

Title VII and GERA

Sexual Harassment and EEOC Complaint Processing

Joint Meeting of
Illinois Senate Sexual Discrimination and Harassment Awareness & Prevention Task Force
and
Illinois House Sexual Discrimination & Harassment Task Force

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OVERVIEW

TITLE VII AND GERA

Title VII

- Prohibits employers with 15 or more employees from discriminating against employees (including applicants) on the bases of race, color, religion, national origin, or sex.
- Prohibits retaliation against a person because the person complained about discrimination, filed a charge of discrimination, or participated in an employment discrimination investigation or lawsuit.

GERA

- Personnel actions must be free from discrimination based on:
 - Race, color, religion, sex, or national origin (within meaning of Title VII)
 - Age 40 and above (within meaning of ADEA)
 - Disability (within meaning of ADA and Rehabilitation Act)
 - Genetic Information (within meaning of GINA)
- Prohibits retaliation against a person because the person complained about discrimination, filed a charge of discrimination, or participated in an employment discrimination investigation or lawsuit.

“EMPLOYEE” COVERAGE

TITLE VII Exclusions

- Elected state or local official
- Person chosen by such elected official:*
 - To be on his/her **personal staff**;
 - As an appointee on the **policymaking** level; or
 - As an **immediate adviser** with respect to the **exercise of constitutional or legal powers** of the office.

*Not excluded from Title VII coverage if the person is covered by civil service laws

GERA Coverage

- Person chosen or appointed by an elected state/local official:
 - To be on his/her **personal staff**;
 - To serve the official on the **policymaking** level; or
 - To serve the elected official as an **immediate adviser** with respect to the **exercise of constitutional or legal powers** of the office

FREQUENT EXCLUSION and COVERAGE QUESTIONS

- Is the person an **elected** state/local official (excluded by Title VII and GERA)?
- Has the person been **chosen or appointed** by an elected state/local official?
- Is the person on the **personal staff** of the elected official?
 - Six factor analysis in some circuits
- Does the chosen person serve in a **policy-making** capacity?
 - Ex: magistrate who sets bail or officiates weddings without exercising policy discretion probably *does not* serve in a policy-making
 - But: judge who decides civil or criminal matters under state law probably *does* serve in a policy-making capacity.

Analysis is often fact-intensive

7TH CIRCUIT EXAMPLES

- Examples include ADEA cases: ADEA and Title VII have identical definitions of “employees”.
- Cases analyzing the Title VII exemptions are instructive in understanding GERA coverage.
 - Title VII exemptions are almost a mirror of the positions covered by GERA.

TITLE VII EXEMPTIONS (7TH CIRCUIT)

Personal Staff:

District courts in 7th Circuit have applied the 5th Circuit's six-factor test to determine whether an individual falls within the "personal staff" exception:

- (1) whether the elected official has plenary powers of appointment and removal,
- (2) whether the person in the position at issue is personally accountable to only that elected official,
- (3) whether the person in the position at issue represents the elected official in the eyes of the public,
- (4) whether the elected official exercises a considerable amount of control over the position,
- (5) the level of the position within the organization's chain of command, and
- (6) the actual intimacy of the working relationship between the elected official and the person filling the position.

TITLE VII EXEMPTIONS (7TH CIRCUIT)

Examples of Personal Staff:

➤ **Administrative assistant to mayor**

- *Lockwood v. McMillan*, 237 F.Supp.3d 840 (S.D. Ind. 2017)

➤ **City fire chief**

- *Deneen v. City of Markham*, No. 91-C-5399, 1993 WL 181885 (N.D. Ill. May 26, 1993) (Fire chief is member of Mayor's staff)

TITLE VII EXEMPTIONS (7TH CIRCUIT)

Policy Making:

“An individual is considered an appointee on the policymaking level if ‘the position held by the individual authorizes, either directly or indirectly, meaningful input into governmental decision-making on issues where there is room for principled disagreement on goals or their implementation.’”

- *Opp v. Office of the State’s Attorney of Cook County*, 630 F.3d 616, 619 (7th Cir. 2010) (quoting *Americanos v. Carter*, 74 F.3d 138, 141 (7th Cir. 1996)). (ADEA case)
 - Under Illinois statute, positions of Assistant State’s Attorneys gave plaintiffs inherent policymaking authority, notwithstanding actual duties.

