 25 (5th Cir. 1982); *EEOC v. McLean Trucking Co.*, 525 F.2d 1007, 1010 (6th Cir. 1975). Enforcement actions for the purpose of advancing the public interest in the elimination of employment discrimination are squarely within the EEOC's authority "to vindicate rights belonging to the United States as sovereign." *Goodyear Aerospace Corp.*, 813 F.2d at 1543 (citation omitted).

IV. Conclusion

For the reasons set forth and discussed above, an employer may not interfere with an individual's protected right under Title VII, the EPA, the ADA, or the ADEA to file a charge, testify, assist, or participate in any manner in an EEOC investigation, hearing, or proceeding.

V. Charge Processing Instructions

1. Investigators should take and process charges in conformity with priority charge processing procedures regardless whether the charging party has signed a waiver of his or her right to file a charge.

2. If a charging party has been required to relinquish his or her right to file a charge or participate in a commission investigation, hearing, or proceeding, a cause determination should be issued.

4-11-97

/s/

Date

Gilbert F. Casellas
Chairman

1. Although the enforcement guidance addresses this issue primarily in the context of the private sector, the principles and considerations discussed herein are equally applicable to the federal sector.

2. Title VII, for example, provides that:

it shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this title, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title.

42 U.S.C. § 2000e-3. In *Robinson v. Shell Oil Company*, 117 S. Ct. 843 (1997), the Supreme Court held that this section extends protection to former employees. Comparable anti-retaliation provisions appear at 29 U.S.C. § 623 (d) (ADEA); 29 U.S.C. § 215 (a) (3) (EPA); and 42 U.S.C. § 12203 (a) and (b) (ADA).

3. "Waiver agreement" refers to the type of agreement described in section 7(f) of the ADEA (permitting knowing and voluntary waiver of an individual's right to recovery under the Act). 29 U.S.C. § 626(f). Although the ADEA is the only EEOC-enforced statute containing specific language authorizing the use of knowing and voluntary waiver agreements, such agreements are widely used with respect to rights protected under other statutes enforced by the Commission.

4. The Commission relies on charges not only as its principal source of information regarding unlawful conduct, but also, in the case of Title VII and the ADA, as a statutory prerequisite for its investigations and proceedings. 42 U.S.C. § 2000e-5(b); 42 U.S.C. § 12117(a) (ADA section incorporating Title VII procedures). Under the ADEA and EPA, the Commission is empowered to investigate without a charge. 29 U.S.C. § 626(a) (ADEA) and 29 U.S.C. § 211 of the Fair Labor Standards Act (FLSA).

5. A longstanding Commission interpretive regulation under the ADEA provides that "[c]lauses in employee benefit plans which state that litigation or participation in any manner in a formal proceeding by an employee will result in the forfeiture of his rights are unlawful insofar as they may be applied to those who seek redress under the Act. This is by reason of section 4 (d) which provides that it is unlawful for an employer ... to discriminate against any individual because such individual 'has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this Act.'" 29 C.F.R. § 1625.10(d)(5).

6. See *Daily Lab. Rep.* (BNA), No. 80 (April 26, 1995).

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