CIVIL RIGHTS INSIDER

Federal Bar Association Civil Rights Law Section's Newsletter

Fall 2017

From the Desk of the Chairperson

"No one is born hating another person because of the color of his skin or his background or his religion. People must learn to hate, and if they can learn to hate, they can be taught to love, for love comes more naturally to the human heart than its opposite." Nelson Mandela

This sentiment, recently tweeted by President Obama, has been widely shared in the past few weeks as the country has become more divided by differing notions of what is good and what is evil. The tragic events in Charlottesville, Virginia highlighted this division while invigorating those of us involved in the Federal Bar Association's Civil Rights Law Section more than ever.

Civil Rights lawyers around the country have had busy years indeed. Our nation faces bigger challenges than most of us have seen within our lifetime, and some believe that we are living through historical moments while revisiting some of the worst moments of our past. With great change has come enormous hurdles, and it has been a privilege to watch civil rights attorneys across the country come out in full force. For the Section's part, we have enjoyed hosting panels, educating attorneys, and connecting and building relationships with lawyers in firms across the country. We also gathered in New Orleans in April to host our first, national CLE, the Civil Rights Etouffee, where we heard from speakers on topics that run the gamut of current civil rights issues.

For all our hard work this year, I am proud to say that we are being honored with the Federal Bar Association's Recognition Award! This will be the first time the civil rights section will be recognized with this annual award. Our success would not have been possible without all the hard work from our board, our officers, our committee chairs, our national liaisons and our general membership. I will proudly accept this award at the national convention in Atlanta, Georgia in September on behalf of all of us.

I would like to take this opportunity to welcome and thank our

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In this Issue:

Supreme Court Previews

Provided by Samuel T. Brandao, Clinical Instructor, Civil Rights and Federal Practice Clinic, Tulane University Law School

Whitford v. Gill, 218 F. Supp. 3d 837 (W.D. Wis. 2016), *appeal docketed, Gill v. Whitford,* 137 S. Ct. 2268 (2017).

No. 16-1161; set for argument October 3, 2017.

This partisan gerrymandering case is the political and voting rights blockbuster of the upcoming term. Wisconsin's redistricting plan, known as Act 43 and enacted by its Republican-controlled legislature in 2011, was first declared an unconstitutional partisan gerrymander by a divided panel of the federal district court in November 2016. In January, that court ordered the defendants to enact a remedial plan in time for the November 2018 election. By a 5-4 vote, the Supreme Court has now stayed that injunction. The intense attention focused on this case is reflected in the growing list of amici, which already includes legislators, several states, and the NRCC.

The Court revisits partisan gerrymandering for the first time since Vieth v. Jubelirer, 541 U.S. 267 (2004). Justice Kennedy's concurrence invited challengers to articulate a "limited and precise" standard with which the courts could decide how much political disenfranchisement is too much. The Gill v. Whitford plaintiffs proffer, and the district court adopted, a three-pronged test: discriminatory intent, sizeable discriminatory effect, and the impossibility of justification by legitimate state interests or neutral factors. Crucially, the effect is expressed in terms of numerical efficiency, or the proportion of votes that, because of a gerrymander, have no effect on the outcome—including both votes for a loser and votes for a winner beyond the total needed to secure victory. Wisconsin dismisses the plaintiffs' approach as "social-science hodgepodge" that it alleges would invalidate one-third of the legislative maps drawn in recent decades. As a backstop, Wisconsin urges remand so that it can present evidence that it satisfied the standard, which it argues it had no notice of before the district court's decision.

Husted v. A. Philip Randolph Institute, 838 F.3d 699 (6th Cir. 2016), cert. granted, 137 S. Ct. 2188 (2017).

No. 16-980; not yet set for argument.

"Every time the office of the solicitor general changes position, without an intervening change in the law, it damages its credibility a little bit," opines Professor Justin Levitt of Loyola Law School, Los Angeles. Professor Levitt refers to Husted as one of a number of cases in which the new Justice Department has switched sides; here, submitting an amicus brief to the Supreme Court in support of Ohio's voter roll purge process after the previous administration submitted one to the Sixth Circuit declaring that process illegal. Notably, the Trump Justice Department's brief was not signed by any career attorneys from the Civil Rights Division.

The plaintiffs challenge Ohio's registration-cancelling "supplemental process" under the National Voter Registration Act of 1993 (NVRA) and the Help America Vote Act of 2002 (HAVA). Those laws provide that states must keep their voter rolls current by taking reasonable measures to remove folks who move away or die, but specify that states must not purge anyone "by reason of the person's failure to vote." Ohio illegally purges voters, plaintiffs argue, because failure to vote is what triggers the supplemental process that annually cancels thousands of registrations. Ohio sends confirmation notices to voters who fail to vote for two years, and then purges them if they do not return the notices or vote within four years.

