ON THE LEGAL FRONT

EEO Enforcement Activity in 2007: A Sign of Things to Come?

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This column reviews equal employment opportunity (EEO) enforcement activity from fiscal year (FY) 2007. The agencies most relevant to the I-O psychologist are the Equal Employment Opportunity Commission (EEOC) and the Office of Federal Contract Compliance Programs (OFCCP). Both of these agencies made headlines due to their enforcement efforts and the corresponding financial consequences of those efforts in FY 2007. Both agencies make general enforcement information publicly available on their Web sites, although the level of detail differs by agency.[1]

The EEOC made headlines on two fronts. First, the number of discrimination charges made to the EEOC increased dramatically in FY 2007 as compared with charges made in FY 2006. The charge increase occurred across most statutes. Second, in FY 2007 the EEOC recovered $345 million in litigation and nonlitigious merit resolution for victims of employment discrimination. The EEOC continued to eliminate frivolous cases and focus on strong cases, as evidenced by an impressive percentage (23%) of cases resulting in what the EEOC considers to be "merit" resolutions.[2] For its part, the OFCCP also had an active year of enforcement in FY 2007, garnering just under $52 million for victims of discrimination. This number also included a combination of litigation and nonlitigious merit resolutions.

The EEOC enforces Title VII, the Americans with Disabilities Act (ADA), the Age Discrimination in Employment Act (ADEA), and the Equal Pay Act (EPA), with the majority of activity under Title VII. The OFCCP enforces Executive Order 11246, Section 503 of the Rehabilitation Act of 1973 and the Vietnam Era Veterans' Readjustment Assistance Act of 1974, with the majority of the activity under the Executive Order. Intuitively, it makes sense that Title VII is the most used statute that the EEOC enforces given that it protects the largest number of groups and covers the broadest set of employment actions. The FY 2007 statistics support this notion. Executive Order 11246 mirrors Title

[1] For example, see www.eeoc.gov/stats/charges.html and www.dol.gov/esa/ofccp/enforc07.pdf.
[2] According to the EEOC Web site, a merit resolution is defined as "Charges with outcomes favorable to charging parties and/or charges with meritorious allegations. These include negotiated settlements, withdrawals with benefits, successful conciliations, and unsuccessful conciliations."

VII in protected classes and also covers a fairly wide range of employment decisions (i.e., hiring, promotion, termination, compensation, etc.). However, the Executive Order is narrower than Title VII in that it covers federal contractors, and enforcement is *proactive* and *audit-based* instead of *claim-based* like Title VII. Although the OFCCP did not publish enforcement activity differences across statute/executive order in FY 2007, it seems reasonable to assume that the majority of activity was under the Executive Order for the same reasons that Title VII is the most used statute enforced by the EEOC.

EEOC Enforcement Activity

Table 1 shows some interesting EEOC charge statistics from FY 2005, 2006, and 2007, as well as the percentage increase in charges from 2006 to 2007. Note that the number of charges stayed about the same when comparing FY 2005 with FY 2006.[3] This was not the case in FY 2007, where the total number of charges grew by 9%. This increase is substantial based on historical EEOC data, and perhaps even more interesting is the fact that there were charge increases across just about every statute.[4] For example, in FY 2007, race, national origin, disability, and age discrimination charges all increased by at least 13% as with compared with charges in FY 2006. In addition, sex discrimination charges increased by 7%. Less frequent charges of pregnancy and religious discrimination both increased by more than 10%. Retaliation charges under Title VII (19%) and across multiple statutes (18%) had the sharpest increase in charges in 2007 as compared with FY 2006. In fact, retaliation became the second most frequent charge after race discrimination in FY 2007.

Why were charges of discrimination more frequent in 2007? Unfortunately, the EEOC doesn't provide detailed insight into the possible explanations behind this increase. Of course, there could be a number of explanations. Obviously, employers could be discriminating more often. This appears to be one reasonable explanation to the EEOC, as Chair Earp suggested in a press release that "Corporate America needs to do a better job of proactively preventing discrimination and addressing complaints promptly and effectively."

