

The Evidentiary Impact of EEOC Reasonable Cause Determinations

When an employee or former employee files a charge of discrimination with the U.S. Equal Employment Opportunity

Commission (EEOC) or a state counterpart, and when that agency issues a finding of "reasonable cause that discrimination has occurred" is this reasonable cause finding admissible as evidence in a later jury trial? What if the agency issues a finding of "no probable cause"? Can the mere existence of a reasonable cause stand in the way of a summary judgment?

The answer to these questions varies by jurisdiction and may come as a surprise to many employers. At a time when the EEOC reports a backlog of charges and the need for more financial resources to hire investigators, courts are admitting reasonable cause findings into evidence in many cases, and these findings play a role in summary judgment motions as well. The standards applied by the courts in making the admissibility determination are in many ways inconsistent. In some cases, the rationale for admitting reasonable cause findings is best described as whimsical.

Employers facing EEOC charges must be careful to take the investigatory process very seriously and remain mindful of the lasting effects of an adverse EEOC finding. When such a determination exists and litigation ensues, defense counsel must develop and implement a plan to exclude the determination from evidence or minimize its effect on a jury.

Background

The EEOC was created almost a half century ago with the charge of ending discrimination on the basis of race, color, national origin, sex, and religion in private sector employment throughout the United States. In later years, new federal laws were passed that extended the EEOC's enforcement authority

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to include discrimination on the basis of age, disability, pregnancy, family medical history, or genetic status. The agency now has jurisdiction to enforce federal employment discrimination laws in federal government workplaces in addition to the private sector.

The agency has primary responsibility for enforcing federal employment discrimination laws. An individual asserting a claim under Title VII of the Civil Rights Act of 1964 (Title VII), the Age Discrimination in Employment Act of 1967 (ADEA), or the Americans with Disabilities Act of 1990 (ADA) must file a charge of discrimination with the agency before commencing litigation in the courts. Upon receiving a charge of discrimination, the EEOC begins an investigation. It may or may not conduct a formal fact-finding conference. If an investigation leads the EEOC to conclude that discrimination has occurred, the EEOC will issue a reasonable cause finding. The charging party will be permitted to file a lawsuit in court if conciliation efforts are unsuccessful.

An examination of 2012 EEOC charge statistics shows that reasonable cause findings were made in 3.8 percent of all cases in that year (4,207 total cases), and no cause findings were made in 67.9 percent of cases. The balance of the cases was disposed of in other ways, such as through conciliation efforts. See <http://www.eeoc.gov/eeoc/statistics>.

Some practitioners without a strong employment background fail to understand that a reasonable cause finding—whether valid or invalid—can have lasting effects in litigation and can even cause an employer to pay more to settle a claim than it might otherwise. The reason is that in many jurisdictions, an EEOC determination may pose a significant barrier to summary judgment and may be admissible evidence in some form. Admissibility determinations are made on an ad hoc basis at the end of a case, unless a defense counsel moves for *in limine* relief beforehand. Examining the case law shows that employers face a real threat that a reasonable cause finding could be admitted into evidence while a no cause finding has a stronger chance of being excluded altogether. These facts point out the importance of ensuring that competent counsel is consulted to deal with any charges before the EEOC or state investiga-

tors and that employers take all such investigations very seriously.

In early cases courts freely admitted reasonable cause findings into evidence as governmental records under Federal Rule of Evidence 803(8). This was often predicated on the perceived aura that surrounded the investigatory role of the EEOC. Courts believed that the EEOC was charged with responsibility for investigating such matters and that these “experts” could be trusted to deliver a decision that was “inherently trustworthy” and free of bias. See, e.g., *Bradshaw v. Zoological Soc’y of San Diego*, 569 F.2d 1066 (9th Cir. 1978).