Ohio urges that language elsewhere requires states to keep their rolls current by removing voters who do not respond to confirmation notices and who miss two consecutive federal elections. In its petition for certiorari, Ohio concedes that failure to vote is a factual or but-for cause of the cancellation of registrations under its process, but argues that the "by reason of" language ought to be read as a proximate cause standard, rather than a but-for standard. Because its process purges voters by direct reason of their failure either to respond to the notice or to vote, and only indirectly by reason of the failure to vote that provoked the notice, Ohio insists it passes muster.

The district court dismissed the plaintiffs' suit. A divided panel of the Sixth Circuit reversed, explaining that the NVRA's prohibition would be superfluous if read as Ohio suggests, and dispensing with secondary issues including the form of the notice and mootness. The long list of amici includes several other States who see their processes as similar to Ohio's. Gill v. Whitford commands the spotlight, but the stakes in Husted are potentially comparable: the franchise rights of millions of voters, many in swing states.

Ayestas v. Davis, 817 F.3d 888 (5th Cir. 2016), *cert. granted,* 137 S. Ct. 1433 (2017).

No. 16-6795; not yet set for argument.

The Supreme Court might clarify the standard that applies to habeas petitioners seeking investigative services under 18 U.S.C. § 3599(f).

Mr. Ayestas argues that the Fifth Circuit requires the impossible, namely that he prove that his trial counsel was ineffective in order to receive the funding that will allow him to investigate whether his trial counsel was ineffective. "A test that directs courts to prematurely judge the merit of uninvestigated claims cannot be squared with" the fact that the statute provides funding for investigations.

The Fifth Circuit rejected that as a mischaracterization, explaining instead that "[t]here must be a substantiated argument, not speculation, about what the prior counsel did or omitted doing. Ayestas indeed offered such an argument. We interpret the district court's ruling as being that any evidence of ineffectiveness, even if found, would not support relief." The Fifth Circuit therefore found no abuse of the district court's discretion in the decision to deny services. The Supreme Court now has the opportunity to specify whether and to what extent courts should assess the merits when deciding whether investigative resources are "reasonably necessary" under § 3599(f).

Wilson v. Sellers, 834 F.3d 1227 (11th Cir. 2016), *cert. granted,* 137 S. Ct. 1203 (2017).

No. 16-6855; not yet set for argument.

This capital case offers the Supreme Court the opportunity to resolve a circuit split concerning the applicability of the "look through" doctrine of Ylst v. Nunnemaker. Comity questions pervade the debate, which hinges on the proper interpretation by federal courts of summary opinions by state appellate courts, specifically, whether they implicitly adopt the reasoning of a lower court's decision, if any. Here, did the Georgia Supreme Court endorse the superior court's reasoning when it denied Wilson's application for a certificate of probable cause to appeal in a one-sentence order?

The en banc Eleventh Circuit holds that such summary state court decisions are entitled to deferential review by federal courts—they should be upheld as long as there is some reasonable basis for them, under Harrington v. Richter, whether or not that basis is expressed by any predecessor opinion.

The Fourth and Ninth Circuits have held that Richter governs only cases when there is no lower court opinion that presents reasoning, and therefore nothing of substance for federal courts to review. Otherwise, Ylst requires federal courts to scrutinize that lower court's reasoning, and uphold the decision only if a stated basis is acceptable. In other words, under this approach, a state court decision must undergo Ylst review if any state court has described its reasons, but the decision receives deferential Richter review when they all omit to do so.

The Eleventh Circuit held that Richter deference is the general rule, and that Ylst simply empowers federal courts to note which petitions are procedurally defaulted so as to render further review unnecessary. The Eleventh Circuit opinion also notes that the First, Fifth, and Seventh Circuits seem to have acted consistently with the Eleventh Circuit's approach even if sometimes stating the rule as the Fourth and Ninth Circuits do.

District of Columbia v. Wesby, 765 F.3d 13 (D.C. Cir. 2016), *cert. granted,* 137 S. Ct. 826 (2017).

No. 15-1485; set for argument October 4, 2017.

D.C. police officers arrested over a dozen people at a house party, for unlawful entry, based on disputed evidence that the host was not a lawful tenant. The trial court granted summary judgment to the arrested individuals, and denying the officers' claim of qualified immunity, holding that no reasonable officer would have imagined she had probable cause to arrest these partygoers given the lack of evidence that they knew or should have known that they were trespassing. A divided panel of the D.C. Circuit affirmed.

