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April 9, 2019

Bernadette B. Wilson
Executive Officer, Executive Secretariat
U.S. Equal Employment Opportunity Commission
131 M Street NE
Washington, DC 20507

RE: Notice of Proposed Rule Making (NPRM) 2019-01976, RIN 3046–AA97

Dear Ms. Wilson:

I am writing in connection with the February 14, 2019, Notice of Proposed Rule Making, referenced above.

The late June Kalijarvi founded the firm now known as Kalijarvi, Chuzi, Newman & Fitch (KCNF) over 40 years ago. Since its inception, KCNF has helped employers and employees solve their employment law matters. We serve clients from the Washington, D.C., area, as well as from across the nation and around the world. Our Washington, D.C., employment law attorneys are highly skilled and respected, and a number of our lawyers have received an AV-Preeminent rating from Martindale-Hubbell, the highest rating available. We represent employers and employees in both the federal and private sectors, including matters such as counseling, litigation, investigations, employee manuals and training sessions, and employee claims of discrimination, retaliation, whistleblower protection and hostile work environments.

In particular, KCNF partners June Kalijarvi and George Chuzi represented Barbara Loe in *Loe v. Heckler*, 768 F.2d 409 (D.C. Cir. 1985) (Ginsburg, J.). There, the Court held that Loe had been, "exposed to bureaucratic routing Byzantine in design, and utterly lacking in the perspective Congress intended for agency implementation of equal employment opportunity legislation."

Our experience leads us to offer the following comments that may be helpful to the Commission in drafting the final revisions to 29 CFR § 1614.407.

The primary issue concerns the EEOC's proposal to revise § 1614.407, which governs the time limit in which a Complainant who has appealed to the Commission's Office of Federal Operations (OFO) can pursue a civil action. The EEOC has proposed the revision in order "to recognize that filing an administrative appeal or a request for reconsideration is an optional administrative step, and that an administrative appeal or a request for reconsideration may be withdrawn without affecting the complainant's right to file a civil action." 84 Fed. Reg. 4016 (Feb. 14, 2019).

Towards this end, the NPRM proposes two changes to its regulations:

> The Commission can achieve this result through its proposed revisions to paragraphs (a) and (b) of 1614.407 (*i.e.*, deleting the words ''if no appeal has been filed'' from current paragraph (a), and ''if an appeal has not been filed'' from current paragraph (b)). Additionally, section 717(c) of Title VII, 42 U.S.C. 2000e–16(c), provides that a complainant who wants to file a civil action after receiving notice of an agency's final action must do so within 90 days. Thus, we agree that proposed 1614.407(e) should be revised to clarify that a complainant who has filed an appeal can withdraw it and proceed to court so long as the complainant does so within 90 days of receipt of an agency final action.

*Id.* at 4017.

We are concerned that the EEOC's proposed amendment will make EEO proceedings even more Byzantine – when it would be simple to streamline the process to foster resolution of Civil Rights claims on their merits and fulfilling the remedial purpose of the law. The result is an unnecessary period following the filing of an appeal during which a federal sector Civil Rights claimant cannot file a civil action. We do not read 42 USC § 2000e-16(c) to require such a period.

The statute at issue, 42 USC § 2000e-16(c), uses disjunctive language to create multiple options for claimants to file in federal court:

> (c) **Civil action by employee or applicant for employment for redress of grievances; time for bringing of action; head of department, agency, or unit as defendant**
>
> Within 90 days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection (a), or by the Equal Employment Opportunity Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex or national origin, brought pursuant to subsection (a) of this section, Executive Order 11478 or any succeeding Executive orders, or after one hundred and eighty days from the filing of the initial charge with the department, agency, or unit or with the Equal Employment Opportunity Commission on appeal from a decision or order of such department, agency, or unit until such time as final action may be taken by a department, agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 2000e–5 of this title, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

This statute provides for a 180-day period for the completion of Agency processing. If the Agency makes a timely and final decision within this time, then the claimant will have a 90-day period in which to file a civil action in federal court. Of course, the complainant could also appeal the Final Agency Decision (FAD) to OFO. The status of the complainant's right to appeal at this point could be

resolved by appreciating how this timely administrative appeal deprives the FAD of its finality and tolls the 90-day period for the complainant to initiate a civil action in federal court.