Given the significant budget pressures on the EEOC coupled with the increasing backlog of discrimination charges, this premise has been challenged in recent years. The EEOC’s own 2012 Report to Congress makes clear its limitations in the current financial climate:

Between 2000 and 2008, the EEOC’s staffing level dropped by nearly 30 percent. At the same time, as its jurisdiction expanded, the number of discrimination charges filed with the EEOC reached historic levels, peaking between 2008 and 2010. The convergence of these factors yielded a growing backlog of unresolved discrimination charges.

FY 2012 EEOC Congressional Budget.

Congress has not addressed whether EEOC reasonable cause determinations are admissible in subsequent employment discrimination litigation. The admissibility issue is entirely case law driven, and the results vary widely from jurisdiction to jurisdiction. The courts are split on (1) when and if reasonable cause or no cause findings are admissible, and precisely how a court should analyze this question; and (2) what role a reasonable cause finding should play in an employer’s motion for summary judgment when a court does admit the finding.

As one court has noted, “EEOC determinations are not homogenous products; they vary greatly in quality and factual detail.” *Johnson v. Yellow Freight Sys., Inc.*, 734 F.2d 1304, 1309 (8th Cir. 1984). At one extreme is the Ninth Circuit, where courts regard reasonable cause findings as so probative of discrimination that courts are not allowed to exclude them from evidence, nor should an employer obtain summary judg-

ment when one exists. Other jurisdictions leave the admissibility of reasonable cause findings to the discretion of the trial courts, applying Fed. R. Evid. 803(8), Fed. R. Evid. 403, or both, and hold that such a determination standing alone is insufficient to preclude summary judgment.

When discrimination cases were decided through bench trials, the issue of admissibility was not as important as it became with the enactment of the Civil Rights Act of 1991, which made jury trials available in Title VII and ADA cases. Most defense attorneys with trial experience will say that a reasonable cause is more likely to create unfair prejudice in the minds of jurors than a trained judge. In addition, whether a reasonable cause finding precludes summary judgment in favor of the employer can have a dramatic, lasting effect on the employer, often requiring the payment of settlement sums far greater than would otherwise be paid in without such a rule.

Admissibility of Reasonable Cause Findings

Bradshaw was the Ninth Circuit’s first decision addressing the admissibility of reasonable cause findings. There, the plaintiff brought suit under Title VII claiming that defendant refused to hire her because of her sex. The EEOC’s reasonable cause was stricken as an exhibit to the complaint, and the trial court granted the employer summary judgment. The Ninth Circuit reversed and held that while the weight assigned to a reasonable cause finding is within the discretion of a trial court, it must admit the evidence.

In *Plummer v. Western Int’l Hotels Co.*, 656 F.2d 502 (9th Cir. 1981), the *Bradshaw* holding was extended to cases involving jury trials:

An EEOC determination, prepared by professional investigators on behalf of an impartial agency, (is) a highly probative evaluation of an individual’s discrimination complaint. If we were to adopt the distinction between jury and non-jury trials urged by (the employer), in many cases *Bradshaw* could in effect be ignored and the value of EEOC determinations wasted.... We believe that *Bradshaw* should apply... even when the plaintiff requests a jury trial.

Id. at 505.