The officers knocked, entered, and conducted a search of the house. None of the partiers owned the house or knew who the owner was, although some individuals stated that Peaches, who was not present, had invited them. The officers called Peaches, who confirmed having invited the partygoers, but who allegedly then admitted that she did not have a current lease or the owner's permission to use the house. The officers also spoke with the homeowner, who stated that no one had permission to be at the house. The dissenting judge in the D.C. Circuit and the petitioners argue that on-scene officers, faced with an unlawful entrant who claims an innocent mental state, will now be unable to enforce the law: the "broad new rule . . . essentially removes most species of unlawful entry from the criminal code."

Class v. United States, 765 F.3d 13 (D.C. Cir. 2016), *cert. granted,* 137 S. Ct. 1065 (2017).

No. 16-424; set for argument October 4, 2017.

Does an unconditional guilty plea implicitly waive a constitutional challenge to the statute of conviction? The defendant pleaded guilty to violating 40 U.S.C. § 5104(e), which prohibits the presence of weapons on the grounds of the Capitol: he had left licensed firearms in his Jeep while parked in a nearby parking garage. He appealed, challenging the statute on due process notice/vagueness and Second Amendment grounds. The government argued that the defendant waived any constitutional claims that accrued before he pleaded guilty, including his constitutional challenges to the statute. Coincidentally, the defendant's original indictment included a second charge—but that charge was dismissed after the underlying statute was declared unconstitutional.

The D.C. Circuit affirmed the defendant's conviction without reaching the merits, pointing to its own precedents directing that unconditional guilty pleas, if knowing and intelligent, waive all claims of error, even constitutional ones, excepting only subject-matter jurisdiction and "the defendant's claimed right not to be haled into court at all."

Mr. Class argues that he may in fact claim that right, insofar as an unconstitutional statute cannot empower the state to hale him into court in the first instance. The government disagrees, arguing that even an unconstitutional statute does not deprive the trial court of jurisdiction or the prosecutor of the right to charge the offense. In briefs to the Supreme Court, Mr. Class and amici including the ACLU point out that the criminal justice system is now a system of pleas rather than trials, and insist that conditional pleas and collateral attacks are inadequate alternatives to direct appeal of an unconstitutional statute.

Sam Brandao is a Clinical Instructor with experience enforcing housing equity, civil rights, and disability rights. He joined the Tulane Civil Rights and Federal Practice Clinic in 2016 after completing a two-year Skadden Fellowship, during which he served as a staff attorney at Southeast Louisiana Legal Services in New Orleans. At SLLS, he litigated housing discrimination cases and advocated for policy changes on behalf of persons with disabilities. Brandao clerked for United States District Judge Eldon E. Fallon of the Eastern District of Louisiana and for Circuit Judge Jacques L. Wiener, Jr. of the United States Court of Appeals for the Fifth Circuit. In the Civil Rights and Federal Practice Clinic, he assists Director Lucia Blacksher Rainer in supervising student-attorneys in a range of client representation, including federal cases involving the civil rights of incarcerated citizens, employment discrimination, housing discrimination, and other constitutional claims.

Exclusionary Zoning in the Spotlight

by Sara Pratt, Counsel, Relman, Dane & Colfax PLLC

Exclusionary zoning issues come up frequently in today's civil rights litigation. Generally brought against municipalities by civil rights groups, developers, advocates and the United States Department of Justice, zoning schemes and zoning-related actions have become the focus for exclusion or limitation of particular housing uses that are viewed as illegal and discriminatory.

The Fair Housing Act has been interpreted to prohibit municipalities from using their zoning powers in a way that excludes or limits housing for groups of persons protected by the law.[1] Violations of the Fair Housing Act[2] based on claims of discrimination based on race, national origin, or disability are occurring with some frequency; for disability-based issues the Americans with Disabilities Act Title II[3] which prohibits disability-based discrimination by states and local governments is beginning to become an additional basis for challenging zoning and land use decisions. Under the ADA, zoning qualifies as a public program or service and the enforcement of a zoning ordinance constitutes an activity of a locality within the meaning of Title II.[4]

Exclusionary zoning decisions by municipal officials often are triggered by the perceived characteristics of proposed occupants of housing. They may arise from discriminatory constituent opposition (housing will "turn the neighborhood into a ghetto," "no more Mexicans," "those people") or stereotypes about the effect the housing might have on the community ("decreased property values," "families with children will burden the schools," "will bring drug users into the community.") They may also reflect the imposition of barriers that are not intentionally discriminatory but have the effect of excluding or limiting housing in a discriminatory fashion.

Exclusionary zoning challenges have focused on zoning schemes that exclude low income, "Section 8" or public housing, either directly or indirectly. They may take on communities that reduce or eliminate zoning for multifamily housing such as apartments, require large lot sizes which limit the number of units on a site, or unreasonably limit the number of occupants in housing that will serve people with disabilities such as sober homes. Exclusionary zoning decisions may also occur when local community decision makers deny zoning approvals or condition or limit zoning approvals without adequate justifications, such as requiring occupancy changes from family housing to seniors only, adding new requirements for parking or spacing that only affect housing for people with disabilities, or changing procedural or substantive rules so that zoning applications can be denied.