TITLE VII EXEMPTIONS (7TH CIRCUIT)

Policy Making (con't):

The “policy making” analysis examines the inherent powers in the office, rather than the functions performed by a particular occupant of the position.

- *Tomczak v. City of Chi.*, 765 F.2d 633, 640 (7th Cir. 1985)
- *Opp v. Office of the State’s Attorney of Cook County*, 630 F.3d 616 (7th Cir. 2010) (ADEA case)

TITLE VII EXEMPTIONS (7TH CIRCUIT)

Policy Making (con't):

The Seventh Circuit's analysis of whether an individual is exempted from coverage under Title VII (and the ADEA) is "essentially indistinguishable from that applied in the political firing context.... [T]he reasons for exempting the office from the patronage ban apply with equal force to the requirements of the ADEA [and Title VII]."

- *Americanos v. Carter*, 74 F.3d 138 (7th Cir. 1996), citing *Heck v. City of Freeport*, 985 F.2d 305, 310 (7th Cir. 1993).
 - Applied Supreme Court's political patronage exemption test. See *Elron v. Burns*, 427 U.S. 347, 360 (1976), and *Branti v. Finkel*, 445 U.S. 507, 517 (1980).
 - Held Deputy Attorney General was exempt from the ban on political firing and therefore likewise exempt from coverage under Title VII (and ADEA).

TITLE VII EXEMPTIONS (7TH CIRCUIT)

Examples of Policy-Making Positions (fact-specific inquiries):

➤ ***Assistant State Attorney***

- *Opp v. Office of the State's Attorney of Cook County*, 630 F.3d 616 (7th Cir. 2010). Under Illinois statute, the Assistant State Attorney position has inherent policymaking authority, notwithstanding actual duties. “The position authorizes, either directly or indirectly, meaningful input into governmental decision-making on issues where there is room for principled disagreement on goals or their implementation.” (ADEA case)

➤ **Zoning Board Chair and Member**

- *Pleva v. Norquist*, 195 F.3d 905 (7th Cir. 1999). Plaintiff, who served as an appointed Chairperson and member of the city zoning board, had broad discretion to influence zoning policy and therefore was exempt from the ADEA.

TITLE VII EXEMPTIONS (7TH CIRCUIT)

Examples of Policy-Making Positions - con't (fact-specific inquiries):

➤ **Appointed Illinois state court judge**

- *EEOC v. State of Ill.*, 721 F. Supp. 156 (N.D. Ill. 1989). State judges are appointees on the policymaking level.

➤ **General Counsel for the IHRC**

- *Parker v. IHRC*, No. 12-cv-8275, 2016 WL 946655 (N.D. Ill. Mar. 14, 2006). General Counsel is a *Rutan*-exempt position, and therefore the State could make employment decisions based on political affiliation or because the position is either a confidential or policy-making position. A *Rutan*-exempt position is likewise a policy-making position exempt from Title VII. The General Counsel has a “duty to offer advice and consultation to the IHRC which could affect policy, decisions, and actions of the agency.” (quoting *Tomczak v. City of Chicago*, 765 F.2d 633, 640 (7th Cir. 1985).

TITLE VII EXEMPTIONS (7TH CIRCUIT)

“Appointed” by Elected Official:

➤ Assistant State’s Attorneys

- *Opp v. Office of the State’s Attorney of Cook County* 630 F.3d 616 (7th Cir. 2010). Even though plaintiffs were hired before the current State Attorney was elected, the State Attorney has exclusive authority to appoint ASAs under Illinois statute and each ASA is re-appointed upon the swearing in of each new State Attorney. (ADEA case)

➤ Assistant Attorneys General

- *Levin v. Madigan*, No. 07-C-4765, 2011 WL 2708341 (N.D. Ill. Jul 12, 2011). Illinois law provides that the Attorney General, an elected official, appoints the Assistant Attorneys General. The fact that the AG did not personally interview the Assistant AG is irrelevant.