Table of Cases

Case	Result	Grounds
First Circuit		
<i>Smith v. Massachusetts Inst. of Tech.</i> , 877 F.2d 1106, 1113 (1st Cir. 1989)	Affirming trial court's decision to exclude EEOC files	The court cited cases generally for proposition that EEOC records containing hearsay may be excluded
<i>Patten v. Wal-Mart Stores, Inc.</i> , 300 F.3d 21 (1st Cir. 2002)	Excluding reasonable cause finding	Finding was conclusory and devoid of facts
<i>Talavera v. Municipality of San Sebastian</i> , 865 F. Supp. 2d (D. P.R. 2011)	Admitting reasonable cause finding	Report was relevant to defense raised by employer and was adopted by employer by its actions
Second Circuit		
<i>Gilllin v. Federal Paper Board Co.</i> , 52 F.R.D. 383 (D. Conn. 1970), <i>aff'd in part and rev'd in part</i> , 479 F.2d 97 (2d Cir. 1973)	Admitting reasonable cause finding but excluding additional field reports	Reasonable cause finding and conclusions of EEOC permitted into evidence, but background reports excluded as "mishmash of self-serving and hearsay statements," excluded under Fed. R. Evid. 403
<i>Paolitto v. John Brown E & C, Inc.</i> , 151 F.3d 60, 65 (2d Cir. 1998)	Excluding no cause finding	Court ruled that it would be duplicative, and rejected argument that plaintiff "opened the door" to the evidence by pointing out that employer changed its practices after charge was made
<i>Chamblee v. Harris & Harris, Inc.</i> , 154 F. Supp.2d 670, 678 (S.D.N.Y. 2001)	Admitting state reasonable cause finding; rejecting Fed. R. Evid. 403 challenge	Court admitted fact of the finding only, not report, with limiting instruction
<i>Dodson v. CBS Broadcasting, Inc.</i> , 423 F. Supp. 2d 331 (S.D.N.Y. 2006)	Excluded reasonable cause finding under Fed. R. Evid. 403	The language used by EEOC crossed the line from a reasonable cause finding to a finding of violation, raising a "heightened risk of unfair prejudice"
<i>Doe v. University of Conn.</i> , 2013 WL 4504299 (D. Conn. Aug. 22, 2013)	Excluding no cause finding	The court conflated analysis under Fed. R. Evid. 803 and 403, essentially finding that the No cause determination was not probative since the finding failed to articulate factual basis
<i>Lovejoy-Wilson v. Noco Motor Fuels, Inc.</i> , 242 F. Supp. 2d 236 (W.D.N.Y. 2003)	Articulating standards and directing parties to attempt to reach agreement on admissibility of reasonable cause and EEOC file	
<i>Watson v. E.S. Sutton, Inc.</i> , 2005 WL 2170659 (S.D.N.Y. Sept. 6, 2005)	Admitting reasonable cause finding	Employer's counsel found to have waived objections effectively, limiting instruction given
Third Circuit		
<i>Coleman v. Home Depot, Inc.</i> , 306 F.3d 1333, 1341 (3d Cir. 2002)	Excluding reasonable cause finding	Facts relied upon by EEOC were directly contradicted in record, excluded under Fed. R. Evid. 403.
<i>Walton v. Eaton Corp.</i> , 563 F.2d 66 (3d Cir. 1977)	Excluding reasonable cause finding	The court failed to articulate the rule under which it was excluded.
<i>Martinelli v. Penn Millers Ins. Co.</i> , 2008 WL 723973 (3d Cir. Mar. 18, 2008)	Excluding reasonable cause finding	EEOC report included language indicating it was a "determination on the merits," excluded under Fed. R. Evid. 403.
<i>Abrams v. Lightolier, Inc.</i> , 702 F. Supp. 509 (D.N.J. 1989)	Ruling reasonable cause finding admissible	Defendant moved at the inception of the case and failed to give the court either the EEOC findings or to explain why they were untrustworthy or otherwise excludible.
<i>EEOC v. Smokin' Joe's Tobacco Shop, Inc.</i> , 2007 WL 2461745 (E.D. Pa. Aug. 22, 2007)	Admitting reasonable cause finding under Fed. R. Evid. 803 but excluding it under Fed. R. Evid. 403	No proof that the finding contained evidence that could not otherwise be presented; admission would result in a "sideshow that distracts the jury and lengthens the trial."
Fourth Circuit		
<i>Cox v. Babcock & Wilcox Co.</i> , 471 F.2d 13, 15 (4th Cir. 1972)	Excluding reasonable cause finding	The court did not cite to any particular rule.

