

Office of Government Ethics

99 X 12

**Letter to the Assistant Counsel
to an Organization
dated April 29, 1999**

Thank you for your letter concerning a conversation that you had with an employee of the Office of Government Ethics (OGE). You are seeking a written opinion as to the legality of certain activities in which a former executive branch employee may engage in connection with ongoing litigation. The litigation is a class action complaint brought by several named individual employees from, and job applicants to, one facility of a [Departmental] agency. Plaintiffs' counsel would like to retain the former employee as a non-testifying consulting expert. Plaintiffs' counsel may also have the former employee attend depositions in the case, and possibly testify at trial as an expert witness. You specifically request that we confirm the OGE employee's advice that it would be permissible for the former employee to:

- (1) assist the plaintiffs as a "behind the scenes" consulting expert; and
- (2) serve as a testifying expert witness provided he does not do so in connection with any of the claims on which he worked.

We can confirm the first piece of advice; however, we cannot confirm the second piece of advice based upon the information that you have provided.

According to your letter, the former employee served as a GS-201-13 Personnel Management Specialist with [a Departmental agency]. In that position, the former employee conducted investigations of Equal Employment Opportunity (EEO) complaints filed by employees against [Departmental] agencies, including the defendant agency. The former employee was not personally and substantially involved with any of the claims of the named individual plaintiffs, nor has he had such involvement with the class action claims filed by those plaintiffs. However, the former employee has conducted investigations of complaints by other individuals charging the same type of discrimination that is at issue in the litigation, including complaints arising at the [Departmental] facility that is the subject of the complaint. In the event that the class is certified in the litigation, those other individuals whose claims the former employee investigated may be eligible to join the class action.

QUESTION #1: BEHIND THE SCENES CONSULTING

As you know, the primary post-employment restriction for former executive branch employees is 18 U.S.C. § 207. Section 207 does not bar any individual from accepting employment with any employer after leaving Government service. Rather, it bars individuals from engaging in certain activities on behalf of persons other than the United States. Based upon the information that you have provided to us, the former employee was not a "senior" Government employee, nor was he involved in trade or treaty negotiations. We therefore need not consider four of the six substantive restrictions that section 207 places upon former executive branch employees. The two remaining restrictions, the lifetime bar of section 207(a)(1) and the two-year "official responsibility" bar of section 207(a)(2)¹, both prohibit former employees from communicating to or appearing before the Government with the intent to influence in connection with certain matters.

As we understand it, the person you propose to retain would provide consulting services directly to you. These services would not involve any written or oral communication with any part of the Government on your behalf. This type of assistance as a "behind the scenes" consultant to the plaintiffs' counsel would not constitute a violation of section 207(a)(1) or section 207(a)(2).

QUESTION #2: SERVICE AS AN EXPERT WITNESS

Section 207(a)(1) bars the former employee from making, with the intent to influence, any communication to or appearance before an employee of the United States on behalf of any other person (except the United States) in connection with a particular matter involving a specific party or parties, in which the former employee participated personally and substantially as an employee, and in which the United States is a party or has a direct and substantial interest. While there is an exception to section 207 for testimony under oath, the exception does not permit, except pursuant to a court order, a former officer or employee to serve as an expert witness for anyone other than the United States in a matter where

¹ Based on the information that you provided to us, we are unable to determine whether 18 U.S.C. § 207(a)(2) would apply to the former employee. Because it is not clear from the information that you have provided whether the former employee served in a supervisory capacity in his [Departmental] position, or when he separated from Government service, we are only able to suggest that you advise the former employee to contact the [Departmental] Deputy Designated Ethics Official should the former employee wish to ascertain whether the two-year official responsibility bar of section 207(a)(2) would apply to him.

the former officer or employee is subject to the restrictions contained in section 207(a)(1). See 18 U.S.C. § 207(j)(6)(A).