TITLE VII EXEMPTIONS (7TH CIRCUIT)

Civil Service:

- *Halloway v. Milwaukee County*, 180 F.3d 820 (7th Cir. 1999)
 - The ADEA exemption does not apply to a judicial court commissioner. Although the commissioner is in a policy-making position, he is subject to state civil service laws.

Title VII and GERA Prohibitions regarding Sex Harassment

PROHIBITED DISCRIMINATION

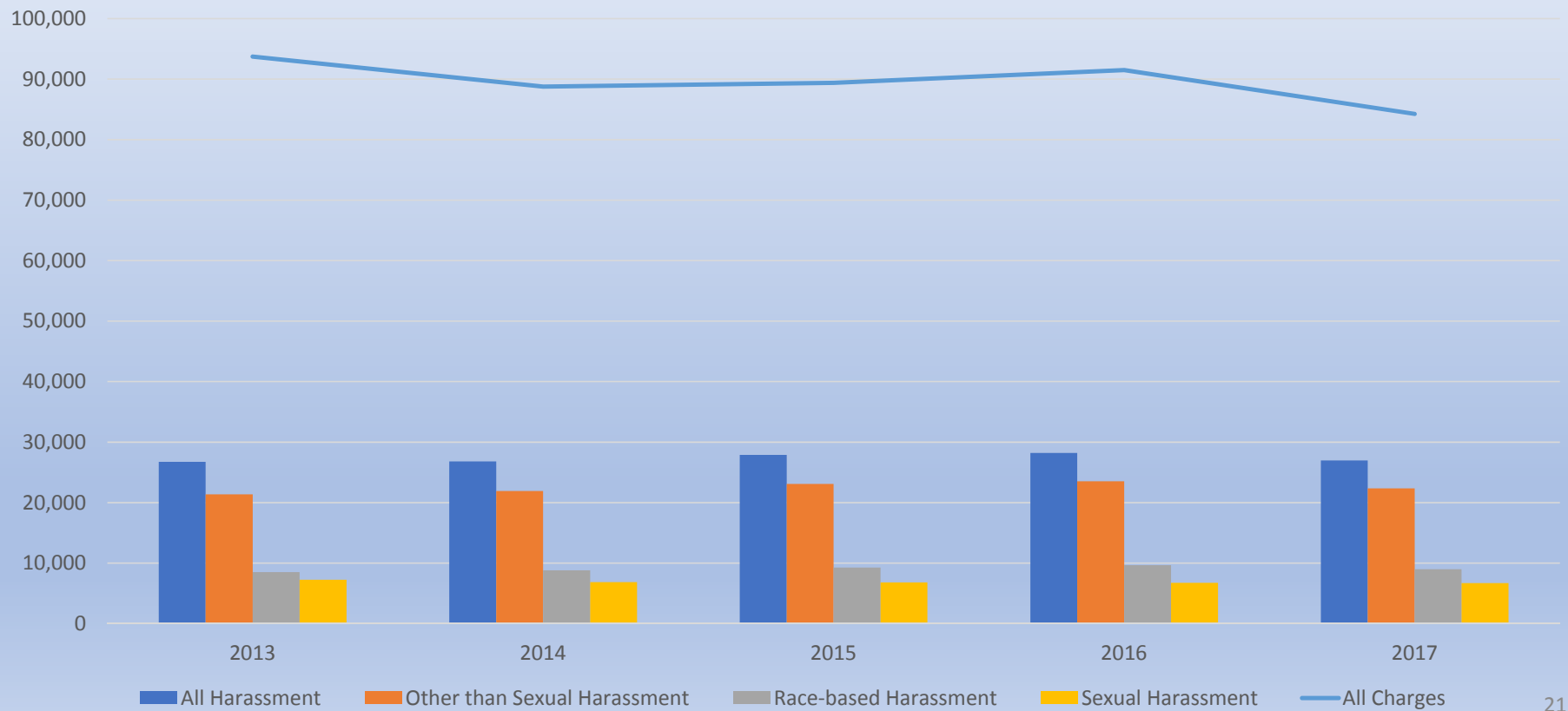
- Title VII and GERA prohibit discrimination on the basis of “sex” in any aspect of employment, including:
 - Hiring
 - Promotion
 - Working conditions
 - Pay
 - Discipline / Termination
 - Work assignments / Work conditions
 - Terms and Conditions
- Title VII and GERA prohibit retaliation.
- Sexual harassment is a form of sex discrimination under Title VII and GERA.
- Sex discrimination includes discrimination because of pregnancy, gender identity (including transgender status), and sexual orientation.