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Fifth Circuit		
<i>Smith v. Universal Svs., Inc.</i> , 454 F.2d 154, 157 (5th Cir. 1972)	Admitting reasonable cause finding	Ruled that trial court was obligated to consider the finding on summary judgment.
<i>Eason v. Fleming Cos.</i> , 1993 WL 13015208 (5th Cir. Aug. 24, 1993)	Admitting no cause finding over plaintiff's objection; rejecting Fed. R. Evid. and 403 challenge by plaintiff	Fact that EEOC report was incomplete was not enough to challenge trustworthiness; jury given limiting instruction.
<i>Harris v. Mississippi Transp. Comm.</i> , 2009 WL 2168913 (5th Cir. July 21, 2009)	Excluding reasonable cause finding	Facts in trial record were diametrically opposed to those set forth in EEOC determination, Fed. R. Evid. 403.
Sixth Circuit		
<i>Williams v. Nashville Network</i> , 132 F.3d 1123, 1128–29 (6th Cir. 1998)	Excluding reasonable cause finding under Fed. R. Evid. 403	Plaintiff argued too strongly that report was a “finding of discrimination,” and failed to articulate “any persuasive rationale for admitting the document.”
Seventh Circuit		
<i>Young v. James Green Mgt., Inc.</i> , 91 Fair Empl. Prac. Cas. (BNA) 1394 (7th Cir. 2003)	Excluding reasonable cause finding and EEOC files under Fed. R. Evid. 803 and 403	EEOC investigator's testimony demonstrated lack of trustworthiness, and nothing in report or files that could not otherwise come in to evidence through another means.
Eighth Circuit		
<i>Johnson v. Yellow Freight Sys., Inc.</i> , 734 F.2d 1304, 1309–10 (8th Cir. 1984)	Excluding reasonable cause finding	Court found that EEOC findings were conclusory and that all evidence before EEOC was put before jury.
Ninth Circuit		
<i>Bradshaw v. Zoological Soc'y of San Diego</i> , 569 F.2d 1066 (9th Cir. 1978).	Admitting reasonable cause finding	Per se rule of admissibility.
<i>Heyne v. Caruso</i> , 69 F.3d 1475 (9th Cir. 1995)	Finding state investigators' determination admissible	A per se rule that such determinations are admissible and that their probative value “far outweighs the prejudicial effect it may have on a jury.”
<i>Plummer v. Western Int'l Hotels Co.</i> , 656 F.2d 502 (9th Cir. 1981)	Ruling reasonable cause finding should have been admitted	Ruled that Title VII plaintiff had right to use report.
Tenth Circuit		
<i>Whatley v. Skaggs Cos.</i> , 707 F.2d 1129, 1136–37 (10th Cir. 1983)	Admitting reasonable cause finding	Court expressed some concern that trial court had permitted underlying report in with prejudicial material such as other alleged acts of discrimination which post-dated complaint, but found that deferential standard permitted decision to stand.
Eleventh Circuit		
<i>Barfield v. Orange County</i> , 911 F.2d 644, 650 (11th Cir. 1990)	Admitting no cause finding	Court stopped short of adopting a per se admissibility test; discusses factors to be considered in motion to exclude such evidence.
<i>Lee v. Executive Airlines, Inc.</i> , 31 F. Supp. 2d 1355 (S.D. Fla. 1998)	Excluding reasonable cause finding	The finding failed to recite the facts on which it was based, and gave only conclusions, excluded under FRE 403
D.C. Circuit		
<i>Hairston v. Washington Metro. Area Trans. Auth.</i> , 1997 WL 411946 (D. D.C. Apr. 10, 1997)	Excluding reasonable cause finding	Language of EEOC letter too strongly inferred it was a determination on the merits; letter provided only a legal conclusion with no facts, excluded under Fed. R. Evid. 403.
<i>Kinsey v. Legg, Mason & Co.</i> , 1974 WL 275 (D.D.C. 1974), <i>rev'd on other grounds</i> , 557 F.2d 830 (D.C. Cir. 1977).	Admitting reasonable cause finding	Finding found trustworthy and relevant, not unduly prejudicial.