Exclusionary Zoning

The Second and Ninth Circuits have recently confirmed long-standing Supreme Court precedent applying the Fair Housing Act to zoning.

The Ninth Circuit recently confirmed important civil rights principles affecting zoning. First, intentional discrimination may be established by direct and circumstantial evidence from which intent may be inferred, including the expression of community opposition through use of code words accompanying the overruling of professional staff recommendations, unexplained departures from usual procedures, a distinct connection between a pattern of segregation and the likelihood of an outcome that would have a disproportionate impact based on national origin, and actions that contributed to making housing unavailable based on the perceived national origin of likely residents.[5] The Court also upheld a claim that a zoning decision had a disparate impact on Hispanics, pointing out that intent may be hidden but the Act also targets "'artificial, arbitrary, and unnecessary barriers' to minority housing and integration that can occur through unthinking, even if not malignant, policies of developers and governmental entities."[6]

The Second Circuit made a similar inquiry into circumstantial and direct evidence of intent and reached a similar conclusion in a case involving a zoning change that ruled out an affordable housing development, based primarily on evidence of community opposition and departures from usual procedures, observing that the community opposition, although not explicitly race-based, referred to a "potential influx of poor, minority residents."[7]

Exclusionary zoning challenges also address zoning issues that affect housing for people with disabilities such as group homes. Another Ninth Circuit decision rejected a city's enactment of zoning provisions because its purpose was to exclude group homes for people recovering from addiction from most residential districts, to bring about the closure of existing group homes in those areas, and to require existing group homes to apply for a use permit.[8]

A recent complaint filed in U.S. District Court in Connecticut challenges a series of actions by a municipality alleged to constitute discriminatory efforts to exclude a sober home, including imposing restrictive zoning requirements, convening a public hearing designed to provide a forum for community opposition and challenging the home's state licensure status.[9]

The Department of Justice and the Department of Housing and Urban Development issued a Joint Statement late last year that addresses the application of the Fair Housing Act to zoning and land use laws and practices that helpfully summarizes the law in this area and its application to a variety of practices.[10] Several fair housing toolkits on affordable housing development are also available on line.[11]

In today's world, the propensity toward outspoken opposition across the country makes it more, not less, likely that local officials will be tempted to use their zoning powers for exclusionary purposes. The Fair Housing Act remains a strong barrier to that effort.

Sara Pratt is Counsel at the firm of Relman, Dane & Colfax, PLLC in Washington, DC. She was formerly Deputy Assistant Secretary for Fair Housing Enforcement and Programs at the Department of Housing and Urban Development.

Endnotes

[1]Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926 (2d Cir. 1988), aff'd 488 U.S.15 (1988).

[2]42 U.S.C 3601 et seq.

[3]42 U.S.C. 12101 et seq.

[4]A Helping Hand v. Baltimore County, 515 F.3d 356 (4th Cir. 2008).

[5]Avenue 6E Invest-

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MEMBER HIGHLIGHT

Diane Citrino, Giffen & Kaminski, Cleveland, OH

Diane Citrino has spent much of her legal career dedicated to the enforcement of local, state, and federal civil rights laws. Now an attorney in private practice at Giffen & Kaminski, a women-owned law firm in Cleveland, Ohio, Diane has served in a wide range of public and private capacities, including litigation focused on civil rights enforcement. Her current practice includes independent investigations in school and work settings.

Her road to Giffen & Kaminski went from earning her law degree from the University of California, Berkeley, to a prominent Chicago firm and then to a position with the Legal Assistance Foundation of Chicago. While there, she prevailed in her representation of 1,400 Spanish-speaking beauty school students who had been promised but then not given an education in Spanish under civil RICO for the fraudulent use of federal Pell grant funds. Diane was instrumental in the creation of the Civil Rights Law Section of the Federal Bar Association back in 2011, and served as its first Chair, so it is only fitting that she be recognized in our first Member Highlight.

Diane is a nationally recognized, award-winning fair housing enforcement advocate whose extensive background and courtroom experience have enabled her to build an excellent reputation with her clients, the judiciary and her peers. She is a sought after speaker and author on a variety of topics related to her areas of practice. She has received awards and honors from several fair housing and advocacy organizations and the Rosa Parks Congressional Medal from the Ohio Civil Rights Commission. In 1999 Diane was selected as one of ten "Lawyers of the Year" by Ohio Lawyers Weekly, after a large jury verdict for multiple women who were sexually harassed by their housing provider over an extended period. More recently, Diane obtained a $4 million judgment on behalf of three women subject to abuse by their landlord – one of the largest fair housing judgments ever awarded.