The limitation on providing expert testimony will apply only if the litigation in question is the same "particular matter involving specific parties" as that in which the former employee participated personally and substantially as a Government employee. Your letter states that, should the class be certified by the court, the potential plaintiffs who could join the litigation may include some individuals who had filed complaints that were investigated by the former employee. We understand that in order to maintain a class action, there must be questions of law or facts common to the class, and the claims or defenses of the representative parties must be typical of the claims or defense of the class. Federal Rules of Civil Procedure, Rule 23(a). If the complaints of all plaintiffs who join the class share these characteristics, the complaint of any who join the class may be indistinguishable from the complaints of others in the class action as a whole.

As indicated in 5 C.F.R. § 2637.201(c)(4),² a matter "may continue in another form" OGE regulations provide a number of factors to consider in determining whether one matter should be considered to be the "same particular matter" as another related matter. These factors are: the extent to which the matters involve the same basic facts, related issues, the same or related parties, the same confidential information, and the continuing existence of an important Federal interest. 5 C.F.R. § 2637.201(c)(4). The parties, facts, and subject matter must coincide to trigger the prohibition of section 207(a). *U.S. v. Medico Industries*, 784 F.2d 840, 843 (7th Cir. 1986). In this regard, parties may be related or coincide even though the specific party or parties involved in the matter at the time of the proposed post-employment representation is or are different from the specific party or parties involved in the matter at the time of the former employee's participation. OGE Informal Advisory Letter 93 x 32; see also OGE Informal Advisory Letter 94 x 13.

Applying these factors to the facts you have presented, it may be possible that the claims in which the former employee participated would be considered the same matter as the ongoing

² Section 207 was amended by the Ethics Reform Act of 1989, Pub. L. No. 101-194 (November 30, 1989). These amendments became effective on January 1, 1991, and apply to all employees retiring from Government on or after that date. The regulations at 5 C.F.R. part 2637 predate these amendments. However, part 2637 still provides useful guidance concerning the elements of section 207 that remained essentially unchanged from the prior version of the statute.

litigation if the claimants joined as plaintiffs. In such a case, it might be determined that the former employee's testimony relating to the class action would unavoidably concern the complaints with which he had been involved as a Government employee -- even if he had ostensibly recused himself from making any communication in relation to those complaints. If such a determination were made, a communication to an employee of the United States relating to the class action would be barred by section 207(a)(1), and the former employee could not offer expert opinion testimony under the exception at 18 U.S.C. § 207(j)(6) unless the testimony were offered pursuant to court order or on behalf of the United States.

For the foregoing reasons, we cannot confirm the initial advice you received that the former employee's proposed service as a testifying expert witness (so long as he would recuse himself from involvement with any of the claims on which he worked) would not create a potential violation of 18 U.S.C. § 207(a)(1).³ Should an individual on whose claim the former employee worked as a Government employee join the litigation, the lifetime bar would be triggered *if* it is determined that the claim in which the former employee participated is the same particular matter as the class action litigation as a whole. If a specific situation should arise that would require such determinations to be made, we suggest that you contact the [Departmental] Deputy Designated Ethics Official. OGE regulations assign agencies the primary responsibility for providing advice to former employees regarding post-employment restrictions. See 5 C.F.R. §§ 2637.101(c)(8) and 2637.201(e). In particular, since an agency ethics official will undoubtedly be more familiar with agency programs and operations, OGE "generally defers to the cognizant agency ethics official when the issue is whether two particular matters are the same for purposes of the permanent bar." OGE Informal Advisory Letter 93 x 17.

³ Although you did not directly request that we resolve the issue, we note that the body of your letter suggests that your organization may wish to have the former employee appear at a deposition as "an observer." For reasons similar to those concerning the former employee's proposed appearance as an expert witness, there would be a question whether an appearance by the former employee at a deposition would violate section 207(a)(1) if any claim on which the former employee worked was determined to be the same particular matter involving specific parties as the litigation.

We hope that this information is helpful to you. Should you have any questions concerning the issues discussed in this letter, you may contact my office.

Sincerely,

Stephen D. Potts
Director