The Ninth Circuit departed from the *Bradshaw* per se rule in *Gilchrist v. Jim Slemons Imports, Inc.*, 803 F.2d 1488 (9th Cir. 1986), but only because of the wording of the EEOC determination. The plaintiff in *Gilchrist* brought suit under the ADEA after his employment was terminated. The jury returned a verdict for the plaintiff, and the employer appealed. On appeal the employer argued that the trial court erred in admitting into evidence a letter issued by the EEOC charging the employer with violating the ADEA. The Ninth Circuit drew a distinction between Title VII reasonable cause determinations and ADEA "letters of violation" and held that reasonable cause determinations do not suggest that an employer has violated Title VII, but that a "letter of violation" reflects the EEOC's determination that an ADEA violation has occurred. Its admission, therefore, has a greater potential to prejudice a jury. The court concluded that the district court must exercise its discretion to admit or to exclude such letters.

In *Heyne v. Caruso*, 69 F.3d 1475 (9th Cir. 1995), the Ninth Circuit extended its per se rule to determinations by state agency equivalents of the EEOC, admitting a reasonable cause finding by the Nevada Equal Rights Commission (NERC) into evidence.

Aside from the Ninth Circuit, those jurisdictions that have addressed the issue have treated the admissibility of reasonable cause findings as a matter committed to a trial court's sound discretion, to be decided on a case-by-case basis. Unfortunately, however, a review of the cases lends no clear guidance for a district court deciding such issues, and this highly deferential rule makes it difficult for an employer to appeal. In *Barfield v. Orange County*, 911 F.2d 644 (11th Cir. 1990), for example, the Eleventh Circuit concluded that given the variables involved in analyzing the admissibility of reasonable cause findings, the decision should be left to the discretion of the trial court. The Eleventh Circuit in this decision rejected the idea that "there can exist no EEOC determinations in which the... circumstances indicate lack of trustworthiness sufficient to justify exclusion from evidence," as is the Ninth Circuit's view.

The Eleventh Circuit held that a reasonable cause finding may be excluded for lack of trustworthiness under Fed. R. Evid.

803(8) and that the trial court should also consider whether to exclude the determination under Fed. R. Evid. 403 when its probative value is outweighed by the risk of unfair prejudice. This determination should not be driven by a case's status as jury or nonjury but should be guided by factors such as the overall trustworthiness

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of the process and whether the findings were accompanied by legal conclusions:

The admission of an EEOC report, in certain circumstances, may be much more likely to present the danger of creating unfair prejudice in the minds of the jury than in the mind of the trial judge, who is well aware of the limits and vagaries of administrative determinations and better able to assign the appropriate weight and no more.

Id. at 650.

The view expressed in *Barfield* appears to be shared by the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Tenth, and D.C. Circuits, although the rationale in the cases in these circuits for admitting or excluding evidence varies among them. *Smith v. Massachusetts Inst. of Tech*, 877 F.2d 1106, 1113 (1st Cir. 1989); *Paolitto v. John Brown E & C, Inc.*, 151 F.3d 60, 65 (2d Cir. 1998); *Coleman v. Home Depot, Inc.*,

306 F.3d 1333, 1341 (3d Cir. 2002); *Cox v. Babcock & Wilcox Co.*, 471 F.2d 13, 15 (4th Cir. 1972); *Smith v. Universal Sys., Inc.*, 454 F.2d 154, 157 (5th Cir. 1972); *Williams v. Nashville Network*, 132 F.3d 1123, 1128–29 (6th Cir. 1998); *Young v. James Green Mgt., Inc.*, 91 Fair Empl. Prac. Cas. (BNA) 1394 (7th – Cir. 2003); *Johnson v. Yellow Freight Sys., Inc.*, 734 F.2d 1304, 1309–10 (8th Cir. 1984); *Whatley v. Skaggs Cos.*, 707 F.2d 1129, 1136–37 (10th Cir. 1983); *Hairston v. Washington Metro. Area Trans. Auth.*, 1997 WL 411946 (D. D.C. Apr. 10, 1997).