As a former Regional Director for the Ohio Civil Rights Commission, Diane led investigations into thousands of cases involving discrimination in housing, employment and public accommodations. Diane has also served as Chair of the Ohio Advisory Committee to the U.S. Civil Rights Commission, is a member of the House of Delegates of the American Bar Association, and formerly served as a Trustee of the Cleveland Metropolitan Bar Association.

Along with her legal talents, Diane is an artist who took up pottery making at Berkeley. She is also an avid reader and gardener who hopes to "create beauty along with creating justice." Diane appreciates the community and support provided by the FBA and other bar associations in working to end the justice gap and ensure justice for all.

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new members for joining, and to extend an invitation to each of our members whose memberships may soon be up for renewal to join us again for the coming year! There is a lot in store and we look forward to providing interesting, helpful and engaging programming for all to enjoy.

I also want to recognize and thank our new officers - that our nominating committee put forward (Thanks Eileen, Jeff, Bonnie, and Keegan) and who were unanimously approved, - for their dedication to the section and for all the work yet to be done (thanks Stephan, Robin, Rob, and Jared). To keep our momentum going, we have been setting goals for the coming year. We are working hard to expand our membership; support and plan local CLEs and panels in multiple cities; and begin planning for our next Etouffee in the Fall of 2018.

We have also set goals to submit at least one article each month for the Federal Lawyer and to increase our social media presence. We are lucky to have some incredible law students helping lead this charge (thanks Keegan and Lindsey).

We are looking forward to filing our first amicus brief in the upcoming year, with the leadership of our amicus team (here's to Kevin & Jared). We will be lending support to important civil rights issues on major appellate cases throughout the country. We will start to have monthly informational emails to join our monthly phone calls. So look for information about amicus applications and submissions, and much more, in these emails that will be sent in the weeks to come (Thanks Robin)!

In spite of all the unrest we are witnessing throughout the country, it has been incredibly satisfying to witness the tens of thousands of people taking to the streets to stand up for the gains the civil rights movement has made to date. Droves of smart, dedicated people continue to commit themselves tirelessly to progress and what they know to be right. We look forward to supporting and encouraging you in your goals in the coming year, and appreciate your support and work with the FBA Civil Rights Section.

Wylie Stecklow
Proud FBA National Civil Rights Chair

The EEOC'S "Strategic Enforcement" Means Fewer Investigations

by Robin B. Wagner, Pitt McGehee Palmer & Rivers, PC, Royal Oak, MI

If your docket includes employment-discrimination cases, then perhaps you have begun to notice some curious changes at the EEOC—namely Right-to-Sue letters are being issued without any substantive investigation. At my law firm outside Detroit, Michigan, we have been receiving these letters within days of submitting a signed charge, when in the past, months were the norm.

Plaintiff-side attorneys place great value on the employer's position paper that the EEOC solicits as part of its investigation into a charge. We use it immediately to evaluate a case—does the employer have colorable defenses or not? Are there non-discriminatory reasons for the adverse action, and if so, are these reasons legitimate or pretext? But far more than that, the position statement is essential to achieving workplace justice for victims of discrimination. It is an admission by the defendant as to the circumstances surrounding the claimant's termination. And it is a powerful tool in litigation, as it commits a defendant early to a "reason" for the termination or other adverse employment action. We use it to craft pre-litigation approaches to settlement, and we rely on the position statement if needed to call out an employer whose reasons shift during litigation.

But even defense attorneys and corporate counsel have told us that they appreciate the opportunity to answer an EEOC charge. Many a potential lawsuit can be nipped in the bud—or at least contained in terms of damage and future risk—through an employer's early investigation.

So when we began to receive Right-to-Sue letters that were issued summarily upon receipt of an executed charge, we were deeply concerned. These letters point the finger at the Commission's "Priority Charge Handling Procedures" ('PCHP') for the reason why our charge received a summary dismissal. Would you believe the source of this disturbing trend is this 1995 unpublished Commission document, the PCHP?[1]

No? Neither did we.

So we looked for clues in the Commission's Strategic Enforcement Plan for Fiscal Years 2017-2021 ("SEP"), which was promulgated towards the end of the Obama Administration.[2] This document sets forth the guiding principles for EEOC enforcement efforts and establishes six "substantive area priorities" for enforcement through Fiscal Year 2021:

- **Eliminating Barriers in Recruitment and Hiring**: the "EEOC will focus on class-based recruitment and hiring practices" that are discriminatory. This category includes background screens, steering, exclusionary policies or practices, restrictive application procedures, screening tools, pre-employment tests. (Based on all of the protected classes: race, sex, religion, national origin, age, disability, genetic information).
- **Protecting Vulnerable Workers**: the focus here is on "job segregation, harassment, trafficking, and policies targeting immigrant and migrant workers, as well as individuals from underserved communities.
- **Addressing Selected Emerging and Developing Issues**: this allows the EEOC to develop cases and precedent in areas such as LGBT rights,[3] ADA qualification standards and inflexible leave policies, violations of the Pregnancy Discrimination Act, complex employment relationships such as staffing agencies and on-demand economy (e.g. Uber drivers) workers, and discrimination against people of Middle Eastern descent.
- **Equal Pay Act Violations**: The EEOC is not only closely examining gender based compensation discrimination under the Equal Pay Act, but is also looking at Title VII wage discrimination based on race, sex and national origin.
- **Access to the Legal System**: including overly broad waivers, arbitration provisions, significant retaliatory practices, and other trends that discourage access to the legal system
- **Preventing Systemic Harassment**: the SEP describes this in terms of a "policy, practice, or pattern of harassment," but the screening focus is on targeting issues that the Commission can remedy through holistic prevention efforts, such as training mandates for big employers. Class-based harassment under all of the statutes the Commission enforces. The EEOC is less likely to put resources into an individual harassment charge when the person is represented by competent counsel, but even in that case, if there are other harmed individuals the Commission may look deeper because of the broader public interest or because of the existence of class members.

But even this guidance document, which spells out the types of cases that will get a priority ranking under the PCHP, doesn't explain why we have been receiving Right-to-Sue letters with no investigation on cases that we believed fit into one of these priority areas.

Seeking more clarity, we spoke with an EEOC Field Office Director and learned that the reason is a confluence of three factors: the SEP, the PCHP, and a new directive from the Commission's headquarters.

Our source explained that her office is under immense pressure to reduce their inventory of charges by 12%. Roughly half of the thousands of inquiries received by a field office will result in charges being filed. And percentage of charges for which a field office is finding cause is not changing significantly despite the imposition of new pressures on the field offices to apply the priority guidance. Applying the PCHP more strictly, roughly 20 to 25 percent of charges are designated as "A" cases that are given priority attention and the highest level of investigative resources. And the "A" cases are determined by evaluating them in relationship to the six Strategic Enforcement Priorities ("SEP"). Of course, just because a charge is labeled an "A" case does not mean that it will yield a finding of cause.

The real change comes from pressure on the field offices to dust off and more strictly adhere to that 1995 PCHP. EEOC field offices have received a directive from EEOC HQ in Washington, D.C. to vigorously enforce the PCHP. Vigorous enforcement of the PCHP translates into a goal that 30% to 40% of filed charges be summarily dismissed. This directive has resulted in more early determinations that a charge on its face is self-defeating or insufficiently supported by direct or indirect evidence of discrimination.

The PCHP specifies that such charges be classified as a "C" case and then summarily dismissed. But field offices have tended in the past to restrict use of the "C" categorization for only cases that utterly fail to make out a claim on their face. Now this categorization has been expanded to claims that might yield colorable claims if investigated and otherwise facially valid claims that are not within the priorities, so as

to meet the new goals for summary dismissals.

Another practical implication of the new emphasis on vigorous enforcement of the PCHA is that the "B" cases, which under the PCHP require more investigation as resources allow, are not benefiting from investigation because of staffing shortages throughout the Commission.

Of course, a certain number of charges can always be dismissed summarily if they are untimely or otherwise facially deficient. However, what we are witnessing is the impact of this new summary-dismissal directive and the EEOC Strategic Enforcement Plan on the field offices' work. The SEP dictates specific priorities that guide the EEOC's efforts, leading to lower priority rankings being assigned to claims that are otherwise not facially deficient.

It is not clear that this triple cocktail of the directive to increase summary dismissals, combined with the SEP and stricter adherence to the 1995 PCHP, is even permissible under the laws and regulations governing the EEOC's work.

First of all, the EEOC has an unequivocal mandate to investigate sworn charges. Just this past April, the Supreme Court reiterated the Commission's mandate to investigate in no uncertain terms:

> The EEOC's responsibilities "are triggered by the filing of a specific sworn charge of discrimination," University of Pa. v. EEOC, 493 U.S. 182, 190, 110 S. Ct. 577, 107 L.Ed.2d 571 (1990), which can be filed either by the person alleging discrimination or by the EEOC itself, see § 2000e–5(b). When it receives a charge, the EEOC must first notify the employer, ibid., and must then investigate "to determine whether there is reasonable cause to believe that the charge is true," University of Pa., 493 U.S., at 190, 110 S.Ct. 577 (internal quotation marks omitted).[4]

And Title VII itself describes the EEOC investigation in mandatory language: "Whenever a charge is filed . . . the Commission shall serve a notice of the charge . . . within ten days, and shall make an investigation thereof."[5]