In addition, charges may have increased because employees are more aware of their equal employment protections and perhaps of the monetary consequences of discrimination charges. In addition, more efficient internal grievance mechanisms and clearer lines of communication to the EEOC may also factor into the increase in charges. Perhaps even the economic context of a potential recession has led to substantially more negative employment outcomes (i.e., layoffs, small raises, no promotions, etc.), which may be attributed to discriminatory causes.

[3] See Zink & Gutman (2005) for a review of EEOC charge statistics from 1992–2003. The authors note that charges had been on the decline before leveling off earlier in the decade.

[4] The general exception to this finding was for the Equal Pay Act, which has been declining in frequency of use, likely because Title VII has been a broader and more attractive statute for pay-discrimination charges, particularly from a monetary benefits perspective.

Table 1: *Some EEOC Charge Statistics in FY 2005–2007*

Charges	2005	2006	2007	% Change from 2006 to 2007
Total[5]	75,428	75,768	82,792	9%
Race	26,740	27,238	30,510	12%
National origin	8,035	8,327	9,396	13%
Age	16,585	16,548	19,103	15%
Disability	14,893	15,575	17,734	14%
Sex	23,094	23,247	24,826	7%
Pregnancy	4,730	4,901	5,587	14%
Religion	2,340	2,541	2,880	13%
Retaliation-all statutes	22,278	22,555	26,663	18%
Retaliation-Title VII only	19,429	19,560	23,371	19%

One of the most interesting findings relates to the large increase in employer retaliation charges. This column spent substantial space on that topic in 2007, particularly with regard to the *BNSF v. White* Supreme Court ruling and potential implications. Recall that this ruling advocated a potentially "lighter" definition of actionable employer behavior in the retaliatory context. This case also received substantial treatment in the popular press, and as such perhaps retaliation charges increased because charging parties and plaintiff lawyers are more aware of retaliatory protection and perceive that these charges are easier to win post-*BNSF*.[6]

However, to understand the relation between the *BNSF v. White* ruling and the number of retaliation charges in FY 2007, one may have to compare the employer actions that are charged to be retaliatory both before and after the ruling. Recall that prior to the ruling the EEOC suggested that the vast majority of retaliation charges focused on more "ultimate" employment outcomes with clear financial consequences like termination, demotion, and negative performance appraisal. If the *BNSF v. White* ruling is the explanation for increased retaliation charges, then "ultimate" employment outcomes may now be less frequent in retaliation claims as compared to the "reasonably likely to deter" employer behaviors. In other words, perhaps slight changes to work schedules, false accusations, and aggregates of multiple smaller individual

[5] Note that due to space constraints not all charges in FY 2007 were included in this table, and thus, the total number of charges is not the sum of other charges presented in the table. Please refer to the EEOC Web site for comprehensive numbers.

[6] In 2007 this column provided various rationales for why retaliation charges may not increase in light of the *BNSF v. White* ruling (see Dunleavy, 2007). In addition, it was suggested and later supported via a case law review (Gutman, 2007) that retaliation charges were probably not easier to win in light of the ruling, primarily because the plaintiff must still prove a causal nexus between the protected activity and employer behavior, and the employer has the final burden to prove that the action was not retaliatory in nature.

retaliatory actions are more frequently cited in charges in 2007 than in the past because the Supreme Court advocated this definition of adverse retaliatory action in *BNSF v. White*. Of course, this is an empirical question.

Table 2 presents resolutions from EEOC litigation and other resolution processes. As the table shows, the EEOC continues to be very efficient in producing merit resolutions, both in and out of court. In fact, the EEOC reported obtaining a merit resolution for 23% of charges before litigation. Of the small number of charges that went to litigation, over 90% produced positive outcomes from the EEOC perspective, and this produced over $54 million in monetary benefits. Additionally, the number of charges that ended up in litigation actually decreased in both 2006 and 2007, while the financial remedies collected outside of litigation have increased substantially since 2005, up to over $290 million in FY 2007. Thus, over 80% of the monetary benefits collected by the EEOC came from outside litigation in FY 2007. This is a clear reminder that litigation isn't the goal of the EEOC. In other words, producing merit resolutions without expending the time and monetary resources necessary for litigation is viewed as a positive outcome.