On this point, *Loe v. Heckler*, 768 F.2d 409, 420 (D.C. Cir. 1985), can be helpful. Barbara Loe had prevailed in claims of race, national origin and age discrimination. She received reinstatement and other relief, including priority consideration for promotions for a one-year period. Contending that the Agency had failed on this obligation, Loe commenced a civil action. The district court dismissed that action on exhaustion and timeliness grounds. In addressing these issues, the Court stated:

> So long as the employer 1) was on notice that its actions allegedly violated Title VII, and 2) has been afforded an adequate opportunity to pursue a mutually satisfactory resolution with the employee, no purpose would be served by demanding a stream of further administrative pleadings ….
>
> When … the initial charge and other documents achieve the ends of the exhaustion requirement, no more may be asked if the "wholesome objective" of antidiscrimination legislation is to be served. *President v. Vance,* 627 F.2d [353] at 363 [(D.C. Cir. 1980)].

The Agency then claimed that the then 30-day period for Loe's civil action commenced with a February 1, 1977, FAD that granted relief to Loe's claim that the priority period should be extended. Loe did not appeal that decision, but waited until the Agency later determined that it had complied with its obligations and this Commission affirmed that finding. The Agency argued that these subsequent actions by the Commission were denials of requests to reopen the case, and not final actions in themselves. The Court held this filing was timely because, "Title VII does not mandate preemptive strikes as a precondition to judicial oversight of subsequent misconduct." *Id*. at 421. Loe prevailed because the relief she sought "harmonizes with the policy of finality." *Id*.

Similarly, whenever a claimant files a timely appeal to this Commission from a FAD, that FAD loses its finality. The 90-day period to file a civil action is tolled until finality is restored. The statute's clause about filing an initial charge with the EEOC "on appeal from a" FAD does nothing to detract from the clause about filing the initial charge with the agency. The claimant should preserve the right to file in federal court until the 90th day after the Commission's final decision. If a claimant were to file a civil action at any time before the Commission's final action, that filing should constitute a a self-effectuating withdrawal of the appeal restoring finality to the FAD and making the civil action timely.

The EEOC's comment reads as if the Commission is supporting the 9th Circuit's reinstatement of a case when the request for a hearing is withdrawn, and the civil action is filed within the 90 days after a FAD. That part is nice and permissive. The NPRM, at 4106, says, "[t]he court noted that it had 'no occasion to decide whether an employee's lawsuit could proceed if the employee prematurely withdrew from an administrative appeal and filed suit more than 90 days after receiving notice of the final agency action on her complaint.' *Id*. at 619[.]" Quoting *Bullock v. Berrien*, 688 F.3d 613, 619 (9th Cir. 2012).

Adopting that logic, the NPRM has proposed § 1614.407(e) and (f):

> (e) … If the complainant, class agent, or class claimant files an appeal with the EEOC from a final agency action and more than 90 days have passed since receipt of the agency final action, the appellant may file a civil action only in accordance with paragraphs (c) or (d) of this section.
>
> (f) … If the complainant, class agent, or class claimant files a request for reconsideration of an EEOC decision on an appeal and more than 90 days have passed since the appellant received the EEOC's decision on the appeal, the appellant may file a civil action only in accordance with paragraphs (c) or (d) of this section.

The end result here would be staggered periods in which a civil action could or could not be filed. They add complexity to the Byzantine process. After an appeal is filed to OFO, there is no purpose served by permitting a claimant to file a civil action on the 89th day after the FAD, but not on the 91st day. Once the OFO appeal is filed, the FAD is no longer final, or even operative. The claimant has preserved his or her claims, and filing the civil action will not interfere with OFO's consideration. Instead, it will relieve OFO of that one case and permit OFO to resolve other cases sooner.

We know from the Commission's interpretation of Title VII that an appeal from a FAD tolls the time limit in which the Complainant must file a civil action. (Hence, the current §§ 1614.407 (a) and (b).) We also know from the Commission's adoption of *Nordell v. Heckler*, 749 F.2d 47 (D.C. Cir. 1984), that a timely filed reconsideration request to the Commission from an OFO decision also tolls the 90-day deadline in which the Complainant would otherwise have to file a civil action after the FAD.

The question is why the Commission simply doesn't provide that a Complainant's withdrawal of a timely filed appeal or reconsideration request constitutes a final administrative decision on the complaint for purposes of the 90-day deadline in which to pursue a civil action? This would have the benefit of removing questions regarding whether an appeal or reconsideration request has been pending for 89, 90, or 91 days, and simply allow the parties (and the Commmission) to know that the administrative process has ended. It would also have the benefit of removing any period, after an appeal or reconsideration request is timely filed, during which a Complainant is precluded from filing a civil action.