One somewhat useful case appears to set the "floor" for what constitutes a satisfactory investigation. This case, Newsome v. E.E.O.C., involved the denial of a writ of mandamus in the case of a woman who found the Commission's investigation unsatisfactory.[6] In Newsome, the EEOC sent a letter to the employer asking it to respond to the charge, which the employer did, and that was the extent of the investigation.[7] The Court reasoned that the EEOC was required to make an investigation, but that Title VII "does not prescribe the manner for doing so."[8] It held that since the "nature and extent of the investigation are discretionary," the charge-filer did not have a "clear right" to a mandamus.[9] In reaching this holding, the Court further reasoned that the petitioner had another remedy available—filing a federal lawsuit.[10]

The takeaway from these cases could be that seeking a response from the employer is something of a "floor" for the Commission's mandate to investigate—at least, it would be difficult to imagine the Court still holding that the EEOC had fulfilled its obligation if it hadn't done at least that minimal amount.

This inference is further supported by the regulations governing the Commission's investigations:

> The investigation of a charge **shall be made** by the Commission, its investigators, or any other representative designated by the Commission. During the course of such investigation, the Commission may utilize the services of State and local agencies which are charged with the administration of fair employment practice laws or appropriate Federal agencies, and may utilize the information gathered by such authorities or agencies. As part of each investigation, the Commission will accept any statement of position or evidence with respect to the allegations of the charge which the person claiming to be aggrieved, the person making the charge on behalf of such person, if any, or the respondent wishes to submit.[11]

Admittedly, this regulation is permissive in terms of what the agency may do in the course of its investigation, but the overwhelming emphasis on the scope of the agency's investigative powers only underscores the fact that its core job is to investigate.

Particularly when a charge facially states a claim, it appears that the EEOC must not dismiss without something more than a review of the charge. The regulation governing dismissal of charges states:

> Where a charge on its face, or as amplified by the statements of the person claiming to be aggrieved discloses, or where after investigation the Commission determines, that the charge and every portion thereof is not timely filed, or otherwise fails to state a claim under title VII, the ADA, or GINA, the Commission shall dismiss the charge.[12]

This statement can be understood to require an investigation, unless there is no facial charge of discrimination under one of the EEOC's statutes or the charge is otherwise facially deficient. Moreover, a "no cause" determination may only be made after an investigation is completed:

> Where the Commission completes its investigation of a charge and finds that there is not reasonable cause to believe that an unlawful employment practice has occurred or is occurring as to all issues addressed in the determination, the Commission shall issue a letter of determination to all parties to the charge indicating the finding.[13]

Even though the regulations and caselaw strongly suggest that an investigation of some sort must take place, it appears that currently, if the charge does not allow the investigator to immediately zero-in on one of the above priorities, the EEOC is simply notifying the employer of the charge and issuing a right-to-sue letter. Indeed, EEOC headquarters have instructed field offices, pursuant to the PCHP, not to seek position statements for claims they assess to be "C" cases.

Crafting a challenge to the Commission's current policies regarding its mandate to investigate may be a move to consider. But it is also important to keep in mind that the SEP, an Obama-era invention, combined with concerns under the current administration of government shut-downs, hiring freezes and defunding, are forcing the

field offices to take these approaches.

A few suggestions on how to effectively represent clients before the EEOC.

- First, draft charges with a sharp eye towards the SEP to ensure that the charge will survive the initial screen.
- Second the Commission's most serious focus, as explained in the SEP, is on the so-called "systemic" cases; therefore, it is important to highlight for the Commission cases that have a potential class of similarly situated claimants.
- Also, in light of the short-staffed EEOC investigative teams, it is beneficial to file a supplemental sheet with the charge to provide richer details on the relationship to that priority, such as known comparatives and the identity of witnesses and decision makers. This EEOC Intake Questionnaire collects beneficial information, even when the claimant is represented by counsel.
- Check with your field office director, who may be open to discussing a particular case with you before the Right-to-Sue letter is issued.

Additionally, the Commission is looking closely at cases that have strategic impact, that is: cases involving facially discriminatory policy, multiple charges against the same respondent on the same issues, charges with plausible class impact and charges that develop the law.

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Endnotes

[1]According to the 1995 PCHP, which we obtained from the EEOC Detroit Field Office, the procedures laid out in this document were adopted in April of 1995 to address a growing backlog of cases. The EEOC developed a three-tiered priority system to classify all charges. "A" charges receive priority treatment because they are charges in which it appears "more likely than not" that discrimination occurs; "B" charges require more information and are to be investigated as resources permit; and "C" charges are summarily dismissed for a facial failure to state a claim.

[2]Available at https://www.eeoc.gov/eeoc/plan/sep-2017.cfm.