Reasonable Cause Findings and Summary Judgments

Depending upon the district in which an employer is sued, a reasonable cause finding may present a barrier to summary judgment. In the Ninth Circuit, for instance, the courts have held that a reasonable cause finding should preclude summary judgment in favor of an employer. The first case to address this issue squarely was *Gifford v. Atchison, Topeka & Santa Fe Railway Co.*, 685 F.2d 1149 (9th Cir. 1982), in which the court held that "an EEOC finding of reasonable cause is 'sufficient at least to create an issue of fact' requiring proceedings beyond the summary judgment stage." The plaintiff in *Gifford* had filed a sex discrimination charge with the EEOC when her employment was terminated. The Ninth Circuit described the EEOC reasonable cause determination to have followed an "impartial investigation." The employer moved for summary judgment, and the plaintiff opposed the motion using the reasonable cause finding as evidence. The trial court granted the employer's motion, but it was reversed when the Ninth Circuit held that the EEOC's determination was sufficient to create an issue of fact on that question. *Id.* See also *Mitchell v. Office of Los Angeles County*, 805 F.2d 844, 847 (9th Cir. 1986) (holding that the EEOC is "expert in the investigation of [discrimination] claims," and that EEOC determination was sufficient to raise an issue of fact requiring proceedings beyond the summary judgment stage).

This holding was further extended to findings by a state employment discrimination agency. In *Stewart v. Suwol*, 1991 WL 22324 (D. Ore. Feb. 20, 1991), the plaintiff sued under Section 504 of the Rehabilitation

Act of 1973 claiming that he was not hired on account of a mental impairment. The defendants moved for summary judgment, claiming that the plaintiff was not hired because of unfavorable references. The plaintiff opposed the motion with the finding by the Oregon Bureau of Labor and Industries that there was "substantial evidence of (an) unlawful employment practice on the basis of handicap." Citing *Gifford* and denying the motion, the court stated that "the finding of the Bureau of Labor that there is substantial evidence that the defendants discriminated against (the plaintiff) on the basis of handicap is sufficient to raise a question of fact on this issue."

The Ninth Circuit's view of the effect of reasonable cause findings on summary judgment proceedings is not shared elsewhere. In *Goldberg v. B. Green & Co.*, 836 F.2d 845 (4th Cir. 1988), for example, the plaintiff brought suit under the ADEA after being terminated at the age of 50. The trial court granted the employer's motion for summary judgment, finding that the plaintiff had produced no evidence of age discrimination. On appeal, the plaintiff argued that he had presented sufficient evidence for a jury to infer age discrimination and pointed to a reasonable cause finding by the Maryland Commission on Human Relations. The Fourth Circuit rejected the plaintiff's argument, stating:

[T]he Commission's findings are not sufficiently probative to create a genuine issue of material fact about (the employer's) intent to discriminate on the basis of age. The Commission's report merely repeats facts which (the plaintiff) himself alleges elsewhere in this case, and then states in conclusory fashion that those facts reflect age discrimination. Such facts, standing alone, are not enough to salvage (the plaintiff's) claim.