Sexual Harassment Analysis under Title VII and GERA similar to IHRA Analysis

- Sexual harassment claims under GERA are analyzed the same as sexual harassment claims under Title VII.
- Sexual harassment claims under Title VII (and, therefore, GERA) are analyzed virtually the same as sexual harassment claims under the Illinois Human Rights Act.
 - *Polychroniou v. Frank*, No. 1-15-1177, 2015 WL 7429318, at *7 (Ill. App. Ct. Nov. 20, 2015) (“The prohibition of sexual harassment found in the Illinois Human Rights Act ‘closely parallels’ Title VII of the Civil Rights Act ... and, therefore, examination of federal Title VII law is appropriate.”)
 - *Frey v. Coleman*, 141 F.Supp.3d 873, 879 (N.D. Ill. 2015) (“The requirements to make out a sexual harassment claim under the IHRA are substantially the same” as those under Title VII.)

EEOC ENFORCEMENT

EEOC Harassment Charges

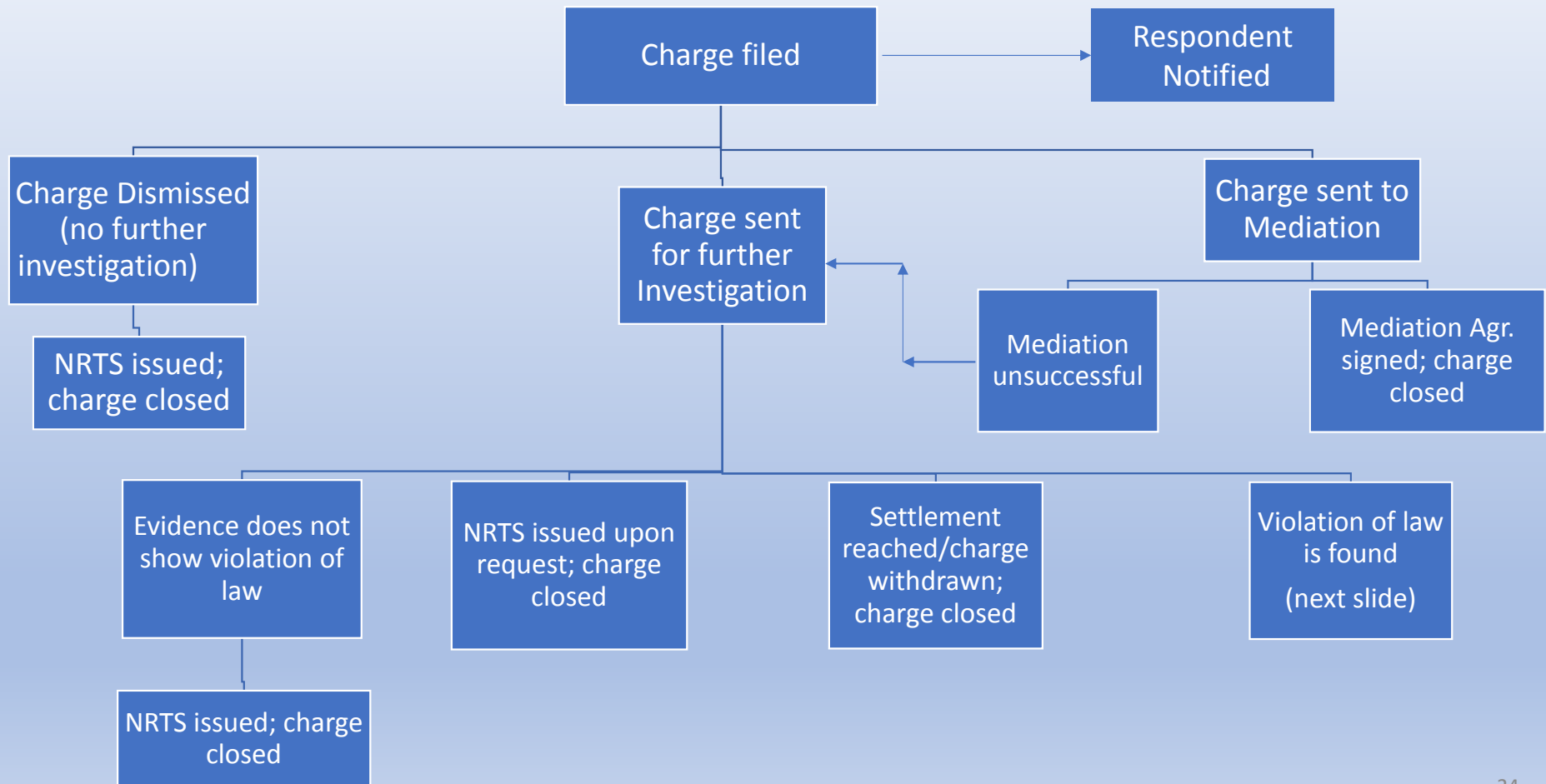


EEOC Prioritizes the Elimination of Workplace Harassment

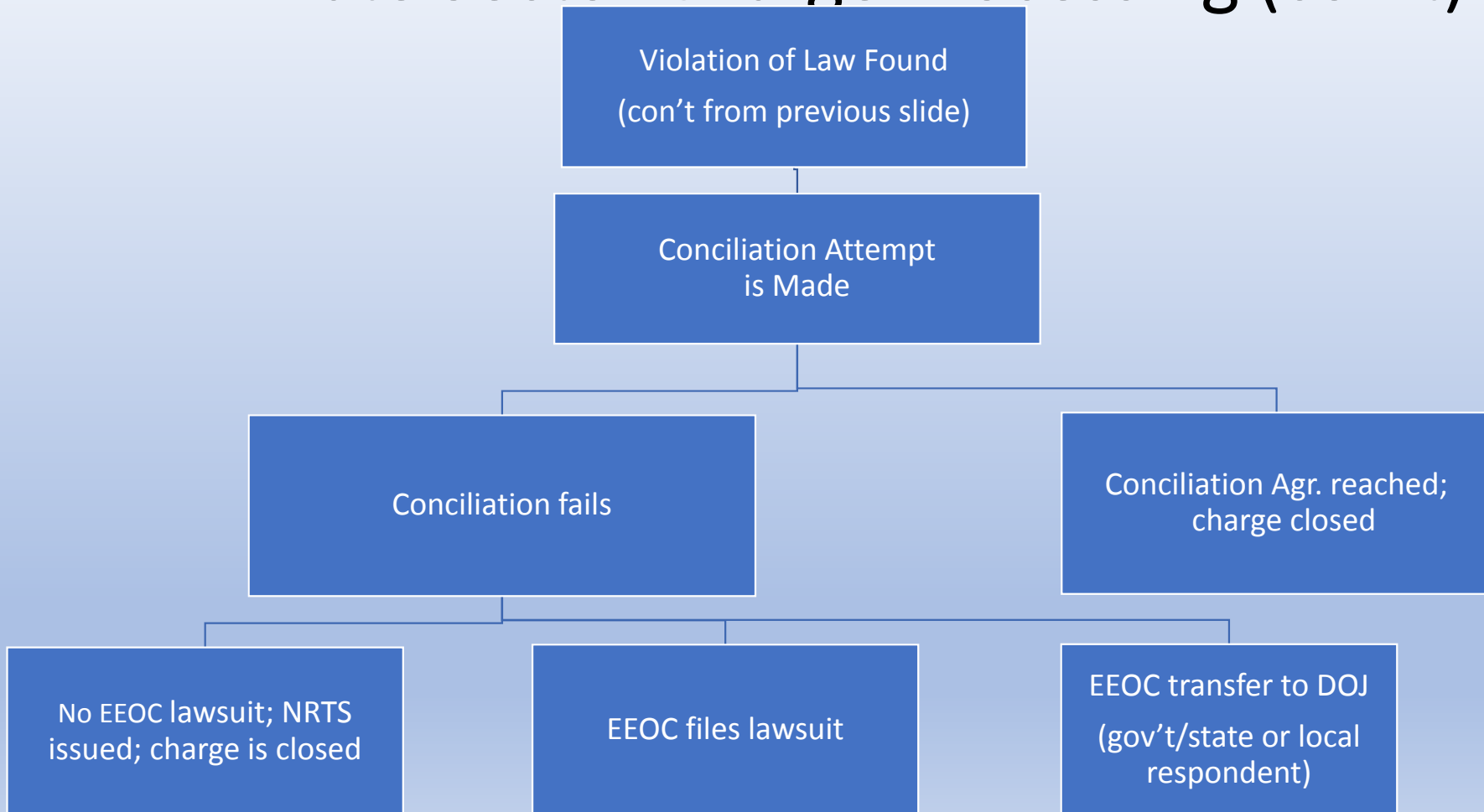
- **Preventing systemic harassment has been one of the EEOC's national enforcement priorities since 2013.** It is included in the 2017-2021 Strategic Enforcement Plan.
- **Select Task Force on the Study of Harassment in the Workplace**
 - Report of the Co-Chairs of the Select Task Force on Harassment in the Workplace with findings and recommendations about harassment prevention (June 2016)
 - Promising Practices
- **Respectful Workplaces Training** launched by EEOC in October 2017, consistent with the Task Force recommendations.