Table 2: *EEOC Litigation and Resolutions in FY 2005–2007*

	2005	2006	2007
Litigation resolutions			
All suits filed [7]	416	403	362
Merit suits	381	371	336
Title VII	295	294	268
ADA	49	42	46
ADEA	44	50	32
Monetary benefits (millions)	$104.8	$44.3	$54.8
Nonlitigious resolutions			
Merit resolutions	16,614	16,510	16,598
% total charges	21.5%	22.2%	22.9%
Monetary benefits (millions)	$271.6	$229.9	$290.6

OFCCP Enforcement Activity

The OFCCP also had an active year of enforcement in 2007. Table 3 summarizes OFCCP activity and financial remedies from FY 2005 to 2007. However, OFCCP summary data are less detailed than the summary information provided by the EEOC. Regardless, we do know that the OFCCP conducted just fewer than 5,000 audits of federal contractors required to submit affirmative action plans under Executive Order 11246. Specific federal contractor locations are selected for an audit using an algorithm that ranks and prioritizes locations based upon the likelihood that discrimination will be uncov-

[7] Once again, not all types of cases are presented due to space constraints, and as such frequencies do not sum to the total number of suits filed.

ered. This activity resulted in just under $52 million in back pay and annualized salary and benefits for just over 22,000 victims of discrimination.[8] Of this $52 million, more than $18 million was recovered from litigation referred to the Department of Labor's Office of Solicitor. This financial remedy from litigation is a substantial increase compared with recent years (e.g., over $6 million in 2005 and just over $15 million in 2006). Thus, in contrast to EEOC, OFCCP enforcement may be moving toward more litigation.[9]

Unfortunately, OFCCP enforcement information is not as transparent as EEOC information. For example, exact remedies for each particular statute/executive order are not available. Importantly, the OFCCP stressed that 98% of the monetary benefit was collected in cases of "systemic" discrimination where a group of workers or applicants were victims of discrimination stemming from an employment practice. This rationale is consistent with the data requirements of the executive order, which include applicant flow data for the analysis of hiring, termination, and promotion systems. Anecdotally, it is reasonable to assume that a majority of monetary benefits stemmed from OFCCP investigations into hiring practices. In addition, it is also reasonable to assume that record-keeping violations are a common outcome of audit investigations.

Table 3: *OFCCP Enforcement Activity and Financial Remedies in FY 2005–2007*

	2005	2006	2007
Compliance evaluations	2,730	3,975	4,923
Victims represented	14,761	15,273	22,251
Monetary benefits[10] (in millions)	$45.2	$51.5	$51.7
Monetary benefits from litigation (in millions)	$6.3	$15.1	$18.1

EEO Enforcement and Employee Selection

So is employee selection a focus in any of this enforcement activity? Unfortunately, neither enforcement agency has published activity specifically related to selection. However, anecdotal evidence suggests that selection is on the radar of both agencies. This is not surprising given recent initiatives at both agencies to eliminate "systemic" discrimination that affects a large group of people via employment practices and policy. Both intentional (e.g., pattern or practice) and unintentional (e.g., adverse impact) theories of discrimination fall into the general category of "systemic."

At the National Conference on Equal Employment Opportunity Law in March, EEOC General Counsel Ronald Cooper confirmed that the agency is taking a greater interest in selection/testing. He suggested that this strategy is

[8] Note that, compared with 2006, the OFCCP collected about the same amount of monetary benefit for victims of discrimination in 2007, but for an additional 7,000 victims.

[9] Given that the actual number of DOL cases that went before an administrative law judge (ALJ) is unknown, perhaps it is more accurate to say that OFCCP may be moving toward increased monetary benefits received from litigation and not necessarily more DOL litigation.

[10] In this context monetary benefits refer to back pay and annualized salary and benefits.

consistent with "the systemic litigation initiative focuses on neutral employment practices that can have a widespread, discriminatory impact on protected groups." He also mentioned that the EEOC received "about twice as many charges alleging unlawful discrimination based on tests and other selection devices in fiscal 2007 as it had in 2002."

