

## **THIRD CIRCUIT DECIDES THAT EEOC LETTERS ARE NOT AUTOMATICALLY ADMISSIBLE AT TRIAL**

by [Jay Barry Harris](#)

The “automatic” admission into evidence of EEOC letters of discrimination has always been a bone of contention in employment discrimination lawsuits. Being able to tell a jury that the US Equal Employment Opportunity Commission investigated and found reasonable cause to believe that discrimination occurred can be a critical component of any plaintiff’s case. Recently, the Court of Appeals for the Third Circuit joined the majority of Circuits in holding that the EEOC letters of discrimination are not automatically admissible. At present, only the Fifth and Ninth Circuits have held that, absent proof of their unreliability (under F.R.C.P. 808), the EEOC letters are automatically admissible.

The Third Circuit addressed this issue in Coleman v. Home Depot, 306 F.2d 1333 (3<sup>rd</sup> Cir. 2002) which involved a claim by Mary Coleman that she was treated differently because she was an older African-American woman. Instead of hiring her for a sales position, Coleman claimed that Home Depot ignored her experience in hardware, plumbing, lumber, paint and electrical sales and hired her as a cashier. Coleman lasted six months before she was terminated. During that time, she received nine written warnings about her poor job performance because of shortages and overages in her register. Ultimately, Coleman was fired after a customer called the store complaining that Coleman shortchanged him \$10.

After her firing, Coleman filed a complaint with the EEOC alleging race, sex and age discrimination. The EEOC conducted an investigation and issued a letter of determination stating that “reasonable cause” existed to believe that Home Depot discriminated against Coleman because of her sex and race. Based upon its investigation, the EEOC concluded that Home Depot routinely hired women as cashiers while men with similar or less experience were hired for better-paying sales positions. During her employment, Coleman applied for transfer to sales position and was refused. The EEOC concluded that Coleman was a victim of this policy because Home Depot never honored her request despite her “high experience in hardware and other sales areas.” The EEOC attributed problems with Coleman’s job performance to the fact that she had been placed in a cashier’s position.

At trial, Home Depot's lawyers moved to exclude the EEOC letter because the evidence did not support the EEOC's findings. The trial judge deferred ruling on the motion until the plaintiff presented her case. Once plaintiff presented her case, the trial judge indicated that she would test the EEOC report against the evidence adduced by the plaintiff to determine whether there was reliable evidence upon which the EEOC findings could have been based.

Midway through the trial, the trial judge granted the defense motion concluding that the evidence, at best, showed that Coleman's sales experience was limited to "mom and pop" stores. Thus, plaintiff could not offer evidence to support the EEOC's findings. The trial judge also stated that admitting the letter would have required Home Depot to present extensive rebuttable evidence. Interestingly, the trial judge made this ruling despite concluding that there was substantial evidence to support the plaintiff's claim but found that there was little probative value in the EEOC's conclusory statements.

On appeal, the Third Circuit upheld the trial judge's ruling but for different reasons. Instead of focusing solely upon F.R.C.P. 808(a)(c), the Third Circuit also incorporated F.R.C.P. 403 into its analysis.

The Third Circuit concluded that a trial judge must focus upon the interplay between F.R.C.P. 808(a)(c) which creates an exception to the hearsay rules allowing government records to be admitted because of a presumption of reliability and F.R.C.P. 403 under which the trial judge must exclude evidence if the probative values is substantially outweighed by unfair prejudice, confusion of the issues, undue delay or needless presentation of cumulative evidence. Since 1976, when the Supreme Court in Chandler v. Roudebush, 425 U.S. 840, 96 S.Ct. 1949 (1976) ruled that F.R.C.P. 808(a)(c) covers the EEOC determinations, the Fifth and Ninth Circuits held that EEOC letters are always admissible, unless a defendant can show under Rule 808 that there is reason to doubt their reliability.

In contrast, several other Circuits (now including the Third Circuit) have held that a defendant can move for preclusion of the EEOC letters under F.R.C.P. 403, which requires trial judges to conduct a balancing test to determine if the "probative value" of a piece of evidence is "substantially outweighed" by its possible negative consequences. The rule requires a judge to consider the dangers of unfair prejudice,

confusion of issues or misleading the jury and also judicial economy, including undue delay, waste of time, or needless presentation of cumulative evidence. Since Rule 403 is an umbrella rule, it can be used to exclude evidence which would otherwise be admissible under Rule 808(c).

Judge Becker, who wrote the Third Circuit opinion, described Rule 403's purposes stating, "Evidence may be excluded if its probative value is not worth the problems that its admission may cause.... However, there is a strong presumption that relevant evidence should be admitted and thus, for exclusion under Rule 403 to be justified, the probative value of the evidence must be 'substantially outweighed' by problems in admitting it." The purpose of the balancing test in Rule 403 is to ensure that juries are not presented with evidence that is far less probative than it is prejudicial.

In finding that EEOC letters are per se admissible, the Fifth and Ninth Circuits held that the probative value of the EEOC determinations almost always outweighs any prejudicial impact. Consequently, Rule 808(a)(c) creates a presumption of admissibility that trumps most objections. In contrast, the majority of courts addressing this problem, found that the Rule 403 factors, especially considerations of undue delay, wasted time or needless presentation of cumulative evidence, can be used by defendants to tip the scale towards exclusion.

In Coleman's case, the Third Circuit concluded that the trial court was clearly correct about the low probative value of the most critical facets of the EEOC report – that Coleman was not hired as a sales associate despite being a highly experienced candidate. At trial, the evidence clearly established that Coleman was not a highly experienced hardware sales person. However, the Third Circuit rejected the trial court's analysis that in order to determine the admissibility, a trial court should wait for the admission of plaintiff's evidence to determine if it justified the admission of the EEOC report.

Instead, the Third Circuit held that the trial judge should have balanced the low probative value of the EEOC report with the amount evidence Home Depot would have been required to produce to counter the report's conclusion about the fate of the other employees, male and female. Since the EEOC concluded that Home Depot had "systematically" discriminated against female and minority employees,

the Third Circuit accepted Home Depot's argument that it would have had to rebut the EEOC finding by presenting evidence showing that it did not discriminate when it placed former employees in cashier positions or fired them. In essence, Home Depot would have had to conduct a trial within a trial about the employment history of a large number of employees. In weighing those equities, the Third Circuit found that the scale tipped in favor of Home Depot and excluded the EEOC letter.

Coleman v. Home Depot, Inc, 306 F.2d 1333 (3<sup>rd</sup> Cir.  
2002)

**If you have any questions about the foregoing article or how it may affect you or your business, please contact [Jay Barry Harris](#) at 215-893-9300.**