[3]At the time this article was written, the Department of Justice had just filed an amicus brief in a Second Circuit case to reverse the DOJ and EEOC's prior stance on LGBT employment discrimination and instead argue that Title VII does not cover discrimination on the basis of sexual orientation. (available at https://www.nytimes.com/interactive/2017/07/27/nyregion/gay-rights-justice-department.html). The EEOC has not at this point changed its stance on the topic.

[4]*McLane Co. v. E.E.O.C.*, 137 S. Ct. 1159, 1164, 197 L. Ed. 2d 500 (2017), *as revised* (Apr. 3, 2017) (emphasis added).

[5]42 U.S.C. § 2000e-5(b) (emphasis added).

[6]*Newsome v. E.E.O.C.*, 301 F.3d 227 (5th Cir. 2002).

[7]*Id.* at 229-30.

[8]*Id.* at 231.

[9]*Id.* (quoting *E.E.O.C. v. Keco Industries, Inc.,* 748 F.2d 1097, 1100 (6th Cir.1984)).

[10]*Id.*

[11]29 C.F.R. § 1601.15(a) (emphasis added).

[12]29 C.F.R. § 1601.18(a).

[13]29 C.F.R. § 1601.19(a).

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ments LLC et al. v. City of Yuma, Arizona, 818 F.3d 493, (9th Cir. Ariz. 2016), on remand, denial of city's motion for summary judgment, 2:09-cv-00297 JWS (May 1, 2017)

[6]Texas Department of Housing and Community Affairs et al. v. Inclusive Communities Project Inc. et al., 576 U.S. ___, 135 S.Ct. 2507 (2015).

[7]MHANY Mgmt. Inc. v. City of Nassau et al., 819 F.3d 581 (2d Cir. 2016).

[8]Pacific Shores Properties v. City of Newport Beach, 730 F.3d 1142 (9th Cir. 2013), cert den. ____ U.S. ____ (Nov. 3, 2014).

[9]Gilead Community Services, Inc. et al. v. Town of Cromwell et al., No. 3:17-cv-627 (filed April 17, 2017).

[10]Joint Statement of the Department of Housing and Urban Development and the Department of Justice, "State and Local Land Use Laws and Practices and the Application of the Fair Housing Act," (November 16, 2016) available at https://www.justice.gov/crt/page/file/909956/download.

[11]Pratt, Sara and Allen, Michael, Addressing Community Opposition to Affordable Housing: A Fair Housing Toolkit, available at www.fhcsp.com/Links/toolkit.pdf; PolicyLink, Equity Resources Affordable Housing Toolkit, available at http://www.policylink.org/equity-tools/equitable-development-toolkit/affordable-housing, Metropolitan Area Planning Council, Fair Housing Toolkit available at http://www.mapc.org/fair-housing-toolkit. Allen, Michael, Why Not in Our Backyard? Planning Commissioners Journal No. 45.

http://www.fairhousing.com/include/media/pdf/Why-Not-In-Our-Back-Yard.pdf.

Human Trafficking Report Released in Ohio

by Diane Citrino, Giffen & Kaminski, Cleveland, OH

The trafficking of persons is described by many as a "modern or Twenty-First Century form of slavery." Human trafficking generally is divided into two categories based on the form of compelled services the victim provides: sex trafficking or labor trafficking. Both forms involve the exploitation of a person for commercial activity through force, fraud, or coercion.

Ohio, by some measures, is one of the five worst states in the nation for human trafficking. The Ohio Advisory Committee to the U.S. Commission on Civil Rights (Committee)* has released a report following a series of panel discussions on civil rights and human trafficking in Ohio. The Committee examined the civil rights impact of human trafficking in Ohio; including the impact of human trafficking on individuals and communities targeted because of their race, color, age, sex, religion, national origin, or disability.

The Committee heard testimony from law enforcement officials, government officials, academic experts, legal professionals, community leaders, advocates, and trafficking survivors. Through this testimony, the Committee identified a number of concerns, including: the continued perception or treatment of trafficking victims as criminals; insufficient mental health supports to address the psychological impact of trauma associated with trafficking; insufficient or incomplete data collection; insufficient legal protection for children involved in sex trafficking; and a lack of public awareness and cooperation between law enforcement and community groups to most effectively identify victims and connect them with the appropriate support services. The Committee also formulated a number of recommendations which may help to remedy some of these concerns moving forward.

The full report can be viewed at: http://www.usccr.gov/pubs/06-15-Human-Trafficking-and-Civil-Rights-Ohio.pdf

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*The U.S. Commission on Civil Rights is an independent, bipartisan agency charged with studying and advising the President and Congress on civil rights matters and issuing an annual federal civil rights enforcement report. Advisory Committees to the Commission conduct reviews and produce reports and recommendations concerning state and local civil rights issues.