Dr. Rich Tonowski, EEOC's chief psychologist, provided background on these issues for this article. Regarding the spike in discrimination claims in 2007, he mentioned that the EEOC is planning to investigate some of the potential explanations for the increase in the next few months, but there were no clear explanations as of yet. He did reiterate that systemic discrimination is a real focus at the Commission right now and that selection and testing fall into that category. Dr. Tonowski also pointed out that testing is still a relatively low frequency element of discrimination claims and that there are many other forms of systemic discrimination that are more intentional in nature.

In addition, Rich suggested that recent testing claims have generally been dealing with more "common sense" issues than concerns about what level of validity evidence is "valid enough." Rich suggested that there is a real interest in searching for reasonable alternatives, particularly in situations where a selection procedure produces heavy adverse impact and was validated and implemented many years ago. As expected, Rich confirmed that there are no plans to update the *Uniform Guidelines on Employee Selection Procedures* (*UGESP*). The OFCCP and EEOC are certainly on the same page concerning this issue.

A recent focus on selection procedures by the OFCCP was mentioned during numerous presentations at the most recent SIOP conference in San Francisco. Those discussions (and anecdotal evidence on our end) suggest that the OFCCP has been strict in evaluating the validity evidence of selection procedures after adverse impact has been identified in a compliance audit. For example, some selection procedures may appear to have adequate criterion-related validity evidence based on the technical standards for a criterion-related validity study under the *UGESP*[11], but aren't quite "valid enough" in the eyes of the OFCCP.

In particular, the OFCCP has focused on the magnitude of bivariate correlations, requiring that the pattern of correlation coefficients is greater than or equal to .30 in order to demonstrate practical significance.[12] In situations where a content validity strategy has been used, the OFCCP has been particularly focused on evidence that each item on a selection procedure is linked to the test construct of interest via a "test blueprint."

[11] The OFCCP enforces the *UGESP* as law.

[12] This criterion appears to be used regardless of the statistical significance of validity coefficients. Although statistical significance is obviously not a synonym for adequate evidence of validity and can be abused via "overpowering" a statistical test and/or capitalizing on chance, the *UGESP* do provide guidance on interpreting statistical significance tests. The *UGESP* do not mention an "$r = .30$" practical significance rule of thumb. See Aamodt, 2007 for an interesting review of this issue. Additionally, it can be argued that bivariate rules of thumb minimize the notions of incremental variance accounted for and predictor utility in the financial sense.

Conclusion

As this article has demonstrated, EEO enforcement activity has increased in scope and consequence for both the EEOC and OFCCP in FY 2007. Both agencies increased their workload in 2007, and their efforts produced a substantial amount of monetary benefits for victims of discrimination in addition to unspecified injunctive relief. Will this trend continue? This is a difficult question to answer given no clear explanation for why the 2007 numbers increased. Having said that, we can say that both agencies appear to be staying busy in FY 2008.

For example, both the EEOC and OFCCP publicized a number of "show-stopping" settlements early in FY 2008. For example, the EEOC publicized a $24 million settlement with Walgreens and a $2.5 million settlement with Lockheed Martin. The OFCCP has announced a $1.5 million settlement with Vought in a testing case.

Thus, there is anecdotal evidence that the increased interest in selection cases will continue, particularly given the systemic initiatives of both agencies.

There is one final point to consider in differentiating the EEOC enforcement context from the OFCCP context. If the EEOC challenges a test or selection procedure, the employer has the right to disagree and meet the Commission (and the plaintiffs) in court. There is no penalty or remedy unless and until imposed by a court. On the other hand, based on Executive Order 11246, the OFFCP is free to impose penalties prior to judicial action, including fines, affected class rulings, and even disbarment. The employer must then appeal for a hearing before an administrative law judge (ALJ) and upon losing appeal to the Secretary of Labor. If these appeals fail, the employer may then attempt to prove innocence in federal court. In short, the system is such that very many EEOC charges go to trial in comparison to very few OFCCP judgments. Thus, it is possible for a ruling that a court might reject if brought by the EEOC would never receive judicial consideration if brought by the OFCCP because the OFCCP process under the executive order generally discourages judicial review.

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