How EEOC Processes Title VII and GERA Complaints

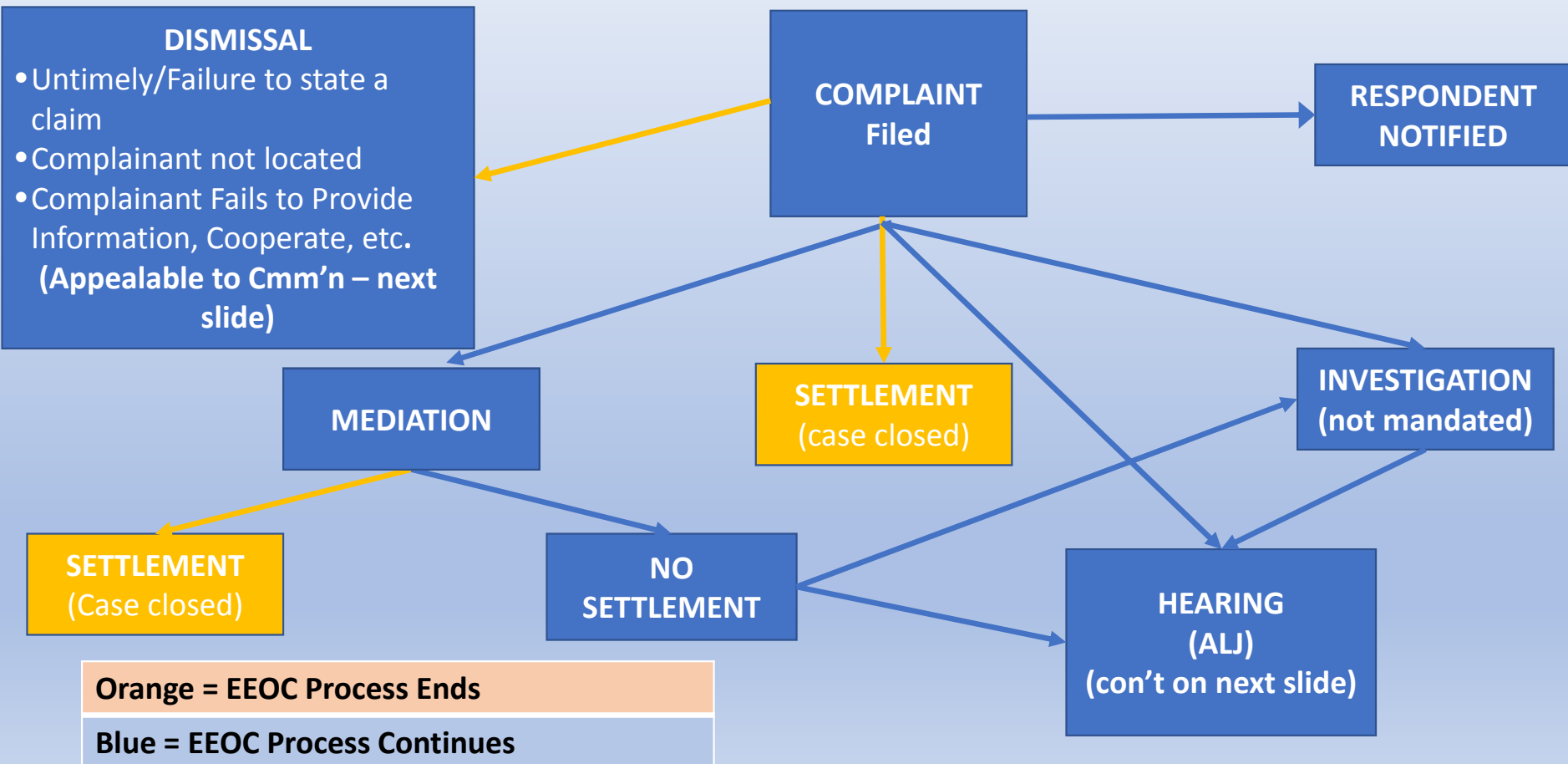
Private Sector Charge Processing



Private Sector Charge Processing (con't)



GERA Complaint Processing



GERA Complaint Processing

DISMISSAL
(previous slide)

HEARING
By
ALJ

Issue Certified
for Interlocutory
Review

DECISION by
ALJ

APPEAL To CMM'N
(filed with OFO)

COMMISSION
DECISION

PETITION FOR JUDICIAL
REVIEW
(U.S. Court of Appeals)

SETTLEMENT
at any stage
(Case closed)

Orange = EEOC Process Ends

Blue = EEOC Process Continues

Important Differences: Title VII and GERA

<u>Title VII</u>	<u>GERA</u>
180 day filing deadline is extended to 300 days in state/locality with FEPA	180 day filing deadline is not extended even where there is a FEPA
Charge filing date is the date of receipt by EEOC (or FEPA)	Complaint filing date is the date: (1) delivered by fax, (2) delivered in person, (3) postmarked, or (4) when postmark is illegible, received by mail within 5 days after expiration of filing period.
“Relation back”: when a charge is “misfiled” (ex: filed under Title VII, when it should have been filed under GERA, or vice versa), the date of filing will relate back to the date when the original charge or complaint was filed.	
Charge may be filed against an entity/entities, but not against a person.	Complaint may be filed against a person, a governmental agency, or a political subdivision.

Important Differences: Title VII and GERA

