

# PUBLICATION

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## Employers Take Note: Seventh Circuit Widens Scope of EEOC's Right to Investigate

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**Earlier this month, in *EEOC v. Union Pacific Railroad*, No. 15-3452, F.3d (7th Cir. Aug. 15, 2017), the Seventh Circuit issued a decision regarding the scope of the EEOC's right to investigate. It determined that neither the EEOC's issuance of a right-to-sue letter nor the disposition of a civil action brought by the charging party under Title VII precludes further investigation by the EEOC.**

The decision arose out of charges filed by two former African-American employees of Union Pacific Railroad Company. They were hired as "Signal Helpers," which is an entry-level position. After a 90-day probationary period, the employees became eligible for a potential promotion to the "Assistant Signal Person" position. One of the conditions for becoming an Assistant Signal Person was to take the Skilled Craft Battery Test. Both employees applied to take the test, but neither was provided the opportunity to take it. Shortly after submitting their applications, Union Pacific eliminated the Signal Helper position in the areas where the employees worked and terminated each employee's employment.

Both employees filed charges of discrimination on the basis of race, and after the EEOC issued a right-to-sue letter, both employees filed a complaint in federal court. The court granted Union Pacific's request for summary judgment, finding the evidence insufficient to support the employees' claims and the Seventh Circuit affirmed that decision.

While the EEOC had sought information from Union Pacific before issuing right-to-sue letters, during the proceedings in the district court, the EEOC issued Union Pacific an additional request for information, which sought, among other things, information about Signal Helpers across the company who were similarly situated to the two former employees. Union Pacific refused to respond, so the EEOC served a subpoena. Union Pacific sought administrative relief, seeking to revoke or modify the subpoena and the EEOC filed an enforcement action in federal court. Union Pacific asserted that the EEOC lost its investigative authority after the issuance of the right-to-sue letter, or, if not then, after the district court dismissed the employees' claims on summary judgment. The district court did not agree and granted the EEOC's motion to enforce the subpoena.

In affirming the district court, the Seventh Circuit joined the position taken by the Ninth Circuit, which previously held in *EEOC v. Federal Express Corporation*, that the issuance of a right-to-sue letter did not remove the EEOC's authority to continue an investigation, including one that examined allegations on a company-wide basis.

It also distinguished its holding from the Fifth Circuit's decision in *EEOC v. Hearst*, that the EEOC's authority to investigate terminates when the EEOC issues a right-to-sue letter. In refusing to follow the Fifth Circuit's decision, the Seventh Circuit relied upon the statutory language of Title VII, which states it does not limit the EEOC's investigatory power to the actions of the charging party, as well as a subsequent United States Supreme Court decision, which rejected the idea that the EEOC's role is "merely derivative" of the charging party. It further found that the Fifth Circuit's decision was based on an insufficient (or irrelevant) policy consideration related to "speeding up the EEOC process as a whole."

Given this decision of first impression in the Seventh Circuit, employers should take note: if the EEOC seeks information after it issues a right-to-sue letter, or even after the disposition of a lawsuit by a charging party, employers may be required to produce sought-after information that is relevant to the charge of discrimination that prompted the investigation.