Courts have reached different conclusions on the weight to assign to reasonable cause findings when adjudicating summary judgment motions. See, e.g., *Horne v. Turner Construction Co.*, 136 Fed. Appx. 289 (11th Cir. 2005)(reversing grant of summary judgment to employer where trial court failed to consider EEOC probable cause determination when granting summary judgment); *Simms v. Oklahoma ex rel Dep't of Mental Health & Substance*

Abuse Svs., 165 F.3d 1321, 1331 (10th Cir. 1999)(granting summary judgment notwithstanding reasonable cause finding); *Conkwright v. Westinghouse Elec. Corp.*, 739 F. Supp. 1006 (D. Md. 1990)(declining to consider a reasonable cause finding and granting summary judgment); *Kesselring v. United Technologies Corp.*, 753 F. Supp. 1359 (S.D. Ohio 1991) (holding that Ohio Civil Commission's conclusory findings were not sufficient to prevent summary judgment); *Bailey v. South Carolina Dep't of Social Svs.*, 851 F. Supp. 219 (D. S.C. 1993) (where reasonable cause finding was internally inconsistent, it lacked probative value; granting summary judgment); *Bynum v. Fort Worth Indep. Sch. Dist.*, 41 F. Supp. 2d 641, 656 (N.D. Tex. 1999)(concluding that reasonable cause finding did not bar summary judgment); *Baumgardner v. Inco Alloys Int'l*, 746 F. Supp. 623 (S.D. W. Va. 1990) (concluding that that reasonable cause finding merely restated the plaintiffs' allegations and that this was not sufficient to create a genuine issue of fact precluding summary judgment in employer's favor on ADEA claim); *Cary v. Carmichael*, 908 F. Supp. 1334 (E.D. Va. 1995) (holding that a reasonable cause finding was "not... sufficiently probative to create a genuine issue of material fact" to preclude summary judgment in favor of the employer).

Strategic Considerations

The author undertook an exhaustive analysis of all reported and unreported decisions involving challenges to the admissibility of reasonable cause and no cause findings. No clear picture emerges of any coherent test that courts apply in such cases. Rather, as is typical of admissibility decisions that are left to the sound discretion of courts, the case law is quite varied.

Nonetheless, the case law has illuminated particular areas that a defense attorney should focus on when formulating a strategy to exclude a reasonable cause finding and that it is critical to present a consistent defense from the start, beginning when someone files charges with the EEOC, through the final judgment. Except in the Ninth Circuit, the first level of attack is the trustworthiness of the reasonable cause finding under a Fed. R. Evid. 803(8) analysis. In the Third Circuit, for instance,

the courts apply the following four-factor test in assessing the trustworthiness of a reasonable cause finding:

- (1) The timeliness of the investigation;
- (2) The special skill or experience of the official;
- (3) Whether a hearing was held and the level at which conducted; and
- (4) Possible motivation problems.

EEOC v. Smokin' Joe's Tobacco Shop, Inc., 2007 WL 2461745 (E.D. Pa. Aug. 22, 2007).

Even when a court finds a report to be trustworthy, as was the case in *Smokin' Joe's*, that does not end the inquiry. Most cases excluding such reports are decided on a Fed. R. Evid. 403 challenge, and it is not uncommon for EEOC records to contain hearsay statements and evidence of other claims of discrimination, which may give separate grounds for attack under a strict 403 prejudice analysis or even relevance argument.

The attached table of cases on page 32 summarizes the general grounds on which such determinations have been made, although the distinction between a Fed. R. Evid. 803 and Fed. R. Evid. 403 analyses are often quite blurred in these cases.

Finally, a frequently cited reason for admitting reasonable cause findings is that a defendant employer argued something before the EEOC that is materially different from a position taken in the litigation, thus requiring admission of the EEOC file and report. This fact points out the need for a carefully thought out and implemented defense in EEOC proceedings, with defense counsel for an employer remaining ever mindful of these evidentiary issues at every step.

Conclusion

Employers faced with a charge before the EEOC or a state counterpart must take the process seriously and formulate a consistent defense up front and stick with it through trial. A failure to do so could prove problematic in the event that a reasonable cause finding is made because such a finding can in some jurisdictions carry with it a lasting evidentiary effect. Further, a defense attorney presented with a case in which a reasonable cause finding has been made should develop a clear strategy from the outset to exclude the finding from evidence at a later trial. ■■