<u>Title VII</u>	<u>GERA</u>
Investigation is for enforcement purposes, to reach a “cause” or “no cause” determination.	If EEOC investigates, it is not for enforcement purposes. No authority to find “cause” or “no cause” or to issue a “Right to Sue.” A timely complaint that is not otherwise resolved goes to a hearing by ALJ.
Government may sue on the Charging Party’s (CP’s) behalf: <ul style="list-style-type: none"> • EEOC may sue any respondent that is <u>not</u> a gov’t, gov’t agency, state/local subdivision. • DOJ may sue a respondent that <u>is</u> a gov’t, gov’t agency, state/local subdivision. 	EEOC cannot sue on the complainant’s behalf.
CP gets Notice of Right To Sue (NRTS) when charge dismissed or upon request (180 days after charge filed). If CP files suit, it must be filed in U.S. District Court within 90 days after NRTS is received.	A party may petition U.S. Court of Appeals to review a final EEOC decision.

RESOURCES

- [Report](#) of the Co-Chairs of the Select Task Force on the Study of Harassment in the Workplace
 - [Checklists and Chart of Risk Factors for Employers](#)
- [Promising Practices for Preventing Harassment](#)
- [Harassment Prevention and Respectful Workplaces Training](#)
 - Employers: “[Leading for Respect](#)”
 - All Employees: “[Respect in the Workplace](#)”

(Electronic versions of these resources have been provided to each Task Force)

QUESTIONS AND ANSWERS