This Commission can further the remedial purpose of Title VII by making explicit how an OFO appeal vitiates the finality of the Agency's FAD and creates a continuous period from the 180th day after the formal complaint to the 90th day after a truly final decision.

Title VII's prohibitions against discrimination undoubtedly "reflect an important national policy," *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 716 (1983), because of "society's consensus that discrimination ... is a profound wrong of tragic dimension," *Patterson v. McLean Credit Union*, 491 U.S. 164, 188 (1989). To effectuate Title VII's broad, nationally important remedial purposes, the Supreme Court has cautioned against issuing opinions that "signal[ ] one inch of retreat from Congress' policy to forbid discrimination in the private, as well as the public, sphere." *Id.*

The Supreme Court has held that Title VII cannot be applied literally. Instead, we must read it with an eye towards its remedial purpose. In *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 397, 71 L. Ed. 2d 234, 102 S. Ct. 1127 (1982), the Court stated:

> In *Love v. Pullman Co.*, 404 U. S. 522 (1972), we announced a guiding principle for construing the provisions of Title VII. Declining to read literally another filing provision of Title VII, we explained that a technical reading would be "particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process." *Id.* at 404 U. S. 527. That principle must be applied here as well.

In *Bowden v. United States*, 106 F.3d 433, 439 (D.C. Cir. 1997), the Court stated:

> What we have repeatedly stated regarding Title VII exhaustion requirements applies here as well: They are " 'practical and pragmatic' ... and should not be invoked when [they] serve[ ] no practical purpose." *Wilson* [*v. Pena*], 79 F.3d [154] at 165 [(D.C.Cir. 1996)] (quoting *Brown* [*v. Marsh*], 777 F.2d [8] at 14 [(D.C.Cir. 1985)] (quoting *President v. Vance*, 627 F.2d 353, 363 (D.C.Cir. 1980))).

Eliminating discrimination and retaliation in the federal sector is a particularly important public policy. Compare 42 U.S.C. § 2000e-2(a)(1) (for the private sector) and 42 U.S.C. §2000e-16(a) (for the federal sector, saying all federal sector personnel actions "shall be made free from any discrimination").

As a practical matter, the NPRM provides no explanation of how the staggered periods would further the remedial purposes of Title VII. They will not. Instead, they add potential traps that may justify dismissal of a Civil Rights claim on purely technical grounds of timing. See, for example, *DeBacker v. F.B.I.*, No. 1:12CV9, 2013 WL 1148569, 2013 U.S. Dist. LEXIS 37858, at *6 (N.D.W. Va. Mar. 19, 2013) (*pro se* plaintiff's complaint dismissed without prejudice when it was filed on the 142nd day after the OFO appeal). The remedial purpose of Title VII is furthered by making the process simpler and permissive, and by avoiding dismissals on technicalities.

Dismissals of civil actions are particularly ironic when the claimant could just wait until the 180th day after filing an appeal to OFO, for example, and then file a timely civil action. There is no practical benefit to dismissal of a civil action that is filed in that period between the 91st day after the FAD and the 180th day after appealing to OFO. If a claimant wants to go to federal court, the Commission should be pleased to have one less case to adjudicate, and should support the claimant in seeking adjudication of the claims on the merits in federal court. Any other stance would push against the remedial purposes of Civil Rights laws.

To fulfill the remedial purpose of Title VII, here is what 29 CFR 1614.407 should say:

> (a) A complainant who has filed an individual complaint, an agent who has filed a class complaint or a claimant who has filed a claim for individual relief pursuant to a class complaint is authorized under Title VII, the ADEA the Rehabilitation Act and the Genetic Information Nondiscrimination Act to file a civil action in an appropriate United

States District Court on any date beginning with the 180th day after filing a formal complaint to the 90th day after the final adjudication of the claim. A final agency decision is not the final adjudication of the claim if any party has filed a timely appeal to the Commission. A decision by the Commission is not a final adjudication of the claim if any party has filed a timely request for reconsideration.

(b) A Complainant may withdraw a timely filed appeal to OFO or a timely filed reconsideration request to the Commission at any time. Such withdrawal must be made in writing to the Commission, and constitutes final administrative action on the complaint within the meaning of Title VII, 42 U.S.C. §2000e-16(c).

We ask the Commission to adopt this simple and permissive interpretation of 42 USC 2000e-16(c) and use the text in the preceding paragraphs instead of the text in the NPRM. If there is any way that our firm can be helpful in your consideration of this matter, you are welcome to call on us.

Sincerely,

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